NORTH CAROLINA REPORTS

VOLUME 369

SUPREME COURT OF NORTH CAROLINA

19 AUGUST 2016

9 JUNE 2017

RALEIGH
2018

CITE THIS VOLUME

369 N.C.

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

MARK D. MARTIN

Associate Justices

ROBERT H. EDMUNDS, JR.[1]
PAUL MARTIN NEWBY
ROBIN E. HUDSON
BARBARA A. JACKSON
CHERI BEASLEY
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN[2]

Former Chief Justices

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

Former Justices

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J. PHIL CARLTON
WILLIS P. WHICHARD
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FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
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GEORGE L. WAINWRIGHT, JR.
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ROBERT N. HUNTER, JR.

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Kimberly Woodell Sieredzki
Jennifer C. Peterson

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[1] Term ended 31 December 2016. [2] Sworn in 1 January 2017.

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	Marvin K. Blount, III	Greenville
	Jeffery B. Foster	Greenville
6A	Alma L. Hinton	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
7BC	Milton F. Fitch, Jr.	Wilson
	Walter H. Godwin, Jr.	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	John E. Nobles, Jr.	Morehead City
	Joshua W. Wiley[1]	New Bern
4A	W. Douglas Parsons[2]	Clinton
4B	Charles H. Henry	Jacksonville
5	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	Wilmington
	R. Kent Harrell[3]	Burgaw
8A	Paul L. Jones[4]	Kinston
	Imelda J. Pate[5]	Kinston
8B	Arnold O. Jones, III[6]	Fremont
	William W. Bland[7]	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith, III	Semora
10	Donald W. Stephens[8]	Raleigh
	Howard E. Manning, Jr.[9]	Raleigh
	Michael R. Morgan[10]	Raleigh
	Paul C. Gessner[11]	Raleigh
	Paul C. Ridgeway[12]	Raleigh
	G. Bryan Collins, Jr.	Raleigh
	A. Graham Shirley	Raleigh
	Rebecca W. Holt[13]	Raleigh
	Vinston M. Rozier[14]	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	James E. Hardin, Jr.	Hillsborough

DISTRICT	JUDGES	ADDRESS
	Elaine M. O'Neal	Durham
	Michael O'Foghludha	Durham
15A	Wayne Abernathy[15]	Burlington
	James Roberson[16]	Burlington
	D. Thomas Lambeth[17]	Burlington
15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
	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[18]	Mount Airy
	Andy Cromer[19]	King
	Angela B. Puckett[20]	Westfield
18	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig, III	High Point
	R. Stuart Albright	Greensboro
	Susan Bray	Greensboro
	Patrice A. Hinnant	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	Christopher W. Bragg	Monroe
	Jeffery K. Carpenter	Wadesboro
22A	Joseph Crosswhite	Statesville
	Julia Lynn Gullett	Statesville

DISTRICT	JUDGES	ADDRESS
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.[21]	Lexington
	Lori Hamilton[22]	Mocksville
	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
	Yvonne Mims Evans[23]	Charlotte
	Linwood O. Foust[24]	Charlotte
	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
Adam Conrad[25]	Charlotte
Richard L. Doughton	Sparta
James L. Gale[26]	Greensboro
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Andrew Heath[27]	Raleigh
Kendra D. Hill[28]	Raleigh
Jeffrey P. Hunt	Brevard
Gregory P. McGuire	Raleigh
Michael L. Robinson	Winston-Salem
Casey M. Viser	Charlotte
Ebern T. Watson, III	Wilmington
Reuben F. Young[29]	Raleigh

JUDGES	ADDRESS

EMERGENCY JUDGES

Sharon T. Barrett	Asheville
Beverly T. Beal	Lenoir
Michael E. Beale	Rockingham
Richard D. Boner[30]	Charlotte
C. Preston Cornelius	Mooresville
W. Russell Duke[31]	Greenville
James L. Gale[32]	Greensboro
Thomas D. Haigwood	Greenville
A. Robinson Hassell	Greensboro
Clarence E. Horton, Jr.	Kannapolis
Robert F. Johnson	Burlington
Paul L. Jones[33]	Kinston
Timothy S. Kincaid	Newton
Charles C. Lamm, Jr.[34]	Terrell
Russell J. Lanier, Jr.[35]	Wallace
W. David Lee	Monroe
A. Moses Massey[36]	Mount Airy
Jerry Cash Martin	Pilot Mountain
James W. Morgan	Shelby
Calvin Murphy	Charlotte
J. Richard Parker	Manteo
William R. Pittman	Raleigh
John W. Smith	Raleigh
Ronald E. Spivey	Winston-Salem
Ronald L. Stephens	Durham
Kenneth C. Titus	Durham
Gary E. Trawick, Jr.[37]	Burgaw
Joseph E. Turner	Greensboro
William Z. Wood, Jr.	Lewisville

RETIRED/RECALLED JUDGES

W. Douglas Albright	Greensboro
J. B. Allen, Jr.[38]	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[39]	Charlotte
Zoro J. Guice, Jr.	Hendersonville
Knox V. Jenkins[40]	Four Oaks
John R. Jolly, Jr.[41]	Raleigh

JUDGES	ADDRESS
Robert D. Lewis	Asheville
Howard E. Manning, Jr.	Raleigh
Julius A. Rousseau, Jr.	Wilkesboro
Thomas W. Seay	Spencer
W. Ervin Spainhour	Concord
James C. Spencer	Burlington
Jack A. Thompson[42]	Fayetteville
Ralph A. Walker, Jr.	Raleigh

[1] Sworn in 1 January 2017. [2] Deceased 24 September 2017. [3] Sworn in 11 December 2017. [4] Retired on 31 December 2016.
[5] Sworn in 1 January 2017. [6] Resigned 31 December 2016. [7] Sworn in 1 January 2017. [8] Retired on 31 October 2017. [9] Retired on 25 July 2015.
[10] Resigned on 31 December 2017. [11] Retired on 31 December 2015. [12] Became Senior Resident on 1 November 2017.
[13] Sworn in 1 January 2017. [14] Sworn in 24 February 2017. [15] Retired on 30 June 2017. [16] Became Senior Resident on 1 July 2017.
[17] Sworn in 14 July 2017. [18] Retired on 31 December 2017. [19] Became Senior Resident on 1 January 2017. [20] Sworn in 1 January 2017.
[21] Retired on 31 December 2017. [22] Sworn in 1 January 2017. [23] Retired on 31 December 2017. [24] Retired on 31 October 2017.
[25] Sworn in 23 December 2016. [26] Retired on 30 September 2016. [27] Sworn in 30 December 2016. [28] Resigned on 31 December 2017.
[29] Resigned on 28 December 2017. [30] Resigned on 22 September 2017. [31] Resigned on 27 July 2017. [32] Sworn in 4 October 2016.
[33] Sworn in 24 April 2017. [34] Deceased 27 March 2016. [35] Deceased 30 June 2017. [36] Sworn in 11 April 2017. [37] Retired on 20 October 2015.
[38] Deceased 27 November 2016. [39] Deceased 7 November 2017. [40] Deceased 9 November 2016. [41] Resigned on 31 December 2017.
[42] Resigned on 24 April 2017.

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)[1]	Greenville
	Patricia Gwynett Hilburn[2]	Greenville
	G. Galen Braddy	Grimesland
	Brian DeSoto	Greenville
	Lee F. Teague	Greenville
	Wendy S. Hazelton[3]	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
	Sarah Cowen Seaton	Jacksonville
	Carol Jones Wilson	Kenansville
	Henry L. Stevens, IV	Warsaw
	James L. Moore	Jacksonville
	William B. Sutton	Clinton
	Michael C. Surles[4]	Jacksonville
5	J. H. Corpening, II (Chief)	Wilmington
	James H. Faison, III	Wilmington
	Sandra A. Ray	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	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
	John J. Covolo	Rocky Mount
	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
	Elizabeth Freshwater Smith	Wilson

DISTRICT	JUDGES	ADDRESS
8	David B. Brantley (Chief)	Goldsboro
	R. Leslie Turner	Pink Hall
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor, III	Goldsboro
	Ericka Y. James	Goldsboro
	Annette W. Turik[5]	Kinston
	Curtis Stackhouse[6]	Goldsboro
9	J. Henry Banks[7]	Henderson
	John W. Davis (Chief)[8]	Louisburg
	Carolyn J. Yancey	Creedmoor
	Amanda Stevenson	Oxford
	Adam S. Keith	Louisburg
	Caroline S. Burnette9	Henderson
	Benjamin S. Hunter[10]	Louisburg
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry[11]	Pelham
	John H. Stultz, III[12]	Roxboro
10	Robert Blackwell Rader (Chief)	Raleigh
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	Craig Croom	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Vinston M. Rozier, Jr.[13]	Raleigh
	Kris D. Bailey	Cary
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Jacqueline L. Brewer[14]	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	Raleigh
	Sam S. Hamadani[15]	Raleigh
	Ashleigh P. Dunston[16]	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[17]	Clayton
	Paul A. Holcombe	Smithfield
	Caron H. Stewart	Smithfield
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jerry F. Wood[18]	Selma
12	Robert J. Stiehl, III (Chief)	Fayetteville
	Edward A. Pone	Parkton

DISTRICT	JUDGES	ADDRESS
	Talmage Baggett	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan[19]	Fayetteville
	Toni S. King	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes	Fayetteville
	April M. Smith	Fayetteville
	Tiffany M. Whitfield[20]	Fayetteville
13	Jerry A. Jolly[21]	Tabor City
	Marion R. Warren[22]	Ash
	William F. Fairley	Southport
	Scott Ussery (Chief)[23]	Elizabethtown
	Pauline Hankins	Tabor City
	Willie Fred Gore	Whiteville
	Jason C. Disbrow	Southport
	C. Ashley Gore[24]	Whiteville
14	Marcia H. Morey[25]	Durham
	James T. Hill (Chief)[26]	Durham
	William Andrew Marsh III[27]	Durham
	Brian C. Wilks	Durham
	Patricia D. Evans	Durham
	Doretta Walker	Durham
	Fred Battaglia, Jr.	Durham
	Shamieka L. Rhinehart[28]	Durham
	Amanda L. Maris[29]	Durham
15A	Bradley Reid Allen, Sr. (Chief)	Burlington
	David Thomas Lambeth, Jr.[30]	Burlington
	Kathryn W. Overby	Burlington
	Steven H. Messick	Burlington
	Larry D. Brown[31]	Graham
15B	Joseph M. Buckner (Chief)	Chapel Hill
	Charles T. Anderson[32]	Chapel Hill
	Beverly A. Scarlett	Durham
	Lunsford Long[33]	Chapel Hill
	James T. Bryan	Hillsborough
	Samantha Cabe[34]	Chapel Hill
	Sherri T. Murrell[35]	Chapel Hill
16A	Scott T. Brewer (Chief)	Monroe
	Lisa D. Thacker	Polkton
	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
	Judith Milsap Daniels	Lumberton
	William J. Moore	Maxton
	Dale G. Desse	Maxton
17A	James A. Grogan (Chief)	Reidsville
	Chris Freeman	Wentworth
	Christine F. Strader	Reidsville

DISTRICT	JUDGES	ADDRESS
17B	Charles Mitchell Neaves, Jr.[36]	Elkin
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett[37]	Westfield
	William F. Southern III (Chief)[38]	King
	Marion M. Boone[39]	Dobson
18	H. Thomas Jarrell, Jr. (Chief)	High Point
	Susan R. Burch	High Point
	Theresa H. Vincent	Summerfield
	Kimberly Michelle Fletcher	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump	Browns Summit
	Betty J. Brown	Greensboro
	Jan H. Samet[40]	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	David Sherrill[41]	Greensboro
	Randle L. Jones[42]	High Point
	Jonathan G. Kreider[43]	Greensboro
	Lora C. Cubbage[44]	Greensboro
	Mark Cummings[45]	Greensboro
	Tonia A. Cutchin[46]	Greensboro
	William B. Davis [47]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Kannapolis
	Donna G. Hedgepeth Johnson	Concord
	Brent Cloninger	Mount Pleasant
	Christy E. Wilhelm	Concord
	Nathaniel E. Wilhelm[48]	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
	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.[49]	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

DISTRICT	JUDGES	ADDRESS
	David Sipprell	Winston-Salem
	Gordon A. Miller	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery[50]	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 C. Paul	Thomasville
	Carlton Terry	Advance
	J. Rodwell Penry[51]	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[52]	Burnsville
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder[53]	Boone
	Larry B. Leake[54]	Marshall
25	Buford A. Cherry (Chief)	Hickory
	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	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[55]	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

DISTRICT	JUDGES	ADDRESS
	Yolanda M. Trotman[56]	Charlotte
	Aretha V. Blake[57]	Charlotte
	Tracy H. Hewett[58]	Charlotte
27A	John K. Greenlee (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	James A. Jackson	Gastonia
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
	Pennie M. Thrower	Gastonia
	Craig R. Collins	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Lincolnton
	Jeanette R. Reeves	Shelby
	Justin K. Brackett[59]	
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
	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

Thomas V. Aldridge, Jr.[60]	Ocean Isle Beach
Sherry Fowler Alloway	Greensboro
Charles T. L. Anderson[61]	Chapel Hill
Kyle D. Austin[62]	Pineola
C. Christopher Bean	Edenton
Rebecca W. Blackmore	Wilmington
Joseph A. Blick	Greenville
Robert M. Brady	Lenoir
Jacqueline L. Brewer[63]	Apex
Charlotte Brown-Williams[64]	Cornelius
John B. Carter, Jr.[65]	Lumberton

JUDGES	ADDRESS
Samuel Cathey	Charlotte
Albert A. Corbett, Jr.	Smithfield
Shelly H. Desvousges	Raleigh
Thomas G. Foster, Jr.	Pleasant Green
David K. Fox	Hendersonville
George J. Franks[66]	Fayetteville
Nancy E. Gordon	Durham
Jane Powell Gray	Raleigh
Joyce A. Hamilton	Raleigh
Richlyn D. Holt	Waynesville
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
F. Warren Hughes[67]	Burnsville
Jerry A. Jolly[68]	Tabor City
A. Elizabeth Keever	Fayetteville
Wayne G. Kimble[69]	Jacksonville
David Q. LaBarre[70]	Durham
William C. Lawton	Raleigh
David A. Leech[71]	Greenville
William L. Long[72]	Chapel Hill
William A. Marsh[73]	Durham
Harold Paul McCoy, Jr.	Halifax
William G. McIlwain[74]	Wagram
Lawrence McSwain	Greensboro
Charles M. Neaves[75]	Elkin
Thomas R.J. Newbern	Aulander
Theofanis X. Nixon[76]	Charlotte
L. Suzanne Owsley	Hickory
Dennis J. Redwing	Gastonia
Anne B. Salisbury	Cary
J. Larry Senter	Raleigh
Joseph E. Setzer, Jr.	Franklinton
Russell Sherrill III[77]	Raleigh
Catherine C. Stevens[78]	Chapel Hill
William G. Stewart	Wilson
Robert D. Stubbs[79]	Clayton
Leonard W. Thagard	Clinton
Jerry Waddell	Bryson City
Fredrick B. Wilkins, Jr.	Reidsville

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Grafton G. Beaman	Elizabeth City
Sarah P. Bailey	Rocky Mount
Chester C. Davis	Winston-Salem
M. Patricia DeVine	Hillsborough
Daniel Fredrick Finch	Oxford
Louis F. Foy, Jr.	Pollocksville
James R. Fullwood	Raleigh
Samuel G. Grimes	Washington

JUDGES	ADDRESS
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[80]	Lillington
Fritz Y. Mercer, Jr.	Summerfield
Thomas F. Moore	Charlotte
J. Bruce Morton	Greensboro
Otis M. Oliver	Dobson
J. Rodwell Penry[81]	Lexington
Nancy C. Phillips	Elizabethtown
Jan H. Samet[82]	Greensboro
Margaret L. Sharpe	Greensboro
Charles M. Vincent[83]	Greenville
J. Kent Washburn	Burlington
Charles W. Wilkinson, Jr.	Oxford

[1] Retired on 31 December 2016. [2] Became Chief District Court Judge on 1 January 2017. [3] Sworn in 1 January 2017. [4] Sworn in 1 January 2017. [5] Resigned 31 December 2016. [6] Sworn in 1 January 2017. [7] Retired on 31 January 2017. [8] Became Chief District Court Judge on 1 February 2017. [9] Sworn in 1 January 2017. [10] Sworn in 13 June 2017. [11] Retired on 31 December 2016. [12] Sworn in 1 January 2017. [13] Resigned on 24 February 2017. [14] Retired on 31 July 2017. [15] Sworn in 9 June 2017. [16] Sworn in 17 November 2017. [17] Retired on 31 December 2016. [18] Sworn in 1 January 2017. [19] Retired on 31 December 2016. [20] Sworn in 1 January 2016. [21] Retired 31 December 2016. [22] Resigned on 31 March 2015. [23] Became Chief District Court Judge on 1 January 2017. [24] Sworn in 1 January 2017. [25] Retired on 5 April 2017. [26] Became Chief District Court Judge on 6 April 2017. [27] Resigned on 31 December 2017. [28] Sworn in 1 January 2017. [29] Sworn in 22 August 2017. [30] Resigned on 30 June 2017. [31] Sworn in 27 October 2017. [32] Retired on 31 December 2016. [33] Retired on 31 December 2016. [34] Sworn in 1 January 2017. [35] Sworn in 1 January 2017. [36] Retired on 1 September 2017. [37] Resigned on 31 December 2016. [38] Became District Court Judge on 1 May 2017. [39] Sworn in 27 February 2017. [40] Retired on 31 December 2016. [41] Sworn in 17 July 2015 and resigned 31 December 2016. [42] Resigned on 31 December 2016. [43] Resigned on 31 December 2016. [44] Sworn in 1 January 2017. [45] Sworn in 1 January 2017. [46] Sworn in 1 January 2017. [47] Sworn in 1 January 2017. [48] Sworn in on 5 December 2016. [49] Retired on 31 December 2016. [50] Sworn in on 1 January 2017. [51] Retired on 31 December 2016. [52] Retired on 31 December 2016. [53] Sworn in 13 February 2015. [54] Sworn in 5 March 2017. [55] Retired on 31 December 2016. [56] Resigned on 31 December 2016. [57] Sworn in 1 January 2017. [58] Sworn in 28 April 2017. [59] Sworn in 13 December 2016. [60] Resigned on 10 August 2017. [61] Sworn in 30 March 2017. [62] Resigned on 6 February 2017. [63] Sworn in 27 October 2017. [64] Sworn in 7 March 2017 and resigned on 2 July 2017. [65] Sworn in 3 March 2017. [66] Sworn in 23 July 2015 and resigned on 12 October 2017. [67] Sworn in 1 February 2017. [68] Sworn in 6 April 2017. [69] Resigned on 17 July 2017. [70] Resigned on 5 May 2017. [71] Sworn 3 April 2017. [72] Sworn in 31 March 2017. [73] Sworn in 27 March 2017 and resigned 28 July 2017. [74] Resigned on 19 June 2017. [75] Sworn in 12 October 2017. [76] Died on 10 May 2017. [77] Resigned on 20 July 2015. [78] Resigned on 5 December 2017. [79] Sworn in 6 March 2017. [80] Resigned on 21 March 2016. [81] Sworn in 11 August 2017. [82] Sworn in 10 April 2017. [83] Sworn in on 30 October 2015.

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3B	Scott Thomas	New Bern
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5	Ben David	Wilmington
6	Valerie Asbell	Winton
7	Robert Evans	Rocky Mount
8	Matt Delbridge	Goldsboro
9	Mike Waters	Oxford
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10	Lorrin Freeman	Raleigh
11A	Vernon Stewart	Lillington
11B	Susan Doyle	Smithfield
12	Billy West	Fayetteville
13	Jon David	Bolivia
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15A	Pat Nadolski	Graham
15B	Jim Woodall	Hillsborough
16A	Kristy Newton	Raeford
16B	Johnson Britt	Lumberton
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27A	KELLUM MORRIS	Gastonia
28	M. LeANN MELTON	Asheville
29B	PAUL B. WELCH	Brevard

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

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Frederick C. Davis ..... Fort Mill, SC
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Keta Mahesh Desai ..... Chapel Hill
Manisha Devasthali ..... Fayetteville
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James Patrick Ellington ..... Sandy Ridge
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Lindsey Morgan Brown ..... Fletcher
Martha Stockton Brown ..... Kinston
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Aneshia Allister Cooper ..... Durham
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David Journey Darr ..... Charlotte
Nicholas D'Auria ..... Pinehurst
Skye Alexandria David ..... Raleigh
Brandy Lee Davis ..... Winston-Salem
Charlotte Elizabeth Davis ..... Charlotte
Hillary Dawe ..... Charlotte
Premela Gillian Deck ..... Cary
Shannon Lynn DeJesus ..... Fairview
Michele Delgado ..... Chapel Hill
Zabrina Barbosa Delgado ..... Charlotte
Cara Artuso Dempster ..... Knightdale
Jeb Stuart Dennis ..... Durham
Jack Darren Densmore ..... Goodlettsville, TN
Taylor Diamond ..... Raleigh
Maggie Harris Dickens ..... Charlotte
Jaren Dickerson ..... Whitsett
Adam Lindsey Dillard ..... Haw River
Courtney Elaine Dinkins ..... Mooresville
Christopher Joseph DiSanto ..... Harrisburg, PA
Cristine Rose Dixon ..... Huntersville
Cynthia Dixon ..... Clinton
Lindsay Grace Dobner ..... Charlotte
Christopher Steven Dodson ..... Charlotte
Patrick A. Doerr ..... Silver Spring, MD
Preston Howard Dole ..... Gastonia
Eric Thomas Dolenti ..... Charlotte
Peter Francis Donohue ..... Durham
Jon Parker Douglas ..... Raleigh
JoLisa D'nise Drayton ..... Charlotte
Mary Frances Dudley ..... Charlotte
Brian Matthew Dunaway ..... Charlotte
Kathleen Phillips Dunn ..... Garner
Cassandra Marcella Duran ..... Durham
Patricia Genevieve Duret ..... Indianapolis, IN
LaFarran Renee Durman ..... Charlotte
John Heyward Earnhardt ..... Raleigh
James Anthony Eatman ..... Raleigh
Justin Michael Edge ..... Boone
Adam Elkins ..... Troy
Joseph Haydon Ellis ..... Raleigh

Joseph Wesley Ellis ..... Fuquay-Varina
Olivia Harper Ensign ..... Woodland, CA
Erin Holcomb Epley ..... Lewisville
Ashley Sarah Escoe ..... Raleigh
Rebecca Amelia Ewing ..... Durham
Taylor Ey ..... Waxhaw
Joseph Sherwood Ezzell ..... Mount Olive
Anastasia Elizabeth Fanning ..... Charlotte
Richard Benjamin Faulkner ..... Morehead City
Ryan Mitchell Feinberg ..... Wilmington
Paige Dorothy Miles Feldmann ..... Raleigh
Sean William Fernandes ..... Greensboro
Alma Delia Fernandez ..... Charlotte
Joseph Anthony Ficarrotta ..... Washington, DC
Amanda Leigh Fisher ..... Ashburn, VA
Meredith FitzGibbon ..... Charlotte
Ashley Lynn Flaherty ..... Charlotte
Melissa Kay Flanagan ..... Fuquay-Varina
Macy Lee Flinchum ..... Clemmons
Patricia Ann Flood ..... Chapel Hill
Wilson Frank Fong ..... Climax
Sumner Christopher Fontaine ..... Greensboro
Catherine Ann Forneris ..... Mebane
Rebecca Forte ..... Monroe
Oliver Daniel Frey ..... Dublin, OH
Andrew Corey Frost ..... Chapel Hill
Bernard Charles Funk ..... Charlotte
Koral Elyse Fusselman ..... Asheville
Amanda Lynne Gainey ..... Newport
Chelsea Elise Gajewski ..... Charlotte
Tarrah Janel Garabato Brown ..... Mooresville
Timothy Edward Garcia ..... Westminster, CA
Rudolf Alexander Garcia-Gallont ..... Winston-Salem
Jane Creighton Garrity ..... Winston-Salem
Regan Michelle Gatlin ..... Smithfield
Rebecca L. Gauthier ..... Charlotte
Brandon Michael George ..... Graham
Matthew Eric Gerber ..... Greensboro
Lily Clara Geyer ..... Woodbridge, VA
George Everett Gibbs Jr. ..... Matthews
John Thomas Gibson ..... Greensboro
Nicole Shae Giffin ..... Charlotte
Luke Andrew Gilhooly ..... Stanfordville ,NY
Rebecca Paige Gitlen ..... Raleigh
Robert J. Glowacki Jr. ..... Raleigh
Jacob Allen Goad ..... Durham
Ethan Goemann ..... Charlotte
Justin Bradley Goforth ..... Charlotte
Mary Ellen Goode ..... Charlotte
Rachel Tait Goodling ..... Raleigh

Ann Taylor Goodnight ..... Charlotte
Anne Dunbar Gordon ..... Chapel Hill
Conrad Ross Gordon ..... Washington, DC
Delia Rose Ledesma Goubeaux ..... Asheville
Dawnielle Y. Grace ..... Winston Salem
David James Grant ..... Archdale
Evin Lamar Grant ..... Raleigh
Damon Gray ..... Huntersville
Susan Pegram Greeson ..... Oak Ridge
Jasmine Meche' Gregory ..... Charlotte
Ashley Nichole Grisham ..... Pasadena, CA
Stacey Marinn Groce ..... Wilkesboro
Mary Catherine Simpson Gross ..... Hillsborough
Stephen Arnott Guardipee ..... Charlotte
Kaylee RaeAnne Gum ..... Woodbridge, VA
Benjamin Simon Gurlitz ..... Chapel Hill
Brian Gwyn ..... Cary
Eric Dean Hageman ..... Winston-Salem
Lauren Ellis Halbert ..... Williamsburg, VA
Joshua Richard Hall ..... Raleigh
William Barrett Hamner ..... Charlotte
Ross Tanner Hardeman ..... Raleigh
Maren Margaret Erling Hardin ..... Hillsborough
Toni Johnson Hardin ..... Holly Ridge
Jaren Soibhan Hardy ..... Charlotte
Jeremy Harn ..... Morrisville
Joshua Owen Harper ..... Jamestown
Jennifer Lynn Harrington ..... Concord
Quintina Cherrice Harrington ..... Rockingham
Molly Hunter Harris ..... Chapel Hill
Precious Harrison-Cobb ..... Hubert
William Robinson Hartzell ..... Raleigh
Amanda San Mei Hawkins ..... Poland, OH
Kathryn Mitchell Hayes ..... Winston-Salem
Anna Kate Heath ..... Kenansville
Brad Carpenter Heath ..... Lynchburg, VA
Erica Jade Taylor Helmle ..... Winston-Salem
Hannah Elizabeth Heltzel ..... Winterville, GA
Audrey K. Henderson ..... Charlotte
Andrew Eliezer Henkle ..... Greensboro
Barbara Henry ..... Jacksonville
Erica Martin Henson ..... Fort Mill, SC
Christian Nathaniel Herring ..... Barboursville, VA
Kimberly Anne Herron ..... Durham
Margaret Wilks Hertzler ..... Raleigh
Patricia Isabell Heyen ..... Mount Gilead
Heather Marie Higgins ..... Hickory
Camille Elyse Hill ..... Marietta, GA
Eric Robert Hinderliter ..... Chapel Hill
Travis Styres Hinman ..... Chapel Hill

Elise Christine Hofer ..... Charlotte
Michaela Connors Holcombe ..... Charlotte
Laura Holland ..... Durham
Caleb John Holloway ..... Charlotte
Patrick Dale Holmes ..... Raleigh
Tyler Stewart Hood ..... New Milford ,CT
Martin Lee Horowitz ..... Englewood, FL
Caline Kit-Lien Hou ..... Durham
Joseph C. Hoyle ..... Kings Mountain
Alexandra Bradsher Hubbard ..... Lynchburg, VA
Margaret Unger Huffman ..... Holly Springs
Ivana C. Hughes ..... Evans, GA
Felicia Marie Hyde ..... Cary
Warren David Hynson ..... Cary
Morgan Mikolajczyk Insley ..... Charlotte
Danielle Fuller Irwin ..... Hurricane ,WV
Alec Steven Jalovec ..... Charlotte
Melissa Jarel ..... Cary
Lily Beatrice Jenkins ..... Leicester
Robin Elizabeth Jenkins ..... Forest, VA
Kenia Soares Johannes ..... Charlotte
Alicia Michelle Johnson ..... Charlotte
Astrid Tikiya Johnson ..... Charlotte
Emily Karen Johnson ..... Carrboro
Kayla Brooke Johnson ..... Greensboro
Lindsay Marie Johnson ..... Knoxville ,TN
William Hester Johnson ..... Graham
Kelly Jones ..... Brown Summit
Brittny Marie Kaltenbach ..... Charlotte
Katlin Jessie Karges ..... West Hartford, CT
Daniel P. Karlsson ..... Greensboro
Devon Howell Karst ..... Raleigh
Anna Marie Karvelis ..... Charlotte
Kristen Michelle Kato ..... Durham
Caroline Elizabeth So-Jin Keen ..... Mount Olive
Jason Adam Keith ..... Durham
Deja Dorothy Kemp ..... Charlotte
Ryan Shane Kennedy ..... Hampstead
Brian Kendrick Kettmer ..... Chapel Hill
Anne M. Keyworth ..... Boston, MA
Danielle Elizabeth Kimelstein ..... Boynton Beach, FL
Christopher Gary King ..... Charlotte
Alexander Frank Kingsley ..... Charlotte
Taylor Marie Kinsey ..... Wake Forest
Alexandria Paige Kirby ..... Charlotte
Lindsey Ameliann Knapp ..... Sanford
Michael Eldon Kohagen ..... Durham
Kelsey Kolb ..... Atlanta ,GA
Nadzeya Kolby ..... Charlotte
Charles Michael Kunz ..... Durham

Marissa Ann Kuzbyt.....Winston Salem
Cameron Alexandra Lambe..... Raleigh
Thomas Elmo Lamm .....Fuquay Varina
Jacob Josiah Lane..... Walnut Cove
Elizabeth Amanda Larner ..... Huntersville
Ma'idah Nasrin Lashani..... Raleigh
Allison Leigh Laubach..... Salisbury
Kerriann Elise Laubach.....Alexandria, VA
Daniel James Lawall.....Greensboro
Jonathan Daniel LeCompte .....Charlotte
Joshua David Lee.....Charlotte
Scottie Forbes Lee.....Greensboro
Eunice Yoohyang Lee-Ahn..... Sylva
Benjamin Leighton.....Charlotte
Dominic Michael Lerario .....Charlotte
Ryan Bowen Leverone .....Tallahassee, FL
Gary Alexander Lewis..... Goldsboro
Kaylee Marie Lewis.....High Point
Timothy R. Lewis .....Asheville
Brian Ross Liebman .....Fuquay Varina
Daneen Furr Lipscomb ..... Raleigh
Safari Little .....Boiling Springs
Michele Lee Livingstone ..... Raleigh
Selby Alvin Lo ..... Cary
Jeremy Daniel Locklear .....Pembroke
John Charles Lohman..... Garner
Giancarlo Lookman..... Wilmington
Aracely Lopez..... Raleigh
Jordan Elizabeth Leigh Lowery .....Charleston, SC
Holly Ann Wilcox Luther .....Greensboro
Michael Robert Lynch .....Charlotte
Sarah Elisabeth Mabry-Caraffa..... Raleigh
Madison Locke Mackenzie ..... Raleigh
Sean R. Madden ..... Raleigh
Jaclyn A. Maffetore.....Greensboro
Anna Christina Majestro ..... Charleston, WV
Patricia Louise Mallory .....Wilson
Joseph B. Mangun.....New Bern
Matthew P. Margiotta ..... Raleigh
Andria Dayna Marquez.....Cramerton
Jessica Ann Marsden..... Chapel Hill
Kevin Anthony Marshall.....Clementon, NJ
Edward William Martin .....Charlotte
Carmela Mastrianni .....Hillsborough
Jovanna Nicole Mastro.....Charlotte
Kelly William Mathews.....Charlotte
Jonathan Chambers Mattox .....Bryson City
Chelsey Marie Maywalt.....Carriere, MS
Katie McAbee .....Charlotte
Ashley Jordan McBride.....Monroe

Melissa Andrea McCallop ..... Raleigh
Nicole Marie McCluney ..... High Point
Mark Christopher McIntyre ..... Durham
Ryan James McIntyre ..... Laurel, NY
Benjamin Russell McKaig ..... Lewisville
Timothy McLister ..... Winston-Salem
Sarah Bess McPherson ..... Southport
Amanda Dwyer McQuade ..... Gastonia
Adam Russell Melrose ..... Charlotte
Maria Rafaella Mendoza Guillem ..... Charlotte
Lora Meredith Mercer ..... Raleigh
Sara L. Messina ..... Garner
Morgan Louise Meyers ..... Jamestown
Chandler Abernathy Michael ..... Raleigh
Marion William Middleton ..... Charlotte
Sean Frank Miles ..... Durham
Taittiona Miles ..... Winston-Salem
Daniel Lee Miller ..... Manhattan, NY
John Thomas Miller ..... Rutherfordton
Matthew James Millisor ..... Greensboro
Rebekah L. Mills ..... Parkesburg, PA
Elena Faria Mitchell ..... Charlotte
Sharelle Mitchell ..... Henderson
Samantha Carien Mobley ..... Charlotte
Maria Concetta Moore ..... Greenville
Sadler Blaydes Moore ..... Weddington
Leora Hermanson Moreno ..... Brooklyn, NY
Jonathan David Morgan ..... Garner
Samuel Kerr Morris-Bloom ..... Raleigh
Brennon Blake Morton ..... Morrisville
Jeremiah Grant Mosteller ..... Denver
Cassandra Nicole Motley ..... Bossier City, LA
Deborah A. Moy ..... Whitsett
Michael Mulvey ..... Philadelphia, PA
Gerald Patrick Murphy Jr. ..... Raleigh
Lindsay Gayle Murphy ..... New Bern
Kevin James Murtagh ..... Winston-Salem
Alexander Thomas Arthur Myers ..... Concord
Logan Drew Myrick ..... Durham
Meredith Renee Nall ..... Charlotte
Yohan Namkung ..... Chapel Hill
Cameron Graham Neal ..... Durham
Benjamin Neece ..... Durham
Henry Coble Neese ..... Raleigh
Whitney Maquel Nelthorpe ..... Raleigh
Joni O'Neal Nichols ..... Greensboro
Kristi Alyse Nickodem ..... Chapel Hill
Stephanie Marie Niehaus ..... Wayzata,MN
Steven James Niezgoda ..... Durham
Yuping Niou ..... Chapel Hill

Nkia (No last name) ..... Raleigh
Daniel Jared Nobles ..... Louisburg
Jacob Granville Oakes ..... Chapel Hill
Claire Regina O'Brien ..... Washington, DC
Frank Bauer O'Hale ..... Smithfield
Amy Claire O'Neal ..... Apex
Dorothy Clayton O'Neill ..... Hillsborough
Shawnice Nickelle Orange ..... Winston Salem
Maria Ortiz ..... Charlotte
Daniel Patrick O'Shea ..... Gastonia
Caroline O'Connor Outten ..... Southern Shores
Lauren Yvonne Paglia ..... Troy, VA
Addison Tomasko Palanza ..... Wilmington
Timothy Thomas Palmer ..... Charlotte
Michael Edward Palombo ..... Wilmington
Diane Kristine Pappayliou ..... Southport
Amanda Amber Pasha ..... Charlotte
Kruti Harshad Patel ..... Greensboro
Nishma Patel ..... Cary
Charise Sylvia Patterson ..... Charlotte
James Douglas Patterson ..... Charlotte
Catherine Peebles ..... Raleigh
Cynthia Schafer Pela ..... Eastover
Jessica Maegan Pepper ..... Charlotte
Adam Bruce Perry ..... Durham
Luke Perry ..... Raleigh
Nolan Ray Perry ..... Goldsboro
Erika Michele Peters ..... Raleigh
Colin Petersen ..... Charlotte
Joseph Peterson ..... North Topsail Beach
Madeleine Michelle Pfefferle ..... Raleigh
Melanie Ann Pfeifer ..... Hillsborough
Haley Elizabeth Phillips ..... Greensboro
Robert Cooper Pickren ..... Montgomery, AL
Bonnie Fletcher Pierce ..... Pinetops
Stacy Miranda Pigden ..... Charlotte
William Piontek ..... Charlotte
Ashley Kendall Pittman ..... Raleigh
Gregory Alan Posch ..... Durham
James Frederick Potts ..... Goldsboro
Kaitlin Price ..... Winston-Salem
Brittany Alexis Puckett ..... Winston-Salem
Victoria Pugh ..... Raleigh
Margaret Katherine Ramseur ..... Raleigh
Austin Yates Raymond ..... Pittsboro
Timothy James Readling ..... Salisbury
Alexander Jordan Rector ..... Hickory
James Patrick Redmon ..... Oklahoma City, OK
Monica Rochelle Reid ..... Charlotte
Elizabeth Astrid Reim ..... Durham

Amanda Marie Reney ..... Concord
Jeanna Suzanne Revell ..... Orlando, FL
Lindsey Blair Revels ..... Raleigh
Alexis Reynolds ..... Davidson
Taylor Stephen Richards ..... Lexington
Daniel Parker Richey ..... Lexington, KY
Jocelyne Michelle Riehl ..... Salisbury
Erinn Leslie Rigney ..... Chapel Hill
Christopher Robert Rivers ..... Charlotte
Alec Carlisle Roberson ..... Charlotte
Kayla Louise Robinson ..... Mitchellville, MD
Patricia Ryan Robinson ..... Smithfield
Chelsea Lauren Rodriguez ..... Murphy
Andrew Roy Rogers ..... Roxboro
Erica Barbara Elizabeth Rogers ..... Cary
Caolan John Ronan ..... Greensboro
Austin Roop ..... Concord
Harvey Lee Rouse ..... Trenton
Edna Nicole Roy ..... Charlotte
Jamie Elizabeth Rudd ..... Raleigh
Geneva Griswold Runion ..... Apex
Edward Nathan Russell II ..... Charlotte
John Ira Sanders ..... Winston-Salem
Mary Caitlyn Sanders ..... Carrboro
Robert Gwinn Schaaf ..... Raleigh
George Edward Schinkel ..... Chapel Hill
Angela C. Schulz ..... Cornelius
Gabriel Thomas Scott ..... Raleigh
Mary Woodell Scruggs ..... Raleigh
Alexandra Victoria Seabolt ..... Charlotte
Aaron Michael Seagroves ..... Charlotte
Candace Moore Seagroves ..... Raleigh
Lillie Martin Seifart ..... Raleigh
Bradley Alan Setzer ..... Conover
Jamison Louis Shabanowitz ..... Alexandria, VA
Meredith Susan Sharpe ..... Fayetteville
Isabella Houston Shaw ..... Charlotte
Joseph Robert Shealy ..... Charlotte
Charlotte Alice Sheppard ..... Hendersonville
Maxwell Davis Shipley ..... Raleigh
Richard Seth Sholar ..... Beulaville
Austin Jeffrey Short ..... Severn, MD
Heather Dawn Short ..... Wilkesboro
Joseph R. Shuford ..... Carrboro
John Thomas Sim ..... Charlotte
Taylor Brandon Simmons ..... Kannapolis
Rosanne Niforos Six ..... Greenville
Laura Patricia Sloane ..... Burlington
Mesha Sharnay Sloss ..... Winnsboro, SC
Shirley Bergen Smircic ..... Bolivia

LICENSED ATTORNEYS

Carson Thomas Smith ..... Matthews
Eleanor Margaret Smith ..... Charlotte
Emily Elizabeth Smith ..... Charlotte
Holly Rebecca Smith ..... Belmont
Jared Shane Smith ..... Durham
Kelvin Dwayne Smith ..... Greensboro
Shernika Nicole Smith ..... Charlotte
Sloan Winstead Smith ..... Bath
Matthew Hammond Sommer ..... Raleigh
Caroline Diane Sorensen ..... Morrisville
Robert Scott Sparks ..... Chapel Hill
Brandon Mark Spleen ..... Pittsburgh, PA
Eric Thomas Spose ..... Winston-Salem
Andrew B. Spradlin ..... Raleigh
Cristina Chenlo Stam ..... Washington, DC
Henry Austin Stapp ..... Charlotte
Andrew David Steffensen ..... Grimesland
Jake Stewart ..... Columbia, SC
Brittany Nicole Stiltner ..... Raleigh
Sheldon McCurry Stokes ..... Charlotte
Jordan Alayna Stomean ..... Kernersville
Dana Caroline Stone ..... Raleigh
Jessica Dianne Stone ..... Thomasville
Troy Robert Stone ..... Chapel Hill
Mariah Caitlin Street ..... Apex
Stacy Elise Strickland ..... Raleigh
Sean Stroehle ..... Rock Hill, SC
Dylan Carroll Sugar ..... Chapel Hill
Kenille Renae Sumler ..... Alexandria, VA
Preetha Lakshmi Suresh ..... Cary
Ryan P. Sutton ..... Chattanooga, TN
Katelin Elizabeth Taylor ..... Rockingham
Lisa Marie Taylor ..... Raleigh
Trey Benjamin Taylor ..... Cary
Valerie Jo Thelen ..... Durham
Jamie Lynne Thomas ..... Fuquay-Varina
Stuart Gallagher Thomason ..... Southern Pines
Kacey Jo Tilley ..... Durham
William Benjamin Tobey ..... Denver
Chrystal Ann Tomblyn ..... Winston-Salem
Lauren Tonon ..... Charlotte
Donna Marie Tooill ..... Matthews
Kristina Marie Torpy ..... Waynesville
The Honorable Vincent George Torpy Jr. ..... Waynesville
Dinh Tran ..... Charlotte
Lauren E. Travers ..... Raleigh
Melissa Ann Travis ..... Winston Salem
Melissa Anne Tulis ..... Raleigh
Lauren Andrea Tuttle ..... Winston-Salem
Joe Elias Valentine ..... Washington, DC

Patrick Taylor Vander Jeugdt ..... Waxhaw
Isaac Anthony Vargas ..... Apex
Richard William Veronen Jr. ..... Charlotte
Jammie Lynn Wacenske ..... Hillsborough
Jennifer Peden Wadley ..... Charlotte
Derek Wagner ..... Charlotte
Jack Peter Waissen ..... Durham
Kassia Ana Walker ..... Shelby
Seth Tyre Walker ..... Salisbury
Victoria Velazquez Walker ..... Charlotte
Morgan Elexis Wall ..... Greensboro
Raina Joan Wallace ..... Cheraw, SC
Madison Brooks Waller ..... Wilmington
Llogan R. Walters ..... Columbus, OH
Zachary D. Walton ..... Huntersville
Mark Kamaki Wampler ..... Durham
Mengqian Wang ..... Charlotte
Kelly Anderson Warlich ..... Winston Salem
Phillip Ryan Waters ..... Huntersville
Kandace Lauren Watkins ..... Raleigh
Kristen Peters Watson ..... Birmingham, AL
Jessica Laura Watts ..... Chapel Hill
Britney Weaver ..... Raleigh
Justin Garrett Webb ..... Holly Springs
Chelsea Mullane Weiermiller ..... Charlotte
Meredith Elizabeth Weisler ..... Charlotte
David Michael Welch ..... Chapel Hill
Alexandria June Weller ..... Wilmington
Kathryn Gillespie Wellman ..... Charlotte
Brittany Sade' Whidbee ..... Elizabeth City
Jefferson Palmer Whisenant ..... Moore, SC
Gregory Donald Whitaker ..... Fairfax, VA
James Merritt White ..... Concord
Megan Christine White ..... Columbia, SC
John Carter Whittington ..... Raleigh
Jeffrey Scott Wilkerson ..... Charlotte
Benjamin Charles Williams ..... Cary
James David Williams ..... Williamsburg, KY
Andrew Garner Wilson ..... Eugene, OR
Patricia Lea Wilson ..... Asheville
Zachary James Wilson ..... Henrico, VA
Joshua Aaron Windham ..... Charlotte
Jonathan Brian Winslow II ..... Washington
Melissa Pekrun Woodard ..... Raleigh
John David Wooten IV ..... Greensboro
Kevin Wright ..... Raleigh
Laura Marie Wright ..... Durham
Samantha Yarborough ..... Chapel Hill
Joshua Aaron Yost ..... Huntersville
Alyse Atkinson Young ..... Winston-Salem

Whitney A. Young.....Elizabeth City
Sarah Emily Yousaf.....Florence, SC
Wuji Zeng.....Durham
Jean Ye Zhuang.....Washington, DC

The following persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners in 2016 and have been issued a certificate by the Board.

Maureen Louise Abell ..... Applied from the State of New York
Jeffrey D. Adams ..... Applied from the State of Massachusetts
Timothy Vitow Anderson ..... Applied from the State of Virginia
MaryElizabeth Andriko-Moore ..... Applied from the State of Pennsylvania
Brian James Bailey ..... Applied from the State of New York
Devinn Nicole Barnette ..... Applied from the State of New York
Joseph Martin Barry ..... Applied from the State of New York
Tabitha Angel Bingham ..... Applied from the State of Kentucky
Lee Carroll Bollinger, III ..... Applied from the State of Illinois
Lynn Krisay Brehm ..... Applied from the State of Pennsylvania
Kenneth Michael Brown ..... Applied from the State of Washington
Matthew Edmund Browning ..... Applied from the State of Texas
Christina Bowden Burgess ..... Applied from the State of New York
Terrence Francis Canela ..... Applied from the District of Columbia
Joshua Brown Carpenter ..... Applied from the District of Columbia
Mary Summer Carroll ..... Applied from the State of Pennsylvania
Michael Moonkyung Choy ..... Applied from the State of Illinois
Kelly Leigh Christopher ..... Applied from the State of Georgia
Kirk Robert Chrzanowski ..... Applied from the State of Illinois
Debra Satinoff Clayman ..... Applied from the State of District of Columbia
Daniel Tyler Cowan ..... Applied from the State of Massachusetts
Josef C. Culik ..... Applied from the State of Massachusetts
Kenneth Andrew Cutshaw ..... Applied from the State of Georgia
Melinda Ellen Cyr ..... Applied from the State of New Hampshire
Lisa Ann D'Agostino ..... Applied from the State of Georgia
Carlynn Beth Ferguson Davis ..... Applied from the State of Illinois
Meredith Curran Desharnais ..... Applied from the State of Massachusetts
Joshua Michael Diver ..... Applied from the State of Massachusetts
Jamie D. Dunkel ..... Applied from the State of Oklahoma
David Mark Eaton ..... Applied from the State of Mississippi
Kelly Eisenlohr-Moul ..... Applied from the State of Georgia
Ann McNellis Elmore ..... Applied from the State of Georgia
Heather June Enlow-Novitsky ..... Applied from the State of Ohio
Michael G. Flanagan ..... Applied from the State of Illinois
Daniel Chappell Flint ..... Applied from the State of Michigan
Joseph John Fontanetta ..... Applied from the State of New York
Paul Louis Frampton, Jr. ..... Applied from the State of West Virginia
Benjamin Robert Freeman ..... Applied from the State of West Virginia
Michael T. Freeman ..... Applied from the State of Virginia
Aline D. Galgay ..... Applied from the State of New York
Rachel Mary Garcia ..... Applied from the State of Illinois

Megan Erin Gemunder ..... Applied from the State of Colorado
Michelle Marie Gerred ..... Applied from the State of Ohio
Michael McGrath Giovannini ..... Applied from the State of Georgia
Christopher O'Neil Grant ..... Applied from the State of New York
Kristi Lee Graunke ..... Applied from the State of Georgia
John Everette Hall, Jr. ..... Applied from the State of Georgia
Mark Steven Hanor ..... Applied from the State of Tennessee
Richard Cushman Haskell ..... Applied from the State of Illinois
Mark Alexander Hiller ..... Applied from the State of New York
Julia Carole Thompson Hord ..... Applied from the State of Georgia
Maria Walters Hughes ..... Applied from the State of West Virginia
Sarah Jane Jacobs ..... Applied from the State of Tennessee
Adam David Johnson ..... Applied from the State of Massachusetts
Carol Y. Kendrick ..... Applied from the State of New York
Mark S. Kestnbaum ..... Applied from the State of Illinois
Kristin Joanne King ..... Applied from the State of New York
Amber Shauntise Koger ..... Applied from the State of Minnesota
Mary Barbara Kubicz ..... Applied from the District of Columbia
David William Lamb ..... Applied from the State of Massachusetts
Timothy Ryan Langley ..... Applied from the State of Georgia
Michael Lantrip ..... Applied from the State of Texas
Rebecca Lynn Lepkowski ..... Applied from the State of Nebraska
John Clinton Lloyd ..... Applied from the State of New York
Christopher Allen Lott ..... Applied from the District of Columbia
Corrine Lenore Lusic ..... Applied from the State of Massachusetts
Christy MacPherson Maple ..... Applied from the State of Georgia
Jared Paul Martin ..... Applied from the State of Illinois
Philip Leroy Martin ..... Applied from the State of Utah
Gina B. Masterson ..... Applied from the State of Colorado
David Jonathan Matthews ..... Applied from the State of New York
Julia Alexandra May ..... Applied from the State of New York
Merideth Queen Harness McEntire ..... Applied from the State of Hawaii
Mark Steven McKain ..... Applied from the State of Pennsylvania
Kurt William Meyers ..... Applied from the District of Columbia
Beth Renee Minear ..... Applied from the State of West Virginia
Michael A. Minicozzi ..... Applied from the State of Arizona
Candice Brittany Minjares ..... Applied from the State of Illinois
Alexander Barrett Morrison ..... Applied from the State of Tennessee
Robert Nason Nye, III ..... Applied from the State of Pennsylvania
Christopher Michael O'Connor ..... Applied from the State of Pennsylvania
Mark Vincent Odulio ..... Applied from the District of Columbia
Mary Elizabeth O'Neill ..... Applied from the State of West Virginia
Brian K. Parker ..... Applied from the State of Pennsylvania
Thomas A. Pasquesi ..... Applied from the State of Illinois
Mark David Perkins ..... Applied from the State of Illinois
Kris Reed Poppe ..... Applied from the State of Ohio
Barbara L. Portwood ..... Applied from the State of Minnesota
Emanuela Prister ..... Applied from the State of Texas
Tanisha Renae Reed ..... Applied from the State of Illinois
Senta Fiona Rhodes ..... Applied from the State of Pennsylvania

Laura Roxana Roberts ..... Applied from the State of New York
Jay Arthur Rosenberg ..... Applied from the State of Ohio
Adana A. Savery ..... Applied from the State of New York
Edwin Allen Dawes Schwartz ..... Applied from the State of Pennsylvania
Neil Charles Shulman ..... Applied from the State of New York
John Stuart Sieman ..... Applied from the District of Columbia
Edward C. Silva ..... Applied from the State of Massachusetts
Robert Gerard Slugg ..... Applied from the State of Virginia
Anna Richardson Smith ..... Applied from the State of Virginia
Jennifer Lee Snyder ..... Applied from the State of New York
Joseph P.L. Snyder ..... Applied from the State of Georgia
Michael Thomas Sprenger ..... Applied from the State of Ohio
Jonathan Daniel Stoian ..... Applied from the State of New York
Deborah Ann Strain ..... Applied from the State of Michigan
James McKay Suggs Jr. ..... Applied from the State of Texas
Pamela R. Tankle ..... Applied from the State of Massachusetts
Christine Dajohnna White Tennon ..... Applied from the State of Texas
Abigail Morgan Terhune ..... Applied from the State of Arizona
Aaron Zachary Tobin ..... Applied from the State of Texas
Daniel James Tounsel III ..... Applied from the State of Illinois
Devin Therese Trego ..... Applied from the State of Pennsylvania
Alena Elizabeth Van Tull ..... Applied from the State of New York
Jonathan Matthew Vance ..... Applied from the State of New York
Mariana Vazquez-Garcia ..... Applied from the State of New York
Jean Wright Veilleux ..... Applied from the District of Columbia
Andrew O. Vouziers ..... Applied from the State of Illinois
Howard Warren Walker ..... Applied from the State of Georgia
Eric Ryan Waller ..... Applied from the State of West Virginia
John Theodore Warsinsky ..... Applied from the State of West Virginia
Daniel Stuart Weinstock ..... Applied from the State of Pennsylvania
Jeffrey Brian Werbitt ..... Applied from the District of Columbia
Molly Elizabeth Brock White ..... Applied from the State of West Virginia
David Ethan Wicclair ..... Applied from the State of Pennsylvania
Jonathan Earl Williams ..... Applied from the State of Tennessee
Cameron Clark Winfrey ..... Applied from the State of Texas
Margaret Wai Wong ..... Applied from the State of Ohio
Michael Kent Woolley ..... Applied from the State of Utah

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in February 2017 and have been issued a certificate by the Board.

Caroline H. Allen ..... Wilmington
Matthew Yarn Allen ..... Asheville
Abraham Franklin Mat Al-saeedi ..... Charlotte
Fernando Julio Alvarez-Perez ..... Durham
Khawaja Saanval Amin ..... High Point
Charles Noel Anderson III ..... Raleigh
Sharlene Gilmer Anderson ..... Pinehurst
Bruce Warren Andrews Jr. ..... Durham
Rosa Schmoyer Antunez ..... Durham
Nana Akonorbea Afua Asante ..... Durham
Erin M. Ball ..... Charlotte
Caroline Bergen Barrineau ..... Fernandina Beach, FL
Ashley Burgess Bartolucci ..... Charlotte
Omar Edward Mazin Bashi ..... Raleigh
David F. Bazylewicz ..... Somerville, MA
Sarah Moser Beason ..... Charlotte
Brett Matthew Becker ..... Greensboro
Elizabeth Overby Bhuta ..... Holly Springs
Corey John Biazzo ..... Mint Hill
Milton Lloyd Blackmon ..... Rolesville
Laura Elizabeth Boorman ..... Raleigh
Corey Brown ..... Arlington, VA
Rachel Brunswig ..... Durham
James Ellis Buchanan ..... Charlotte
Frank William Bullock III ..... Durham
Brittney Ariel Burch ..... Greensboro
Shante Monique Burke-Hayer ..... Charlotte
Kirstyn Leigh Burleson ..... Monroe
Jared Michael Burtner ..... Apex
Matthew Cooper Butler ..... Waxhaw
Justin Gary Byrd ..... Greensboro
Jennifer Leigh Carpenter ..... Wilmington
Emily Carol Cauley ..... Raleigh
Aerial Markell Chatman ..... Angier
Lianna Elise Chayoun ..... Charlotte
Taren S. Cherry ..... Raleigh
Patrice Olivia Clark ..... Charlotte
Kevin Cleys ..... Chapel Hill
Jalecia Shontel Coley ..... Raleigh
Leonard D. Conapinski ..... Carrboro
Philip James Corson ..... Bowling Green, SC
Jennifer Aileen Coupland ..... Chapel Hill
Hamilton Reid Craig ..... New York, NY
Ashley Taylor Crawley ..... Winston-Salem
Robert Lee Creech ..... Charlotte

Nathan Riley Creger ..... Durham
Havlin Crispin Crittendon ..... Charlotte
Randall Scott Crowe ..... Charlotte
Thomas Michael Cull ..... Greenville, SC
Alexander Erwin Davis ..... Charleston, SC
Ashleigh Loring Davis ..... Raleigh
Manuel Christian Davis ..... Rocky Mount
Ashton Nicole Dillard ..... Statesville
Julie Anne Dogan ..... Bermuda Run
Camille B. Doom ..... Charlotte
Sterling Alyssa Dunn ..... Charlotte
Keith Alan Dunsmore ..... Fort Lauderdale, FL
Ashley Letitia Edwards ..... Durham
Emily Elizabeth Edwards ..... Charlotte
Hannah Elizabeth Emory ..... Dunn
Julie Davis Epperly ..... Waxhaw
Allen David Ervin ..... Virginia Beach, VA
John A. Fallone ..... Raleigh
Deirdre Ann Farrington ..... Green Cove Springs, FL
Danielle Rae Feller ..... Mooresville
Monique Shontae Ferebee ..... Charlotte
Raquel Fernandez ..... Charlotte
Sidney B. Fligel ..... Charlotte
JoAnna Fenee Fox ..... Troutman
Jeffrey Marc Friedman ..... Charlotte
Caroline Marie Gieser ..... Charlotte
Jeremy Dave Gonzalez ..... Kill Devil Hills
Molly-Catherine Kaiser Goodson ..... Winston-Salem
Andrew Gordon ..... Charlotte
Thomas W. Graham III ..... Charlotte
Caleb Wayne Grant ..... York, SC
Ashleigh Monique Greene ..... Browns Summit
Robert Wade Grimmett-Norris ..... Charlotte
Nina Nicole Gunnell ..... Charlotte
Zoe Anne Hansen Burnet ..... Garner
Joseph Jackson Harris ..... Atlanta, GA
Mirsada Haticic ..... Gastonia
Shira Loree Hedgepeth ..... Winston-Salem
Sean Michael Helle ..... Chapel Hill
Meredith Marie Hermann ..... Winston-Salem
Jonathan Ross Holder ..... Greensboro
Kevin Robert Hornik ..... Hillsborough
Constance Marie Howard ..... Virginia Beach, VA
Susan Samon Howard ..... Durham
Matthew Lewis Hubbard ..... Durham
Tucker Andrew Idol ..... Raleigh
Chrishonda Shonta Jefferson ..... Cary
Colby Bradford Jenkins ..... Charlotte
Leah Jeehae Kang ..... Durham
Kara Jessica Keith ..... Myrtle Beach, SC

Krystine Paige Keller ..... Charlotte
Samantha Jo Kelley ..... Concord
Jaren Eugene Kelly ..... Durham
Valerie Ann Kilgore ..... Charlotte
Llewingtina Constance King ..... Hephzibah, GA
Kelsey Louise Kingsbery ..... Raleigh
Aaron Steven Kirschenfeld ..... Durham
Theresa Lynne Kitay ..... Oak Island
Emily Caitlin Koll ..... Charlotte
Sarah Elizabeth LaBruce ..... Mt. Pleasant, SC
William George Lamb ..... Concord
Rebecca Jean Lawrence ..... Charlotte
Justin Michael Laws ..... Raleigh
Tyson Charles Leonhardt ..... Durham
Miles C. Lindley ..... Currie
Jasmine Nicole Little ..... Alpharetta, GA
Anthony Craig Locklear ..... Durham
Molly Ann Lovedale ..... Davidson
Ta'Juanna M. Lyons ..... Hephzibah, GA
Patterson Andrew Fulmer Maharajh ..... Charlotte
Robert M. Mahoney ..... Raleigh
Elizabeth Faye Malan ..... Statesville
Nihad M. Mansour ..... Chapel Hill
Bernard M. Marshall ..... Charlotte
Peter Glenn Mattocks ..... Durham
Kathleen Anne McConnell ..... Charlotte
Chelsea Cooke McKay ..... Apex
Stephen Paul McLaughlin Jr. ..... Cary
Alison Marie Melvin ..... Mooresville
Kathryn Dawn Milam ..... Charlotte
Marcus Clinton Miller ..... Durham
James Ellis Millikan ..... Ann Arbor, MI
Dominique Mincey ..... Fort Bragg
Sarah Elise Morin-Gage ..... Wilmington
Stephanie Iris Murray ..... Archdale
Danielle Marie Nodar ..... Charlotte
Kathryn Alice Nunalee ..... Burgaw
Elvira Victoria Nunez ..... Charlotte
Irene Oberman Khagi ..... Cary
Erin Christine O'Donnell ..... Cayce, SC
Kathleen Marie O'Malley ..... Wilmington
Holly Anne Oner ..... Greensboro
Kylie Alexandra Opel ..... Raleigh
Benjamin Alan Owens ..... Charlotte
Dmitriy V. Panchenko ..... Charlotte
Robin Milo Perrigo ..... Charlotte
Joseph Thomas Petrack ..... Greensboro
Cherie Yvette Pierce ..... Winston-Salem
Jessica Grissom Plummer ..... Burlington
Joseph Thomas Polonsky ..... Charlotte

Megan S. Powell ..... Fort Mill, SC
Grace Anne Puleo ..... Asheville
Laura Jordan Puleo ..... Pinehurst
Jesse Ramos ..... Durham
John Stanford Raper ..... Rocky Mount
Taniya Donyale Reaves ..... Brown Summit
Bryan Keith Riddle ..... Charlotte
Jeremy Scott Rigsbee ..... Durham
Hope Alexa Robertson ..... Raleigh
Sydney Elizabeth Robinson ..... Hubert
Ashley Marie Romero ..... Charlotte
Gina Russoniello ..... Charlotte
Sammy Said ..... Cary
Layali Salem ..... Raleigh
Evelyn Hilary Saxton ..... Goldsboro
Spencer Elisabeth Schold ..... Chapel Hill
Brooke Elizabeth Schram ..... Benicia, CA
Megan Elizabeth Schultz ..... Sneads Ferry
Danielle Rose Scimeca ..... Rock Hill, SC
Mary Lynn Anna Seery ..... Charlotte
Victoria Elease Sheppard-Anderson ..... Oak Ridge
Jessica Marie Sherman ..... Roxboro
Arista Jamil Barbriel Sibrey ..... Raleigh
David Louie Simmons ..... Asheville
Gregory Richard Simons ..... Wilmington
Mary Ashton Slagle ..... Raleigh
Maria Adriana Slater ..... Durham
Caitlin Marie Slavin ..... Martinsburg, WV
Ryan Hayden Smith ..... Raleigh
Benjamin Lee Snowden ..... Raleigh
Jeanine Rafiq Soufan ..... Durham
Sean M. Spiering ..... Asheville
James Tyrell Stanley ..... Durham
Jennifer Michelle Stevens ..... Charlotte
Rebecca LeAnn Stone ..... Hendersonville
Ryan Maxwell Stowe ..... Salisbury
Emily Nicole Strauss ..... Durham
Marc Stephen Subin ..... Pinehurst
Sharon Suh ..... Artesia, CA
Archie Lee Sumpter ..... Raleigh
Lalisa Sharmaine Sweat ..... Durham
Jillian Diane Swords ..... Charlotte
Whitney Bullins Taylor ..... Huntersville
Jaimie Shontel Terry ..... Buffalo Junction, VA
Sidney Alexis Thomas ..... Durham
Laura Marie Tonch ..... Mooresville
Adriana Toomey ..... Charlotte
Kayleigh Lynn Toth ..... Charlotte
Jonathon Dean Townsend ..... Raleigh
Sara Williams Trexler ..... Raleigh

Jaylene Elizabeth Trivino..... Chapel Hill
Christopher Theodore Greathouse Trusk.....Greenville, SC
Nathaniel Robert Ulmer.....Denver, CO
Elijah James Van Kuren ..... Apex
BreAnna VanHook ..... Goldsboro
Daniel K. Vazquez..... Charlotte
Andrew John Vetrone.....Cornelius
Mauricio Videla ..... Port Washington, NY
Courtney N. Viebrock..... Charlotte
Nathan Paul Viebrock ..... Charlotte
Adam Stephen Vorhis.....Asheville
Emily Grace Watson..... Advance
Samuel Melvil Wheeler.....Charleston, SC
Matthew Benedict White ..... Greensboro
Megan Somers White.....Cornelius
Bethany Marie Wigfield..... Charlotte
Jackson Antwaun Williford ..... Charlotte
Elizabeth Ann Wood..... New Bern
Julia Kay Wood..... Charlotte
Hillary Kathryn Woodard..... Cary
Kristie Nicole Young..... Zebulon
Yao Zhu..... Charlotte

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in July 2017 and have been issued a certificate by the Board.

Hannah Katherine Abernethy.....Carrboro
Ragini Ajay Acharya ..... Charlotte
Courtney Marie Achee ..... Chapel Hill
Chavez Adams.....Raeford
Hunter Weston Adams ..... Lexington, SC
Paul Robert Adams.....Lake Odessa, MI
Samuel Stuart Adams..... Charlotte
Paul Michael Allen..... Apex
Kendra R. Alleyne ..... Raleigh
Zachary Charles Allred..... Greensboro
Jonathan Hunter Altstadter..... Bellmore, NY
Maggie Louise Amos..... Charlotte
Denise Patrice Anderson ..... Concord
Desmon Lamar Andrade ..... Matthews
Riley Mitchell Andrews..... Wilmington
Allain Charles Andry ..... Davidson
Benjamin Evan Apple..... Chapel Hill
Ryan Michel Arnold.....Mebane
Juan Antonio Arreola .....Wilson
Julia Rapp Atchison..... Charlotte
Kristin Maria Athens..... Apex
Elizabeth Ann Bakale-Wise.....Hillsborough

Carly Grace Baker ..... Jacksonville
Daniel P. Ball ..... Raleigh
Meredith Grey Ballard ..... Raleigh
Christina Jansen Banfield ..... Franklin, TN
Chelsea Christina Banister ..... Raleigh
Jackson Allan Barnes ..... Durham
Jenny Marie Barnes ..... Durham
Sarah Ashley Barnett ..... Indian Trail
Haley Rae Bastian ..... Charlotte
Chelsea Morgan Bauer ..... Lake Wylie, SC
Jennifer Elizabeth Bayles-Quirk ..... Clarksville, TN
Deirdre Lynette Beasley ..... Durham
Nanette Corrales Becerra ..... Apex
Brenton Shane Begley ..... Gainesville, FL
Marcus Deshun Benning ..... Charlotte
Monica Corrine Berry ..... Winston-Salem
Maxwell Tanner Bertini ..... Charlotte
Jessica Ann Bertovich ..... Wilmington
Daniel Paul Bethea ..... Charlotte
Morgan Taylor Bethea ..... Charlotte
Lia Charlene Bies ..... Durham
Peter Andrew Bigelow ..... Falls Church, VA
Anthony Joseph Biraglia ..... Brookfield, CT
Leland Latham Black ..... Clemmons
Jeffrey L. Bloomfield ..... Winston-Salem
Danielle Nicole Boaz ..... Charlotte
Parris L. Booker ..... Winston-Salem
Bethany Allison Boring ..... Graham
Allison Lauren Bowman ..... Winston-Salem
Charles Howard Bowyer ..... Charlotte
Kathryn Mererid Boyd ..... Mebane
Philip A. Boyers ..... High Point
Brandon Lamar Boykin ..... Raleigh
Dorothy Michelle Brackett ..... Pittsboro
Justin Michael Bradley ..... Erwin
Brittany LeeAnn Brattain ..... Florence, SC
Jonathan Lawrence Braverman ..... Durham
Alexander Rittenhouse Brick ..... Tallahassee, FL
Brittany Diane Bridges ..... Raleigh
Leah Suzanne Britt ..... Lumberton
Laura Suzanne Browder ..... Greensboro
Andrew Michael Brown ..... Mooresville
Christopher Allen Brown ..... Charlotte
Christopher Joel Brown ..... Durham
Maya Elizabeth Brown ..... Winston-Salem
Christopher S. Bryant ..... Charlotte
Elitsa Hristova Bryant ..... Charlotte
Rachel Mary Helen Buck ..... Charlotte
Bret Michael Buckler ..... Advance
Tiffany Marie Burba ..... Mt. Airy

Kathleen Margaret Bure ..... Charlotte
Matthew Christopher Burke ..... Raleigh
Jonathan William Burns ..... Apex
Gregory Anthony Buscemi ..... Wrightsville Beach
Donald James Butler ..... Monroe
Dominique N. Caldwell ..... Lewisville
Rachel Marie Cane ..... Durham
Nicole Grace Cangcuesta ..... Charlotte
Sarah Russell Cansler ..... Knightdale
Dione Carroll ..... Aiken
Kathleen Erin Carroll ..... Greensboro
Eric Carter ..... Raeford
Caroline Esther Brown Casello ..... Greensboro
Claudine Noel Chalfant ..... Concord
Kent Richard Chalmers ..... Rock Hill, SC
Jacob Douglas Charles ..... Cary
Gary Tyrone Chavis ..... Durham
Darren Keith Chester ..... Bedford, OH
Jason Stone Chestnut ..... Laurinburg
Jocelyn Nicole Chidsey ..... Franklinton
Naomy Christine Chimenge ..... Fuquay-Varina
Daniel Choyce ..... Sicklerville, NJ
Jongwoo Chung ..... Seoul, South Korea
Kayla Marie Churchill ..... Charlotte
Ronnie Ke'Ashla Clark ..... Whitakers
Joshua Michael Clarkson ..... Lexington
Megan Colleen Clemency ..... Charlotte
Cassidy Ann Cloninger ..... Orlando, FL
Matthew Daniel Cloutier ..... Greensboro
Joshua Stevenson Coffey ..... Boone
Alexandra Lesley Coggins ..... Raleigh
Jennifer Rae Coleman ..... Charlotte
Adam Joseph College ..... Raleigh
Margaret Tara Collins ..... Wake Forest
Maria Catherine Collins ..... Charlotte
Lisa Hanley Colon ..... Youngsville
Daniel Lee Colston ..... Rocky Mount
Hannah Alicia Combs ..... Chapel Hill
Cheryl DeAnn Comer ..... Gastonia
Paul Leonard Comer IV ..... Charlotte
Cynthia Gale Cook ..... Mint Hill
Nathaniel Howard Cook ..... Wilmington
William Winstead Cooke ..... Greensboro
Katashia Latrice Cooper ..... Rocky Mount
Elizabeth Anne Corbett ..... Raleigh
Adam Sterling Coto ..... Vale
David William Cox ..... Charlotte
William Randolph Cox ..... Concord
Allie Marie Craver ..... Mebane
Brooke McIntosh Crump ..... Mount Gilead

Drew H. Culler ..... Durham
Rebecca Ann Daddino ..... Charlotte
Clifton Andrew Dandison ..... Charlotte
Rebecca Buff Darchuk ..... Asheville
Skylar Elaine Davenport ..... Raleigh
Shane Lewis Davidson ..... Cary
Clinton Ross Davis ..... Raleigh
Emily Ann Davis ..... Charlotte
Garrett Lee Davis ..... Durham
Matthew Steven Davis ..... Charlotte
Nicole Danielle Davis ..... Carrboro
Robert Davis III ..... Greensboro
Benjamin Charles DeCelle ..... Concord
Marcus Ryan Deel ..... Joint Base Lewis McChord, WA
Elizabeth Louise DeFrance ..... Asheboro
Conor Priest Degnan ..... Charlotte
Michael Charles DeLuca ..... Raleigh
Christopher Birkland Dempsey ..... Annapolis
Jessica Marie Dentzer ..... Charlotte
Andrew William Deschler ..... Raleigh
Taylor Mioko Dewberry ..... Winston-Salem
Candice Ashley Diah ..... Stuart, FL
Andrew John Dickerhoff ..... Raleigh
Rylee Michelle Dillard ..... Charlotte
Sarah Bain Dillard ..... Wilson
Garrett John Dimond ..... Raleigh
Matar Diouf ..... Charlotte
Adam James Doane ..... Charlotte
Jonathan Vaughn Doerr ..... Durham
Jennifer Lee Dumont ..... Raleigh
Casey Nichole Duncan ..... Raleigh
Debra Corinne Duncan ..... Monroe
Samatha Renee Duncan ..... Raleigh
Sharon Elizabeth Dunmore ..... Greensboro
Kimberly Ann Edwards ..... Cary
Paul Tyson Ehlinger ..... Washington
Samuel Ehrlich ..... Greenville
Andrew Michael Eichen ..... Chapel Hill
Casey Sharon Elliott ..... Saratoga
Amanda Gray Ennis ..... Four Oaks
Austin Entwistle ..... Concord
Annemarie Chase Ernst ..... Mills River
Zachary Warne Ernst ..... Cocoa Beach, FL
Raymond Edward Escobar ..... Wilmington, DE
James Ford Eubanks ..... Morehead City
Jonathan Mackenzie Eure ..... Morganton
Ryan Christopher Evans ..... Chapel Hill
Christopher Eason Faircloth ..... Wilmington
Phillip Michael Fajgenbaum ..... Raleigh
Amanda Marie Fannin ..... Wake Forest

Alexia Lindley Faraguna ..... Indian Trail
John Harmon Feasel ..... Durham
Kyleigh Feehs ..... Kensington, MD
Casey Christine Fidler ..... Raleigh
Joshua Finney ..... Charlotte
Nicholas Ivan Fisher ..... Raleigh
Chelsea Rand Flynt ..... Goldsboro
Daniel Lewis Fox ..... Asheville
Jacob Richard Franchek ..... Duncanville, TX
Jennifer Kay Fredette ..... Cary
Lauren Nicole Freedman ..... Greensboro
Alexander Henry French ..... Chapel Hill
Kyle Matthew Frizzelle ..... Sanford
Heather Call Fuller ..... Charlotte
Agnes Gambill ..... Wilkesboro
Kirstin Gardner ..... Morganton
Noah Drayton Garrett ..... Carrboro
Josiah Bradford Garton ..... Charlotte
Shaquansia Gay ..... Durham
Ryan James Geibl ..... Charlotte
Matthew Quinn Geiger ..... Huntington, WV
Christian Alexander Gerencir ..... Charlotte
Jacob Ronald Glass ..... Fayetteville, GA
Abigail Anne Golden ..... Charlotte
Tara Michele Gore ..... Whiteville
Austin Mitchell Grabowski ..... Cornelius
Mark Van Lanier Gray II ..... Summerfield
Kirstin Joi Greene ..... Charlotte
John Lee Gregg ..... Salisbury, MD
Adam Lane Gregory ..... Angier
Grace Anthony Gregson ..... Raleigh
Maxwell Lee Gregson ..... Raleigh
Sara Esperanza Guerra ..... Raleigh
Emily Holland Gunner ..... Raleigh
Niccolle Claire Gutierrez ..... Cary
Emma Katherine Haddock ..... Wilmington
Jessica Anne Hajjar ..... Charlotte
Amir Ragab Hamdoun ..... Belmont, MA
Nathaniel Ramsey Hamilton ..... Hampstead
Racheal Verna Hammond ..... Durham
Rebecca Lane Hammond ..... Cary
Charles William Hands ..... Charlotte
Molly Hopkins Hanes ..... Raleigh
Alia Hassan Haque ..... Mint Hill
Kaitlyn Ann Haran ..... Lenoir
Ryan O'Keith Hargrave ..... Taylorsville
Serenity Hargrove ..... Raleigh
Steven Huntington Harris ..... Charlotte
Ashley Nicole Hartman ..... Winston-Salem
Weston Philip Harty ..... Langhorne, PA

Jacob Daniel Harwood ..... Marshall
Robert Leslie Hash ..... Chapel Hill
Tyler Keith Hawn ..... Charlotte
Amanda M. Hayes ..... Northampton, MA
Katelyn Bailey Heath ..... Salisbury
Edward Lawrence Hedrick ..... Carrboro
Steven Christopher Hemric ..... Winston-Salem
Abigail Watts Henderson ..... Charlotte
Lauren Blaine Henderson ..... Winston-Salem
Nicole Henderson ..... Mooresville
Alexander Hentschel ..... Garner
Karina Esther Herhusky ..... Cary
Kylie Spangler Herring ..... Raleigh
Kathryn Joy Hesman ..... Charlotte
Erica Morgan Hicks ..... Charlotte
Robyn Alise Hicks-Guinn ..... Charlotte
Brooklyn Nicole Hildebrandt ..... Hampton, VA
Alexandra Sophia Hilditch ..... Raleigh
Brittany Leigh Hill ..... Greensboro
Caitlin Veronica Hill ..... Charlotte
Ashley Renee' Hilliard ..... Raleigh
Jordan Clarke Hilton ..... Greensboro
Samuel Armfield Hipps ..... Raleigh
Michael Elliot Hirsch ..... Fort Mill, SC
Dexter Cummings Hobbs ..... Charlotte
Ann Marie Roslyn Holder ..... Greenville
Alisha Patrice Holland ..... Midland
Aranda Denise Holley ..... Durham
Miranda Shanice Holley ..... Durham
Nicholas Presley Holloman ..... Roxboro
Darrion Rashawn Holloway ..... Virginia Beach, VA
Jonathan Michael Holt ..... Clemmons
Seongun Matthias Hong ..... Charlotte
Craig Marshall Horsman ..... Mooresville
Daniel Horwitz ..... Chapel Hill
Dorwin Llewelldyn Howard ..... Oxford
LaQuonta Lynette Howell ..... Charlotte
Karlie Love Hudson ..... Newton Grove
Jenica Dawn Hughes ..... Chapel Hill
Lauren Grace Marie Hunstad ..... Charlotte
Christopher McGee Hurley ..... Wake Forest
Emily Beth Hurtt ..... Cold Spring, KY
Elizabeth Marie Hutchens ..... Cary
John Grover Hutchens ..... Charlotte
Lex-Jordan Osili Ibegbu ..... Raleigh
Esosa Igiehon ..... Charlotte
Michael Anthony Ingersoll ..... Charlotte
Max Edward Isaacson ..... Raleigh
Joseph John Ittoop ..... Charlotte
Volha Ivanushko ..... Raleigh

Dondrea A'lese Jackson ..... Fayetteville
Jennifer Lynne Jackson ..... Greenville
Jonathan Claude Jakubowski ..... Pittsboro
Matthew Thomas James ..... Durham
Emily Catherine Jeske ..... Raleigh
Josue Alfredo Jimenez ..... Charlotte
Eunji Jo ..... Charlotte
Charlene Graham Johnson ..... Clayton
Erika Johnson ..... Roxboro
Ivy Alexandra Johnson ..... Carrboro
Ellison Green Johnstone ..... Charlotte
Brian Patrick Jones ..... Farwell, MI
Edna Nicole Jones ..... Huntersville
Eric Preston Jones ..... Greensboro
Henry Weldon Jones ..... Raleigh
Sa'Metria Desiree Jones ..... Raleigh
Travis Ray Joyce ..... Hillsville, VA
Whitney Natalie Kamerzel ..... Charlotte
Elizabeth Anne Kapopoulos ..... Charlotte
Kyle Matthew Karnes ..... Tega Cay, SC
Stacy Lynn Kelly ..... Chapel Hill
Aaron Michael Kennedy ..... Charlotte
Correll L. Kennedy ..... Winston-Salem
Kenneth Max Kennedy ..... Raleigh
Michael Justin Kerrigan ..... Battle Creek, MI
Sara Kathleen Kidd ..... Raleigh
James Claiborne King ..... Durham
Melody Jo King ..... DeLeon Springs, FL
Selena Anne King ..... Marshall
William Parker King ..... Wilson
Andrew Hampton Kite ..... Maggie Valley
Leslie Magen Kite ..... Raleigh
Natalie Desneiges Klemann ..... Fuquay-Varina
Margaret Troy Kocaj ..... Charlotte
Brandon Alexander Konecny ..... Knightdale
Christina Joy Koscianski ..... Raleigh
Alison Mulnix Kralick ..... Fuquay-Varina
Spencer Christian Krantz ..... Greensboro
Cheslie Kryst ..... Tega Cay, SC
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Travis Howard LaFay ..... Raleigh
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Ryan Allen Layton ..... Mebane
Olivia Angell League ..... Sevema Park, MD
Wayne Douglas Lear ..... Charlotte
Christopher John Leddy ..... Indian Island, SC
Evan Anderson Lee ..... Wilson
Parker Cheatham Lee ..... Raleigh

Carey Sue LeRoux ..... Charlotte
Preston Wyatt Lesley ..... Mount Olive
Jarelle Anthony Lewis ..... Raleigh
Ryan William Lifland ..... Charlotte
Michelle Ann Liguori ..... Raleigh
Michael S. Litrenta ..... Belmont
Nicole Latrice Little ..... Winston-Salem
Zishuang Liu ..... Mountain View, CA
Kadija Lewis Locklear ..... Charlotte
Andrew Scott Loge ..... Charlotte
Michael Anthony Loiacono ..... Lake Lure
Maria D. Lopez Delgado ..... Hickory
Laura Diane Love ..... Raleigh
Jamey Mavis Lowdermilk ..... Greensboro
Amelia Elderidge Lowe ..... Charlotte
Kyra Lowry ..... Pembroke
Benjamin Seth Lumpkins ..... Oxford
Christopher Ryan Lusby ..... Kenly
James Conlan Lynch ..... Charlotte
Kathleen Elizabeth Lynch ..... Brooklyn, NY
Alexandra Michelle Maccioli ..... Morehead City
Steven Mark Maddox ..... Charlotte
Michael Braxton Marcela ..... Vilas
Chanda Denee Marlowe ..... Shallotte
Jeremy Marlowe ..... Denver
Sarah Elizabeth Marshik ..... Charlotte
Carson Ray Martin ..... Durham
Jestyne Angela Martin ..... Sanford
Kyle William Martin ..... Fulton, NY
Madeline Olivia Martin ..... Pawleys Island, SC
Randall Tyler Martin-Franks ..... Roanoke Rapids
Cory Lee Masi ..... Durham
Emily Gray Massey ..... Raleigh
Clint Andrew Mast ..... Morrisville
Sara Ann Matecun ..... Chapel Hill
Mary Ann Matney ..... Raleigh
Rachel Susan Matthews ..... Raleigh
Philip David Mayer ..... Chapel Hill
Rhian Cruise Mayhew ..... Raleigh
Richard H. McAuliffe ..... Raleigh
Sharee Latrice McCall ..... Apex
Patrick Ryan McConnell ..... Statesville
Christian Blair McCullen ..... Clayton
Paige Nicole McElravy ..... Hartsville, SC
Vanessa Noel McGalliard ..... Raleigh
Cory Adams McKenna ..... Greensboro
Tucker Jay McKinley ..... Charlotte
British Alexander McLean ..... Winston-Salem
Joseph McManus ..... Archdale
Aria Quinn Merle ..... Raleigh

Laura Whitworth Milloway ..... Greensboro
James Worth Mills ..... Raleigh
Brittany Nicole Mixon ..... Charlotte
Brian Lee Momeyer ..... San Diego, CA
Amelia Rose Montgomery ..... Charlotte
Sydnee Erin Moore ..... Holden Beach
Tirrill Moore ..... Raleigh
Elizabeth Sterling Moose ..... Florence, SC
Glenn Andrew Morrison ..... Fuquay-Varina
Rebekah Elese Morrison ..... Madison
Jacob Morse ..... Raleigh
Tempestt Head Morton ..... Morrisville
Ashleigh Casey Mothershead ..... Charlotte
Abby Moua ..... Hickory
Hannah Marie Lassiter Munn ..... Charlotte
Meredith Lynne Murchison ..... Charlotte
Hannah Raheal Murphy ..... Raleigh
Sean Christopher Murphy ..... Durham
Caroline Collins Muse ..... Charlotte
Seth Ian Muse ..... Charlotte
Tagreed Sami Nafisi ..... Charlotte
Johnathon Naylor ..... Jacksonville
Tenika Breanna Neely ..... Apex
Mark Allen Nesdill ..... Charlotte
Mary Lawrence Newton ..... Raeford
Jamie Terrell Nichols ..... Rock Hill, SC
Annelise Nininger-Finch ..... Raleigh
Jason Graham Norman ..... Charlotte
William Pendleton Norrell ..... Elizabeth City
Amiee Nwabuike ..... Raleigh
Molly Ann Oneil ..... Raleigh
Rachel Ann Oplinger ..... Sewickley, PA
Alexander Louis Ortiz ..... Fairview
Amanda Lea Owens ..... New Bern
Mark West Owens ..... Greenville
Tyler Ray Owens ..... Durham
Meredith Elizabeth Pace ..... Winston-Salem
Emily Spring Page ..... Durham
Whitney R. Pakalka ..... Winston-Salem
Dylan Eugene Paradis ..... Raleigh
Chelsea Victoria Parish ..... Raleigh
Ryan Young Park ..... Durham
Meredith Jane Parker ..... Garner
William Osvaldo Parra ..... Durham
Alexander Jay Paschall ..... Garner
Melissa Elizabeth Roque Paskow ..... Miami, FL
David Andrew Pasley ..... Winston-Salem
Harsh Atul Patel ..... Raleigh
Martha Grace Ashcroft Patterson ..... Mooresville
Brian Martin Payne ..... Coatesville, PA

Casey Lynn Peaden ..... Williamston
Molly Dale Pearce ..... Raleigh
Melodie Pellot-Hernandez ..... Durham
Nathaniel James Pencook ..... Cary
Kathleen Elizabeth Perkins ..... Charlotte
Benjamin Michael Petitto ..... Charlotte
Andreu Lyndon Phillip ..... Charlotte
Anderson Herman Phillips ..... Durham
James Nathanial Pierce ..... Rock Hill, SC
James Bradford Piland ..... Raleigh
Suzanne McLamb Plunket ..... Cary
Louise Kelmuya Pocock ..... Rock Hill, SC
Elizabeth Cohen Ponder ..... Beaufort
Jillian Katheryn Pope ..... Spring Lake
Matthew Walker Poppe ..... Davidson
Alexandra James Portaro ..... Charlotte
Joelle Courtney Portzer ..... Apex
James Fitzsimmons Powers ..... Charlotte
Michelle Christine Prendergast ..... Clemmons
Nicholas Anthony Presentato ..... Winston-Salem
Jessica Nicole Price ..... Knightdale
Samuel Sutherland Price ..... Warrensville
Ashley Autry Prince ..... Cary
William Christopher Wood Pruden ..... Raleigh
Jason Buran Pruett ..... Whitsett
Michael Lanser Rafetto ..... Raleigh
Cedric Darnell Rainey ..... Charlotte
William Harris Reaves ..... Greenville
Dillon Alexander Redding ..... Fuquay-Varina
Sarah Elizabeth Reddy ..... Charlotte
Nicole Regna ..... Winston-Salem
Cecilia Reyna ..... Fuquay-Varina
Tyler Alexander Rhoades ..... Charlotte
Emily Paige Rhodes ..... Winston Salem
Morgan Leigh Rich ..... Linden
Zachary Richardson ..... Fayetteville
Erin Barts Riddick ..... Raleigh
Ragan Hope Riddle ..... Burlington
Alyssa Michelle Riggins ..... Raleigh
Jessica Marie Rigsbee ..... Charlotte
Donna Rinck ..... Cary
Kelsey Marie Ring ..... Charlotte
Adam Kristian Roberts ..... Greensboro
Peter Bruce Robinson ..... Durham
William Russell Robinson ..... Durham
James Rodgers ..... Germantown, TN
Preston William Rollero ..... Knightdale
Jessica Marie Roman ..... Raleigh
Kiara Barbara Ross ..... South Chesterfield, VA
Joshua Ryan Rowland ..... Durham

Heather Gail Rubinstein ..... Raleigh
Kayla Ariel Rudisel ..... Matthews
Ricky Lynn Ruffin ..... Cornelius
Sarah Margaret Saint ..... Winston-Salem
Mihai Calin Salagean ..... Jamestown
Navdeep Singh Sandhu ..... Durham
Kaylyn Antoinette Sands ..... Fort Wayne, IN
John Joseph Sauve ..... Tryon
Lauren Ashley Saville-Amtower ..... Weaverville
Holly K. Savino ..... Raleigh
Jordan Taylor Sawyer ..... New Bern
Sarah Sawyer ..... Charlotte
Nicole Rochelle Scallon ..... Greensboro
Tara Ann Scanlon ..... Greensboro
Trisha Marie Schell ..... Williamsburg, VA
Sheldon Leigh Schenck ..... Raleigh
Zachary John Schilawski ..... Raleigh
Frederic Hilton Schilling ..... Ponte Vedra Beach, FL
Mollie McLauchlin Schrull ..... Sanford
Tiffany Scott ..... Charlotte
Gregory Michael Seraydarian ..... Bloomfield Hills, MI
Jillian Christine Sewell ..... Wilmington
Zainah Shafi ..... Raleigh
Leticia Louise Shapiro ..... Cary
Sara Shariff ..... Charlotte
Angela Ruth Sheets ..... New Bern
Jared Keith Simmons ..... Raleigh
Michael Antonio Simmons ..... Fayetteville
Micah Raines Simonsen ..... Edenton
Samantha Simpson ..... Charlotte
Tanisha Marie Sims ..... Raleigh
Kevin Michael Sisson ..... Raleigh
Cordon McLendon Smart ..... Winston-Salem
Charles Ruppe Smith ..... Fayetteville
Jenna Rose Smith ..... Raleigh
Shelby Elizabeth Smith ..... Arlington, VA
Shelby Nikol Smith ..... Raleigh
William Gray Smith ..... Wilmington
George Thomas Smith, III ..... Raleigh
Gabriel Glenn Snyder ..... Greensboro
Alexandra Southerland ..... Hope Mills
Frank Clark Spencer ..... Charlotte
Alton Dennis Stainback II ..... Henderson
Kendra Nicole Stark ..... Raleigh
Malaika Ralphael Staten ..... Charlotte
Christopher Albert Stella ..... Greensboro
Holly Renee Stephens ..... Raleigh
Deirdre M. Stephenson ..... Sanford
Christopher John Stevens ..... Winston-Salem
Christopher James Stipes ..... Raleigh

Stratton Fielding Stokes ..... Magnolia
Caitlin Stone ..... Dothan, AL
Lauren Elizabeth Stovall ..... Jekyll Island, GA
Joseph Edward Strader ..... Greensboro
Daniel David Stratton ..... Greensboro
James Neal Strickland ..... Charlotte
Demetria Elaine Stuart ..... Winston-Salem
David Arthur Swenton ..... Owego, NY
Nadira Aisha Swinton ..... Charlotte
Jesse Swords ..... Asheville
Grace Alexandra Sykes ..... Durham
James Harrison Taylor ..... Charlotte
Rebecca Larkin Taylor-Parker ..... Raleigh
Samuel Best Thomas ..... Raleigh
Jovon Andre-Michael Thompson ..... Wake Forest
Russell Carsby Thornton ..... Benson
Elizabeth Irene Thueme ..... Raleigh
Kaitlyn Lassiter Tickle ..... Louisburg
Allison Weller Tikare ..... Cary
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Erica Washington ..... Durham
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Peter Harrison Webb ..... Raleigh
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Trent Wesley Williams ..... Durham
Mackenzie Lee Willow-Johnson ..... Wake Forest
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Laura Wright ..... Durham
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Audrey Marie Zopp ..... Morganton

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Shamira Youkhaneh.....Applied from the State of Illinois
Lisa Jacqueline Zak..... Applied from the State of Ohio

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DUKE ENERGY CAROLINAS, LLC, PLAINTIFF
v.
HERBERT A. GRAY, DEFENDANT/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., LUCAS-FORMAN, INC., AND CARTER LAND SURVEYORS & PLANNERS, INC., FOURTH-PARTY DEFENDANTS

No. 108PA14-2

Filed 19 August 2016

Statutes of Limitations and Repose—easement—utility—relief for encroachment—recovery of land

In an action by a utility to recover the use of its easement, the applicable statute of limitations was the twenty-year statute for real estate found in N.C.G.S. § 1-40 rather than the six-year statute of limitations for incorporeal hereditaments found in N.C.G.S. § 1-50(a)(3). Although easements are incorporeal hereditaments, plaintiff was seeking full use of its easement. Because the easement is real property, the claim is for the recovery of real property. *Pottle v. Link*, 187 N.C. App. 746 (2007), was overruled insofar as it deemed N.C.G.S. § 1-40 inapplicable to actions involving encroachments on easements. Moreover, the state is criss-crossed with utility facilities, and their accompanying easements are not always readily subject to routine inspection by the owning utility. The drafters of N.C.G.S.

§ 1-50(a)(3) did not intend that a utility's right to maintain such easements could be successfully challenged in a time as short as six years.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 766 S.E.2d 354 (2014), affirming an order of summary judgment entered on 1 November 2013 by Judge Richard D. Boner in Superior Court, Mecklenburg County. On 10 June 2015, the Supreme Court allowed defendants' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 6 October 2015.

Womble Carlyle Sandridge & Rice, LLP, by Debbie W. Harden, Meredith J. McKee, and Jackson R. Price, for plaintiff–appellant/appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and John R. Buric, for defendant/third-party plaintiff–appellee/appellant Herbert A. Gray; DeVore, Acton & Stafford, PA, by Fred W. DeVore, III and Derek P. Adler, for third-party defendant/fourth-party plaintiff–appellee/appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc.; and Hamilton Stephens Steele & Martin, PLLC, by Erik M. Rosenwood and Mark R. Kutny, for fourth-party defendant–appellee/appellant Yarbrough-Williams & Houle, Inc.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason and D. Martin Warf, for North Carolina Electric Membership Corporation and North Carolina Association of Electric Cooperatives, amici curiae.

Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel, III, Associate General Counsel, North Carolina League of Municipalities; and Daniel F. McLawhorn, City of Raleigh Associate City Attorney, for North Carolina League of Municipalities, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Matthew D. Rhoad, for Public Service Company of North Carolina, Inc. d/b/a PSNC Energy; and Piedmont Natural Gas Company, Inc., amici curiae.

EDMUNDS, Justice.

Defendant Herbert A. Gray (defendant) owns real property located in Huntersville, North Carolina. Plaintiff Duke Energy Carolinas, LLC (plaintiff or Duke) owns an easement allowing construction of and access to its power lines. A portion of defendant's property encroaches on plaintiff's easement and defendant has failed to remove the encroachment upon plaintiff's request. We consider whether plaintiff has a right to eject defendant's encroachment from the easement. Defendant contends that N.C.G.S. § 1-50(a)(3), which establishes a six-year statute of limitations for injury to any incorporeal hereditament, bars plaintiff's claim. We conclude that removal of the encroachment is a recovery of real property lying outside the scope of subdivision 1-50(a)(3). As a result, this action falls within the twenty-year statute of limitations set out in N.C.G.S. § 1-40. Accordingly, we reverse the decision of the Court of Appeals.

J.L. and Pearl D. Wallace, defendant's predecessors in title, executed a duly recorded easement agreement with Duke Power Company, now plaintiff Duke Energy Carolinas, LLC, on 18 May 1951. The agreement granted plaintiff certain rights in a two hundred-foot-wide strip of land, including "the right to enter said strip . . . and to construct, maintain and operate within the limits of same, poles, towers, wires, lines, apparatus and appliances for the purpose of transmitting electric power and for telephone purposes," and "the right to keep said strip of land free and clear of any or all structures . . . except those placed in or upon same by said Power Company." The agreement also stated that "[t]he right of way and easements hereby granted shall be binding upon and shall inure to the parties hereto, their successors, heirs and assigns." Plaintiff thereafter constructed an overhead 100,000 volt electrical transmission line within the easement in 1951. A 230,000 volt transmission line was constructed in 1957 and 1958.

In September 2005, Yarbrough-Williams & Houle, Inc. (Yarbrough-Williams), a corporation specializing in professional land surveying, created a plat titled "Skybrook Phase 8 Map 1" and recorded it in Mecklenburg County. At the same time, Yarbrough-Williams physically staked out the boundaries of the surveyed property, including the boundaries of Lot 533, the property at issue. The following month, John Wieland Homes and Neighborhoods of the Carolinas, Inc. (Wieland), now Builder Support Services of the Carolinas, Inc., purchased the Skybrook development, including Lot 533. In December 2005, Wieland contracted with Lucas-Forman, Inc. (Lucas-Forman), another corporation specializing in land surveying, to plot and stake the location of the building footprint for Lot 533. In January and February 2006, Wieland

dug the footings and poured the foundation for a house on the Lot. On 16 February 2006, Wieland contracted with Carter Land Surveyors & Planners, Inc. (Carter Land Surveyors), yet another company specializing in land surveying, to conduct a foundation survey of Lot 533. The purpose of this week-long foundation survey was to confirm that no setback, easement, right-of-way, or boundary violations existed.

Thereafter, Wieland completed construction of the house in question on Lot 533, and the county issued a certificate of occupancy on 11 October 2006. In early 2007, defendant purchased the house and lot from Wieland for $608,667.00. During the process, Wieland provided defendant a copy of the foundation survey. Defendant remains the owner of Lot 533, which now bears the address of 14440 Salem Ridge Road, Huntersville, North Carolina.

Three years later, around 17 February 2010, defendant received a letter from Duke alleging that a portion of his home was encroaching on Duke's right-of-way and asking defendant to remove the encroachment. When defendant did not comply, plaintiff filed suit in Superior Court, Mecklenburg County, on 12 December 2012, seeking injunctive and other relief. On 3 January 2013, defendant filed an answer and counterclaim, adding a third-party complaint against Wieland. Plaintiff replied to the counterclaim and third-party complaint on 13 February 2013. Wieland answered the third-party complaint and filed both a motion to dismiss and a fourth-party complaint against Yarbrough-Williams, Lucas-Forman, and Carter Land Surveyors on 8 March 2013. On 7 May 2013, Yarbrough-Williams filed a motion to dismiss the fourth-party complaint. This filing also included Yarbrough-Williams's answer and affirmative defenses. Lucas-Forman filed an answer to and motion to dismiss the fourth-party complaint on 13 May. Finally, Carter Land Surveyors filed a motion to dismiss the fourth-party complaint on 21 June. The trial court denied Yarbrough-Williams's and Lucas-Forman's motions to dismiss on 6 September, and Carter Land Surveyors' motion to dismiss on 13 September 2013.

Wieland filed a motion seeking partial summary judgment on 10 September 2013, and defendant followed with a motion for summary judgment on 2 October 2013. Both argued that the six-year statute of limitations for an injury to an incorporeal hereditament set out in N.C.G.S. § 1-50(a)(3) had run and that, as a result, plaintiff had no legal remedy. After conducting a hearing, the trial court on 1 November 2013 granted the motions for summary judgment filed by defendant and by Wieland, finding that plaintiff's claims were barred by the six-year statute of limitations pertaining to incorporeal hereditaments. The court further found

that the limitations periods set out in N.C.G.S. §§ 1-40 and 1-47(2) did not apply.

Plaintiff appealed, and the Court of Appeals affirmed the trial court's grant of summary judgment. *Duke Energy Carolinas, LLC v. Gray*, ___ N.C. App. ___, 766 S.E.2d 354 (2014). The Court of Appeals concluded that an easement constitutes an incorporeal hereditament and, based on the plain language of N.C.G.S. § 1-50(a)(3), an action for injury to an incorporeal hereditament must be brought within six years. *Id.* at ___, 766 S.E.2d at 358. In its analysis, the Court of Appeals found itself bound by its holding in *Pottle v. Link*, 187 N.C. App. 746, 654 S.E.2d 64 (2007), *appeal dismissed*, 362 N.C. 509, 668 S.E.2d 31 (2008), in which that court concluded that an action by the owner of a dominant estate for injunctive relief against the servient estate owner's encroachment constituted an action for injury to an incorporeal hereditament governed by subdivision 1-50(a)(3). *Duke Energy Carolinas*, ___ N.C. App. at ___, 766 S.E.2d at 361.

The Court of Appeals further held that the statute of limitations for a claim based on injury to an incorporal hereditament begins to run "from the time that the claim accrues, even if a plaintiff is not aware of the injury at that time." *Id.* at ___, 766 S.E.2d at 359. The court determined that plaintiff should have been aware of the encroachment when the certificate of occupancy was issued on 11 October 2006, denoting the completion of construction, and thus was required to file suit against defendant by 11 October 2012 to avoid running afoul of the statute of limitations. *Id.* at ___, 766 S.E.2d at 359. Accordingly, the Court of Appeals concluded that the statute of limitations had expired when plaintiff filed its complaint on 12 December 2012. *Id.* at ___, 766 S.E.2d at 358. On 10 June 2015, this Court allowed plaintiff's petition for discretionary review and a conditional petition for discretionary review filed by defendant, Wieland, and Yarbrough-Williams.

The key issue before us is whether the trial court and the Court of Appeals erred in identifying the applicable statute of limitations. We review determinations by the Court of Appeals for errors of law. N.C. R. App. P. 16(a). The Court of Appeals affirmed the trial court's grant of summary judgment in favor of defendant and Weiland on the grounds that the six-year statute of limitations barred plaintiff's claims. To prevail on a motion for summary judgment, the moving party must first show that, when viewed in the light most favorable to the nonmoving party, no genuine issues of material fact exist. N.C. R. Civ. P. 56(c); *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, ___ N.C. ___, ___, 784 S.E.2d 457, 460 (2016). Allowing a defendant's motion

for summary judgment on the basis of the statute of limitations is appropriate only when all the facts necessary to establish the limitation are alleged or admitted by the plaintiff, with the plaintiff receiving the benefit of all relevant inferences. *City of Reidsville v. Burton*, 269 N.C. 206, 210, 152 S.E.2d 147, 150 (1967) (citations omitted).

Defendant argues that the appropriate limitation period is the six years set out in N.C.G.S. § 1-50(a)(3), while plaintiff contends that the twenty-year statute of limitations found in N.C.G.S. § 1-40 is proper. The former, set out in Chapter 1, Article 5 ("Limitations, Other Than Real Property"), applies to actions for "injury to any incorporeal hereditament." N.C.G.S. § 1-50(a)(3) (2015). The latter, set out in Chapter 1, Article 4 ("Limitations, Real Property"), applies to "action[s] for the recovery or possession of real property." *Id.* § 1-40 (2015). As a result, we must determine whether this action involves injury to an incorporeal hereditament or recovery of real property.

We begin our analysis by considering the characteristics of an incorporeal hereditament, which has been defined as "[a]n intangible right in land, such as an easement." *Incorporeal Hereditament*, *Black's Law Dictionary* (10th ed. 2014); *see also Davis v. Robinson*, 189 N.C. 589, 598, 127 S.E. 697, 702 (1925) ("An easement is an incorporeal hereditament, and is an interest in the servient estate." (citations omitted)). Consistent with this definition, we have observed that "[a]n easement always implies an interest in the land. It is real property, and it is created by grant." *Davis*, 189 N.C. at 600, 127 S.E. at 703 (citations omitted) (quoting *Atl. & Pac. R.R. v. Lesueur*, 2 Ariz. 428, 430, 19 P. 157, 158-59 (1888)); *see also Real Property*, *Black's Law Dictionary* (10th ed. 2014) ("Real property can be either corporeal (soil and buildings) or incorporeal (easements)."). Accordingly, the easement in this case, while an incorporeal hereditament, is also real property.

Next, we review the nature of plaintiff's action. Plaintiff's easement gives plaintiff a property right to a degree of control over the use of an identified swath of land, specifically including "the right to keep said strip of land free and clear of any or all structures." Plaintiff alleges that the encroachment of defendant's home into that strip interferes with and invades its rights over that tract. While plaintiff has alleged an injury to its rights as possessor of the easement, the remedy plaintiff pursues is not damages for any injury to the easement. Instead, plaintiff wishes to regain control over the part of its easement now occupied by defendant's house. Because plaintiff seeks to recover full use of its easement, and because the easement is real property, we conclude that this action is for the recovery of real property. By definition, the statutes of limitation

in Chapter 1, Article 5 do not apply to the recovery of real property. *See* N.C.G.S. § 1-46 (2015) (stating that the limitations periods found in Article 5 are for "actions, other than for the recovery of real property"). Consequently, we conclude that plaintiff's claim is subject to the section 1-40 twenty-year statute of limitations. For similar reasons, the ten-year statute of limitations for sealed instruments found in N.C.G.S. § 1-47(2) is inapplicable because it too is contained in Chapter 1, Article 5 of the General Statutes.

Not only do we conclude that this result is dictated by the language found in the applicable statutes and cases, we acknowledge that utility facilities crisscross the state above, on, and beneath the ground. Their accompanying easements are not always readily subject to routine inspection by the owning utility. We do not believe that the drafters of N.C.G.S. § 1-50(a)(3) intended that a utility's right to maintain such easements could be successfully challenged in a time as short as six years.

We reverse the decision of the Court of Appeals and conclude that the trial court erred in granting summary judgment in favor of defendant and Wieland upon finding that Duke's claims were barred by N.C.G.S. § 1-50(a)(3). In addition, we overrule the decision of the Court of Appeals in *Pottle v. Link*, 187 N.C. App. 746, 654 S.E.2d 64 (2007), insofar as that opinion deemed section 1-40 inapplicable to actions involving encroachments on easements. Defendant's pending claims against other parties are unaffected by this result.

Defendant, Weiland, and Yarbrough-Williams raised several additional issues in their conditional petition to this Court. The first issue is whether plaintiff failed to assert that the encroachment materially interferes with its use of the easement. The second issue is whether the doctrine of laches applies if plaintiff knew or should have known of the alleged encroachment more than six years preceding the filing of this action. As to both of those issues we hold that discretionary review was improvidently allowed. Furthermore, we do not reach the remaining issues raised in the parties' petitions for discretionary review because we have determined that Chapter 1, Article 5 does not apply to this case.

For the forgoing reasons, the decision of the Court of Appeals is reversed, and this case is remanded to that court for remand to the trial court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

EASTERN CAROLINA REGIONAL HOUSING AUTHORITY
v.
SHERBREDA LOFTON

No. 32PA15

Filed 19 August 2016

Landlord and Tenant—public housing—drug activity—ejectment—exercise of discretion by landlord

Summary ejectment was inappropriate in a case involving drug activity in federally subsidized housing where plaintiff-Housing Authority did not exercise discretion before pursuing defendant's eviction, as required by federal law.

Justice ERVIN 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. ___, 767 S.E.2d 63 (2014), affirming an order and judgment entered on 29 August 2013 by Judge David B. Brantley in District Court, Wayne County. Heard in the Supreme Court on 16 November 2015.

Ward and Smith, P.A., by Michael J. Parrish and E. Bradley Evans, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Thomas Holderness, and Erik Randall Zimmerman, pro hac vice; and Legal Aid of North Carolina, Inc., by John Keller, Theodore O. Fillette, III, Peter Gilbert, and Andrew Cogdell, for defendant-appellee.

Brownlee Law Firm, PLLC, by William K. Brownlee, for Apartment Association of North Carolina, amicus curiae.

John R. Rittelmeyer and Yasmin Farahi for Disability Rights North Carolina, amicus curiae.

Francis Law Firm, PLLC, by Charles T. Francis and Ruth Sheehan, for Housing Authority of the City of Raleigh, amicus curiae.

NEWBY, Justice.

In this case we consider whether public housing authorities must exercise discretion when pursuing evictions that are not otherwise mandated by federal law. Recognizing that public housing is the housing of last resort, Congress intended public housing authorities to exercise discretion in certain eviction proceedings, such as the lease violation at issue here arising from the actions of a third party. The trial court's findings establish that plaintiff failed to exercise its discretion before pursuing defendant's eviction. Accordingly, plaintiff has not established its right to summary ejectment. Nonetheless, because the Court of Appeals erred by imposing an unconscionability analysis, we modify and affirm the decision of that court.

Defendant is a tenant in Brookside Manor, which is owned and operated by plaintiff, a federally subsidized housing authority. The tenancy is governed by a signed lease that contains various provisions required by federal law.[1] Relevant here, the lease prohibits "[a]ny drug-related criminal activity on or off the premises" and provides that plaintiff "may terminate . . . the Lease and the tenancy" for any such activity "by Tenant, any of Tenant's household members, any guest of Tenant, or another person under Tenant's control."[2] Plaintiff's "Resident Handbook" and "Admission and Continued Occupancy Policy," both incorporated into the lease, restate the same, characterizing "[d]rug-related criminal activity engaged in on or off the premises by a tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, [a]s grounds to terminate tenancy."

Defendant often asked Cory Smith to baby-sit her children while she worked at night. On 26 April 2013, Smith arrived at defendant's apartment to watch the children while defendant slept before work and later while she worked. While defendant slept, law enforcement entered the apartment and arrested Smith for outstanding child support warrants. Officers searched Smith incident to his arrest and found four small bags of marijuana in his pocket.

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1. The operation and management of public housing authorities, including lease terms and procedures, are governed by the United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C.), and its regulations, *see* 24 C.F.R. §§ 966.1 to 966.57 (2016).

2. The lease defines a "guest" as "a person temporarily staying in the unit with the consent of Tenant or other member of the household with authority to consent on behalf of Tenant." The lease defines a "person under Tenant's control" as "a person not staying as a guest in the dwelling unit, but [one who] is or was present on the premises at the time of the activity in question because of an invitation from Tenant."

Defendant consented to a search of her apartment, during which officers discovered a partially prepared "marijuana blunt" in plain sight, marijuana in plain sight on the kitchen counter, plastic bags for packaging marijuana for sale, and fourteen more bags of marijuana behind a pan on the kitchen counter. Smith admitted that the marijuana belonged to him, and he was charged with felony possession with intent to sell and deliver a controlled substance. Defendant was not charged.

On 22 May 2013, plaintiff notified defendant in writing that she had breached the lease because of the drug-related activity that had occurred in her apartment by Smith, a person under her control. Plaintiff stated it had terminated defendant's lease and ordered her to vacate her apartment. When defendant failed to comply, plaintiff sought summary ejectment. Following a hearing, the magistrate entered judgment for plaintiff, entitling plaintiff to take possession.[3]

Upon appeal to the District Court, Wayne County, for a trial de novo, defendant admitted that Smith placed marijuana in various places in the apartment, that Smith was under her control, and that her lease made her "responsible for the conduct of her guests or persons under her control." Plaintiff's manager testified that she believed any drug-related criminal activity required eviction. In its order the trial court noted defendant's acknowledgement that "drug-related criminal activity" occurred in her apartment and that such activity would "authorize Plaintiff to evict her from her apartment" despite "her lack of knowledge of" the criminal activity. Nonetheless, the trial court found in part:

> 8. Plaintiff did not produce evidence that it considered any mitigating factors or used any discretion in making its decision to terminate Defendant's lease. The only decision Plaintiff considered was whether Defendant met the criteria for having a person under her control who engaged in drug-related criminal activity.
>
> 9. It did not appear that Plaintiff, through its two witnesses, understood that it even had the authority or duty

3. In the initial complaint, plaintiff appears to have elected to pursue defendant's eviction under N.C.G.S. § 42-63 (2015), which allows for eviction as a result of certain criminal activity. Nonetheless, the complaint also described the specific lease terms violated by defendant. On 8 July 2013, the parties stipulated to amend the complaint "as though Plaintiff had selected the additional ground for eviction 'the defendant breached the condition of the lease described below for which re-entry is specified.' " Thereafter, both parties proceeded solely under the lease violation theory. Thus, any argument pursuant to the statutory provision is not before this Court.

> to consider other factors other than whether Defendant met the criteria for lease termination.

The trial court denied plaintiff's request to evict defendant, concluding that federal law required plaintiff to exercise discretion in making its decision. Plaintiff appealed the trial court's order to the Court of Appeals.

The Court of Appeals affirmed the decision of the trial court on a different basis, concluding that plaintiff must prove that evicting defendant was not unconscionable under North Carolina law. *E. Carolina Reg'l Hous. Auth. v. Lofton*, ___ N.C. App. ___, 767 S.E.2d 63 (2014). We allowed plaintiff's petition for discretionary review.

Contrary to the Court of Appeals' decision, the equitable defense of unconscionability is not a consideration in summary ejectment proceedings. To prevail in a summary ejectment proceeding under North Carolina law, a landlord must establish by a preponderance of the evidence that a tenant breached the lease. *See* N.C.G.S. §§ 42-26(a)(2), -30 (2015); *see also Durham Hosiery Mill Ltd. P'ship v. Morris*, 217 N.C. App. 590, 593, 720 S.E.2d 426, 428 (2011) ("A tenant may be removed in a summary ejectment action when the tenant has 'done or omitted any act by which, according to the stipulations of his lease, his estate has ceased.' " (quoting N.C.G.S. § 42-26(a)(2) (2009)); *id.* at 595-96, 720 S.E.2d at 429 (rejecting as "clearly *dicta*" the language in *Morris v. Austraw*, 269 N.C. 218, 223, 152 S.E.2d 155, 159 (1967), perceived as requiring an unconscionability analysis).

If the lease at issue related to a private landlord–tenant relationship, our analysis would end here. When the government is the landlord, however, certain duties arise under applicable law. Federal statutes and regulations govern federally subsidized public housing and require public housing authorities to incorporate certain provisions into their leases. In its role as the final forum for review of government housing decisions, the Court is not to second-guess or replace plaintiff's discretionary decisions but to ensure procedural and substantive compliance with the federal statutory framework. *See Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 555, 464 S.E.2d 68, 71 (1995) ("In federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible." (citation omitted)). "A trial court's findings of fact are binding on appeal if supported by competent evidence." *Durham Hosiery*, 217 N.C. App. at 592, 720 S.E.2d at 427 (citation omitted). The trial court found that plaintiff, believing Smith's drug-related activity mandated defendant's eviction, did not exercise discretion. Thus,

the sole remaining question is whether under federal law plaintiff was required to exercise some degree of discretion in its eviction decision.

Federally subsidized public housing is a safety net designed to provide homes to those least able to afford other housing options. Like everyone else, individuals who live in federally subsidized housing are entitled to be free from "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises." 42 U.S.C. § 1437d(*l*)(6) (2012); *see also* N.C. Const. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); *The Declaration of Independence* para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."). Recognizing the devastating effect of illegal drugs in public housing, Congress adopted the Public Housing Drug Elimination Act of 1988, Pub. L. No. 100-690, § 5122, 102 Stat. 4181, 4301 (codified as amended at 42 U.S.C. § 11901 (2012)). The Act requires leases to include language granting public housing authorities broad discretion to terminate leases to ensure that the housing is "decent, safe, and free from illegal drugs." 42 U.S.C. § 11901(1).

Under federal law, public housing leases must "allow the agency . . . to terminate the tenancy," *id.* § 13662(a) (2012), for any household member "who . . . is illegally using a controlled substance," *id.* § 13662(a)(1), or whose drug abuse "interfere[s] with the health, safety, or right to peaceful enjoyment of the premises by other residents," *id.* § 13662(a)(2). The lease must prohibit not only household members from engaging in drug-related activity but also forbid any guest or person under a tenant's control from engaging in such activity. *Id.* § 1437d(*l*)(6) ("Each public housing agency shall utilize leases which . . . provide that . . . any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy[.]"); 24 C.F.R. § 966.4(f)(12)(i), (ii) (2016); Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991). Violation of these provisions "shall be cause for termination of tenancy" as determined by the local public housing authority in its discretion. 42 U.S.C. § 1437d(*l*)(6); *see* 24 C.F.R. § 966.4(*l*)(5)(vii)(B) (When terminating a tenancy for drug-related criminal activity, the housing authority "may consider all circumstances relevant to a particular case.").

In the seminal case interpreting public housing law, *Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002), some tenants questioned the extent of agency officials' authority to evict residents from public housing. The Supreme Court of the United States held that a housing authority could evict a tenant and her family as a result of a guest's illegal activity even when the tenant was unaware of the activity and had no reason to suspect it. *Id.* at 136, 122 S. Ct. at 1236, 152 L. Ed. 2d at 270; *see also id.* at 131, 122 S. Ct. at 1234, 152 L. Ed. 2d at 267 ("[T]he plain language of § 1437d(*l*)(6) requires leases that grant public housing authorities the discretion to terminate tenancy without regard to the tenant's knowledge of the drug-related criminal activity.").

The decision in *Rucker*, however, emphasizes the importance of housing officials exercising discretion before pursuing these "no-fault" evictions. *Id.* at 134-36, 122 S. Ct. at 1235-36, 152 L. Ed. 2d at 268-70. In particular,

> [t]he statute does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from "rampant drug-related or violent crime," "the seriousness of the offending action," and "the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action." [A] local housing authority may sometimes evict a tenant who had no knowledge of the drug-related activity.

Id. at 133-34, 122 S. Ct. at 1235, 152 L. Ed. 2d at 268 (first alteration in original) (quoting 42 U.S.C. § 11901(2) (1994 & Supp. V) and Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,803 (May 24, 2001)). Congress thus "afford[ed] local public housing authorities the discretion to conduct no-fault evictions for drug-related crime," *id.* at 135, 122 S. Ct. at 1236, 152 L. Ed. 2d at 269 (citation omitted), by "requir[ing] lease terms that give local public housing authorities the discretion to terminate the lease," *id.* at 136, 122 S. Ct. at 1236, 152 L. Ed. 2d at 270. *See also id.* at 130, 122 S. Ct. at 1233, 152 L. Ed. 2d at 266 (holding that 42 U.S.C. § 1437d(*l*)(6) "unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of . . . guests"). In sum, while a public housing authority may conduct no-fault evictions, it must exercise discretion in doing so.

Shortly after the decision in *Rucker*, the federal Department of Housing and Urban Development (HUD) described the discretion given to public housing authorities to seek no-fault evictions based upon the actions of third parties. While characterizing the power as "a strong tool," HUD emphasized that no-fault evictions "should be applied responsibly." Letter from Mel Martinez, Sec'y, U.S. Dep't of Hous. & Urban Dev., to Pub. Hous. Dirs. (Apr. 16, 2002). Moreover, HUD directed that enforcement of the clause be "left to the discretion of each public housing agency . . . to be guided by compassion and common sense," with eviction as "the last option explored." *Id.* Shortly thereafter, HUD reiterated that *Rucker* "made it clear both that the lease provision gives PHAs [Public Housing Authorities] such authority and that PHAs are not required to evict an entire household—or, for that matter, anyone—every time a violation of the lease clause occurs." Letter from Michael M. Liu, Assistant Sec'y, U.S. Dep't of Hous. & Urban Dev., to Pub. Hous. Dirs. (June 6, 2002). Instead, HUD explained, "PHAs are in the best position to determine what lease enforcement policy will most appropriately serve the statutory interest of protecting the welfare of the entire tenant population." *Id.* Accordingly, HUD "urge[d]" PHAs, when making an ultimate decision, "to consider a wide range of factors" and to "balance them against the competing policy interests that support the eviction of the entire household." *Id.*; *see also* 24 C.F.R. § 966.4*(l)*(5)(vii)(B).

Discretion "involve[s] an exercise of judgment and choice, not an implementation of a hard-and-fast rule exercisable at one's own will or judgment." *Discretionary*, *Black's Law Dictionary* (10th ed. 2014). Here the trial court concluded that plaintiff failed to exercise its discretion before seeking defendant's eviction. The trial court found that plaintiff was unaware of its responsibility to exercise discretion; therefore, plaintiff only considered whether the facts permitted eviction, thereby omitting the critical step of determining whether eviction should occur in this case. Neither the federal statutory framework nor plaintiff's lease or policies compel eviction; they only delineate the grounds or cause for eviction. Though the decision to evict lies in plaintiff's discretion, which courts will not second-guess, plaintiff does not exercise discretion when it is unaware it has a choice. *See Hous. Auth. of Covington v. Turner*, 295 S.W.3d 123, 129 (Ky. Ct. App. 2009) (Moore, J., concurring) ("[D]iscretion must be exercised, rather than a blind application of the law because 42 U.S.C. § 1437d(*l*)(6) does not *require* evictions.").

While we affirm the outcome of the Court of Appeals' decision, namely that summary ejectment was inappropriate in this case, we do so for a different reason. We hold that plaintiff failed to exercise its

discretion as required by federal law before pursuing defendant's eviction. Accordingly, we modify and affirm the decision of that court.

MODIFIED AND AFFIRMED.

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

QUALITY BUILT HOMES INCORPORATED AND STAFFORD LAND COMPANY, INC.
v.
TOWN OF CARTHAGE

No. 315PA15

Filed 19 August 2016

Cities and Towns—water and sewer impact fee ordinances—for future use and expansion—invalid

The Town of Carthage exceeded its municipal authority under the Public Enterprise Statutes by adopting water and sewer "impact fee" ordinances that, upon approval of any subdivision of real property, triggered immediate charges for future water and sewer system expansion. These fees were assessed regardless of the property owner's actual use of the systems or whether Carthage actually expanded its systems. The plain language of the statute empowered the Town to charge for contemporaneous use of water and sewer services, not to collect fees for future discretionary spending.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 776 S.E.2d 897 (2015), affirming an order allowing summary judgment entered on 17 October 2014 by Judge James M. Webb in Superior Court, Moore County. On 5 November 2015, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 17 May 2016 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

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Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and William E. Hubbard, for Leading Builders of America, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by Edward F. Hennessey; and J. Michael Carpenter, General Counsel, for North Carolina Home Builders Association, Inc., amicus curiae.

Ellis & Winters LLP, by Matthew W. Sawchak and Paul M. Cox; and F. Paul Calamita for North Carolina Water Quality Association, amicus curiae.

NEWBY, Justice.

In this case we consider whether the Town of Carthage exceeded its municipal authority under the Public Enterprise Statutes, N.C.G.S. §§ 160A-311 to -338 (2015), by adopting certain water and sewer "impact fee" ordinances. Upon approval of a subdivision of real property, the ordinances trigger immediate charges for future water and sewer system expansion, regardless of whether the landowner ever connects to the system or whether Carthage ever expands the system. As creations of the legislature, municipalities have only those powers delegated to them by the General Assembly. When Carthage adopted the ordinances at issue here, it exercised power that it had not been granted. The impact fee ordinances are therefore invalid and, accordingly, we reverse the decision of the Court of Appeals.

In 2003, following a period of rapid population growth, Carthage adopted two similar impact fee ordinances: one pertaining to its water system, and the other pertaining to its sewer system. In their current form, the ordinances state that the impact fees "shall be used to cover the costs of expanding the [water and sewer] system[s]." Carthage, N.C., Code §§ 51.076(F) (water), 51.096(H) (sewer) (2015). These costs include "water treatment plant expansion, elevated storage expansion, and transmission mains" for the water system, *id.* § 51.076(F), and "gravity mains, force mains, and lift stations" for the sewer system, *id.* § 51.096(H).

Under both ordinances, a landowner who seeks to subdivide property and receives "final plat approval," *id.* §§ 51.076(C)(1), 51.096(B),

must pay water and sewer impact fees "based on water meter size according to the town's fee schedule," *id.* §§ 51.076(B), 51.096(A), in amounts ranging from $1,000 to $30,000 per connection. Carthage, N.C., Fee and Rate Schedule 4 (July 1, 2016). "If a [property] has received its final plat, then the entire [water and sewer] impact fee[s] shall be paid at the earliest or next occurrence of . . . [the] (a) Tap fee; or (b) Development permit." *Id.* §§ 51.076(C)(2), 51.096(C); *see also* Fee and Rate Schedule 4 ("Water/Sewer Impact Fees are due upon final plat approval for new subdivisions (major or minor) or upon application for building permit, whichever occurs first."). Tap fees cover Carthage's costs "to 'tap' or access" the "water and/or sewer line that exists in front of the property," whereas "impact fees offset . . . costs to expand the system to accommodate development."

Impact fees are assessed "in addition to the regular water and sewer tap fees," and the monthly service charges to water and sewer customers. If a property owner does not pay the impact fees, Carthage "will refuse" to issue building permits. Certain exceptions exist "for temporary or emergency service," *id.* § 51.076(A)(2)(b), and any service solely for "fire protection," *id.* §§ 51.076(E), 51.096(G), but in all instances, impact fees are assessed regardless of the property owner's actual use of the systems or whether Carthage actually expands the systems. In 2014 Carthage's Town Manager reported that the Town had "neglected to make needed improvements to its water and sewer systems for many years."

Plaintiffs are North Carolina corporations engaged in residential homebuilding. At the time of filing their action, plaintiffs had paid Carthage a total of $123,000 in water and sewer impact fees.

On 28 October 2013, plaintiffs filed their complaint seeking, *inter alia*, a declaratory judgment and monetary damages.[1] Plaintiffs allege that "Carthage has acted outside the scope of its legal authority" by "charging" the impact fees "without a specific delegation of authority from the General Assembly" and that, accordingly, plaintiffs are entitled to a return of all impact fees paid, plus interest and attorneys' fees.

Carthage timely answered the complaint, contending that "the water and sewer fees imposed by Defendant were authorized by North Carolina's Public Enterprise Statute" and asserting various affirmative defenses, including, *inter alia*, the statute of limitations and estoppel.

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1. Not at issue here, on 23 June 2014, plaintiffs amended their complaint to, *inter alia*, add equal protection and due process claims.

All parties moved for summary judgment. On 17 October 2014, the trial court entered an order granting summary judgment for Carthage. Plaintiffs appealed the summary judgment order to the Court of Appeals.

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of Carthage. *Quality Built Homes Inc. v. Town of Carthage*, ___ N.C. App. ___, 776 S.E.2d 897, 2015 WL 4620404 (2015) (unpublished). Applying "broad construction" interpretation principles under N.C.G.S. § 160A-4, the Court of Appeals concluded that Carthage acted within its delegated municipal authority to impose and collect the impact fees under the Public Enterprise Statutes, *Quality Built Homes*, 2015 WL 4620404, at *4-5 (citing, *inter alia*, N.C.G.S. § 160A-4 (2013); *Homebuilders Ass'n of Charlotte v. City of Charlotte*, 336 N.C. 37, 43-44, 442 S.E.2d 45, 50 (1994); and *Town of Spring Hope v. Bissette*, 305 N.C. 248, 252, 287 S.E.2d 851, 854 (1982)), which enable municipalities to "establish and revise . . . schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise," N.C.G.S. § 160A-314(a).[2]

We allowed both plaintiffs' petition and defendant's conditional petition for discretionary review. We review matters of statutory interpretation de novo, *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citations omitted), as well as orders granting summary judgment, viewing the allegations as true and "the presented evidence in a light most favorable to the nonmoving party," *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted).

From the very formation of our State government, municipalities, in their various forms, have been considered "creatures of the legislative will, and are subject to its control." *Lutterloh v. City of Fayetteville*, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908); *see King v. Town of Chapel Hill*, 367 N.C. 400, 405, 758 S.E.2d 364, 369 (2014); *Bd. of Trs. of Youngsville Twp. v. Webb*, 155 N.C. 379, 384-85, 71 S.E. 520, 522 (1911). Fundamental to our system is the legislature's ability to confer upon municipalities certain authority needed to effectuate the purposes of government. N.C. Const. art. VII, § 1 ("The General Assembly shall provide for the organization and government . . . of counties, cities and towns, and . . . may give such powers and duties to . . . [them] as it may deem advisable."); *White v. Comm'rs of Chowan Cty.*, 90 N.C. 437, 438 (1884) ("[Municipalities]

2. Because of its resolution of the matter, the Court of Appeals did not reach the statute of limitations or estoppel issues. *Quality Built Homes*, 2015 WL 4620404 at *5. Moreover, the court overruled plaintiffs' argument that they are entitled to recover attorneys' fees and costs. *Id.* at *6.

contribute largely to the life-principle of American liberty, and are . . . invested with appropriate corporate functions . . . [which] may be enlarged, abridged or modified at the will of the legislature . . . ."); *see also* 1 William Blackstone, *Commentaries* *470 ("[Municipalities] are erected for the good government of a town or particular district . . . .")

The General Assembly delegates express power to municipalities by adopting an enabling statute, which includes "implied powers . . . essential to the exercise of those which are expressly conferred." *O'Neal v. Wake County*, 196 N.C. 184, 187, 145 S.E. 28, 29 (1928); *see Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012); *Town of Saluda v. County of Polk*, 207 N.C. 180, 186, 176 S.E. 298, 301-02 (1934). "All acts beyond the scope of the powers granted to a municipality are [invalid]." *City of Asheville v. Herbert*, 190 N.C. 732, 735, 130 S.E. 861, 863 (1925) (citations omitted).

When determining the extent of legislative power conferred upon a municipality, the plain language of the enabling statute governs. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999) (citation omitted). If the "language of [the enabling] statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Id.* at 811, 517 S.E.2d at 878 (quoting *Lemons v. Old Hickory Council, BSA*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988)). "[A] statute clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419-20, 451 S.E.2d 284, 289 (1994) (citation omitted).

If the enabling statute is ambiguous, the "legislation 'shall be broadly construed . . . to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.' " *King*, 367 N.C. at 405, 758 S.E.2d at 369 (citation omitted) (quoting N.C.G.S. § 160A-4). The "broad construction" mandate of section 160A-4 is "a rule of statutory construction rather than a general directive," *Lanvale Props.*, 366 N.C. at 154, 731 S.E.2d at 809, and, as such, is inoperative when the enabling statute is clear and unambiguous on its face, *see id.* at 154-55, 731 S.E.2d at 809-10 (citations omitted).

Carthage asserts that under the Public Enterprise Statutes it has broad authority to "collect monies" for the "operation, maintenance and expansion" of its water and sewer systems, and that such authority extends to the collection of impact fees. Carthage claims that "impact fees" fall squarely within its "authority to charge 'fees' or 'charges' " under N.C.G.S. § 160A-314. We disagree. While the enabling statutes allow Carthage to charge for the contemporaneous use of its water and sewer

systems, the plain language of the Public Enterprise Statutes clearly fails to empower the Town to impose impact fees for future services.

The enabling statutes at issue here provide, in pertinent part, that "[a] city may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise," N.C.G.S. § 160A-314(a), that "[a] city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises . . . to furnish services," *id.* § 160A-312(a), and that "a city shall have full authority to finance the cost of any public enterprise by levying taxes, borrowing money, and appropriating any other revenues therefor," *id.* § 160A-313.

These enabling statutes clearly and unambiguously empower Carthage to charge for the contemporaneous use of water and sewer services—not to collect fees for future discretionary spending. *See Smith Chapel*, 350 N.C. at 811, 517 S.E.2d at 878 (finding that the "plain language" of N.C.G.S. § 160A-314 is "clear and unambiguous"). A municipality's ability to "establish and revise" its various "fees" is limited to "the use of" or "the services furnished by" the enterprise, which provisions are operative in the present tense. *See Dunn v. Pac. Emp'rs Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) ("Ordinary rules of grammar apply when ascertaining the meaning of a statute . . . ." (citations omitted)).

Though the enabling statutes allow municipalities to charge for "services furnished," unlike similar county water and sewer district enabling statutes, the language at issue here fails to authorize Carthage to charge for services "*to be* furnished." *See McNeill v. Harnett County*, 327 N.C. 552, 570, 398 S.E.2d 475, 485 (1990) (holding that the latter part of the enabling phrase "services furnished or *to be furnished*," N.C.G.S. § 162A-88 (1987) (emphasis added) (governing county water and sewer districts), plainly allowed the charge for prospective services, which are "*not* limited to the financing of maintenance and improvements of *existing* customers").[3] Since 1982 this Court has cautioned that municipalities may lack the power to charge for prospective services absent

3. Enabling statutes pertaining to other entities employ the same "to be furnished" prospective language, which section 160A-314(a) does not. *E.g.*, N.C.G.S. § 162A-9 (2015) (enabling water and sewer authorities to "establish and revise a schedule of rates . . . for the services furnished or to be furnished"); *id.* § 162A-14(3) (enabling certain "governing bod[ies]" to "fix . . . charges . . . for the services furnished or to be furnished by any water system or sewer system of the authority"); *id.* § 162A-49 (2015) (same for district boards of metropolitan water districts). *Accord id.* §§ 162A-53(3), -72, -73(3), -85.13(a), -85.19(a)(3) (2015).

the essential "to be" language. *Bissette*, 305 N.C. at 251, 287 S.E.2d at 853 (dictum) ("[W]e agree that under [N.C.G.S. § 160A-314(a)] a municipality may not charge for services 'to be furnished.' "). We simply cannot read language into a statute where it does not exist. *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (We "presum[e] that the legislature carefully chose each word used." (citation omitted)); *Carlyle v. State Highway Comm'n*, 193 N.C. 36, 47, 136 S.E. 612, 619 (1927) ("If the courts attempt to read into the law words of their own . . . , then this would amount to erecting a legislative despotism of five men . . . .").

The language of the impact fee ordinances plainly points to future services, thus requiring Carthage to invoke prospective charging power. Both ordinances contemplate "expanding" the systems, including "plant" and "storage expansion," and the water impact fee is assessed on property that is "*to be* served" by the water system. The fees are not assessed at the time of actual use, but are payable in full at the time of "final [subdivision] plat approval"—a time when water, sewer, or other infrastructure might not have been built and only a recorded plat exists. Moreover, Carthage charges the impact fees in addition to tap fees, which are assessed when a property owner actually connects to the system. Indeed, plaintiffs were required to pay some impact fees before improving or establishing a need for services on their property. *Cf. Bissette*, 305 N.C. at 251-52, 287 S.E.2d at 853 (concluding that an increased rate on all customers to fund a new treatment plant "did not reflect any services yet to be furnished, but merely the same service which had previously been furnished").

Municipalities routinely seek and obtain enabling legislation from the General Assembly to assess impact fees. *E.g.*, Act of June 28, 1988, ch. 996, sec. 1, 1987 N.C. Sess. Law (Reg. Sess. 1988) 178, 178 (enabling Rolesville to "provide by ordinance for a system of impact fees"); Act of June 23, 1987, ch. 460, sec. 13, 1987 N.C. Sess. Laws 609, 613 (same for Pittsboro); Act of July 8, 1986, ch. 936, sec. 1, 1985 N.C. Sess. Laws (Reg. Sess. 1986) 221, 221 (same for Chapel Hill); *see also Mills v. Bd. of Comm'rs of Iredell Cty.*, 175 N.C. 215, 218, 95 S.E. 481, 482 (1918) (noting that county demands for additional authority, such as "raising of proper funds . . . for improvements in some fixed place or in restricted territory . . . can only be conferred by legislative enactment" (citations omitted)). Yet it appears that Carthage has elected not to pursue such legislation.

Furthermore, Carthage has the authority to charge tap fees and to establish water and sewer rates to fund necessary improvements and

maintain services to its inhabitants, which is sufficient to address its expansion needs. *See Bissette*, 305 N.C. at 251-52, 287 S.E.2d at 853 (concluding that the town validly increased rates on all customers to pay for "a necessary improvement to the already existing sewer system without which the Town could not continue to provide sewer service").

While the Public Enterprise Statutes at issue here enable Carthage to charge for the contemporaneous use of its water and sewer systems, the statutes clearly and unambiguously fail to give Carthage the essential prospective charging power necessary to assess impact fees. Because the legislature alone controls the extension of municipal authority, the impact fee ordinances on their face exceed the powers delegated to the Town by the General Assembly, thus overstepping Carthage's rightful authority. *See Smith Chapel*, 350 N.C. at 812, 517 S.E.2d at 879 (holding that "the [town's] ordinance on its face exceeds the express limitation of the plain and unambiguous reading of" the applicable Public Enterprise Statutes).

The ordinances are therefore invalid and, accordingly, we reverse the decision of the Court of Appeals, which affirmed the trial court's grant of summary judgment for the Town of Carthage. We conclude that discretionary review was improvidently allowed as to the remaining issues on appeal and remand this case to the Court of Appeals for consideration of the unresolved issues.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA
v.
ZACHARY DAVID THOMSEN

No. 308A15

Filed 19 August 2016

1. Jurisdiction—subject matter—writ of certiorari—issued by Court of Appeals—review of sua sponte motion for appropriate relief

Where the trial court accepted defendant's guilty plea and immediately thereafter granted its own motion for appropriate relief, vacated the judgment and the mandatory 300-month sentence, and

sentenced defendant to 144 to 233 months, the Court of Appeals had subject matter jurisdiction to issue a writ of certiorari. Pursuant to the state constitution, the General Assembly has the power to define the jurisdiction of the Court of Appeals. N.C.G.S. § 7A-32(c) empowers the Court of Appeals to review trial court rulings on motions for appropriate relief by writ of certiorari, and this default rule controls unless a more specific statute restricts jurisdiction. Here, if the trial court's sua sponte motion was pursuant to subsection 15A-1415(b), the holding in *State v. Stubbs*, 368 N.C. 40 (2015), controlled and the Court of Appeals had jurisdiction. And if the motion was pursuant to subsection 15A-1420(d), the Court of Appeals had jurisdiction because nothing in the General Statutes revoked the jurisdiction conferred by subsection 7A-32(c).

2. Appeal and Error—additional issue on appeal—rendered moot by holding

Where the Court of Appeals issued a writ of certiorari to review the trial court's ruling on its sua sponte motion for appropriate relief, the Supreme Court did not consider the second issue raised by the parties on appeal: whether the decision by the Court of Appeals petition panel to issue the writ constituted a ruling on jurisdiction that bound the subsequent opinion panel. Because the Supreme Court addressed the underlying subject matter jurisdiction question de novo, this issue was moot.

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. ___, 776 S.E.2d 41 (2015), vacating an order granting appropriate relief and judgments entered on 13 December 2013 by Judge James M. Webb in Superior Court, Moore County, and remanding for a new sentencing hearing. Heard in the Supreme Court on 22 March 2016.

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

Bruce T. Cunningham, Jr. for defendant-appellant.

MARTIN, Chief Justice.

Defendant Zachary David Thomsen pleaded guilty to rape of a child by an adult offender and to sexual offense with a child by an adult offender, both felonies with mandatory minimum sentences of 300 months. *See* N.C.G.S. §§ 14-27.2A, -27.4A (2013). Pursuant to a

plea arrangement, the trial court consolidated the convictions for judgment and imposed a single active sentence of 300 to 420 months. After imposing the sentence, the court immediately granted its own motion for appropriate relief and vacated the judgment and sentence. It concluded that, as applied to defendant, the mandatory sentence violated the Eighth Amendment to the United States Constitution. The court then sentenced defendant to 144 to 233 months, pursuant to the Structured Sentencing Act. *See id.* § 15A-1340.17(c), (f) (2015).

The State did not file a notice of appeal. Instead, it petitioned the Court of Appeals for a writ of certiorari to review the trial court's order granting defendant appropriate relief. Defendant filed a response arguing that the Court of Appeals had already decided in *State v. Starkey*, 177 N.C. App. 264, 628 S.E.2d 424, *cert. denied*, 636 S.E.2d 196 (2006), that it lacked subject-matter jurisdiction to review a trial court's sua sponte grant of appropriate relief, either by the State's appeal or by writ of certiorari. The Court of Appeals allowed the State's petition and issued the writ. In his merits brief before that court, defendant again argued that the court lacked jurisdiction. The State responded that, by issuing the writ, the court had already ruled that it had jurisdiction, and that it would violate the law of the case doctrine articulated in *North Carolina National Bank v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983), if another Court of Appeals panel overruled that decision.

In a divided opinion, the Court of Appeals agreed with the State. *See State v. Thomsen*, ___ N.C. App. ___, ___, 776 S.E.2d 41, 48 (2015). The court held that it was bound by the petition panel's decision on jurisdiction and could not address it anew. *Id.* Addressing the merits, the court held that defendant's original sentence of 300 to 420 months did not violate the Eighth Amendment. *Id.* at ___, 776 S.E.2d at 50. The court then vacated defendant's sentence and the trial court's order granting appropriate relief, and remanded the case for a new sentencing hearing. *Id.* A dissenting opinion maintained that the opinion panel was not bound by the petition panel's decision on jurisdiction, and that the Court of Appeals did not have jurisdiction to issue the writ of certiorari that the State sought. *See generally id.* at ___, 776 S.E.2d at 50-55 (McGee, C.J., dissenting). Defendant appealed to this Court on the basis of the dissenting opinion.

We therefore must address whether the Court of Appeals has subject-matter jurisdiction to review, pursuant to the State's petition for writ of certiorari, a trial court's grant of its own motion for appropriate relief. "We review issues relating to subject matter jurisdiction de novo." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012).

[1] The North Carolina Constitution provides that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). The General Assembly has exercised this constitutional authority in N.C.G.S. § 7A-32(c) by giving the Court of Appeals "jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A-32(c) (2015). This statute empowers the Court of Appeals to review trial court rulings on motions for appropriate relief by writ of certiorari unless some other statute restricts the jurisdiction that subsection 7A-32(c) grants. *See State v. Stubbs*, 368 N.C. 40, 42-43, 770 S.E.2d 74, 76 (2015). In other words, because the state constitution gives the General Assembly the power to define the jurisdiction of the Court of Appeals, only the General Assembly can take away the jurisdiction that it has conferred. Subsection 7A-32(c) thus creates a default rule that the Court of Appeals has jurisdiction to review a lower court judgment by writ of certiorari. The default rule will control unless a more specific statute restricts jurisdiction in the particular class of cases at issue.

In *State v. Stubbs*, we addressed whether the Court of Appeals has jurisdiction to review a trial court's grant of a defendant's motion for appropriate relief by writ of certiorari. *Id.* at 41, 770 S.E.2d at 75. The State filed a petition for writ of certiorari in the Court of Appeals, seeking review of the trial court's grant of appropriate relief for which the defendant had moved under N.C.G.S. § 15A-1415. *Id.* at 41-43, 770 S.E.2d at 75-76. We noted that another statute, N.C.G.S. § 15A-1422(c), specifically addresses review of trial court rulings on section 15A-1415 motions for appropriate relief. *Id.* at 42-43, 770 S.E.2d at 76. But subsection 15A-1422(c), we concluded, contains no "limiting language . . . regarding which party may appeal a ruling" on a motion for appropriate relief that would alter the "broad powers" of review by certiorari that subsection 7A-32(c) grants. *Id.* at 43, 770 S.E.2d at 76. Importantly, we were not concerned with whether subsection 15A-1422(c) provided an independent source of jurisdiction for the Court of Appeals to issue the writ. *See id.* Rather, we focused on the *absence* of language in subsection 15A-1422(c) that would *limit* the court's review. *See id.* Finding none, we held that the Court of Appeals had jurisdiction to issue the writ. *Id.*

The sole relevant difference between *Stubbs* and this case is that the trial court here granted appropriate relief on its own motion rather than on defendant's. *See Thomsen*, ___ N.C. App. at ___, 776 S.E.2d at 43. A defendant may move for appropriate relief under subsection 15A-1415(b)(4) if he "was convicted or sentenced under a statute

that was in violation of the Constitution of the United States or the Constitution of North Carolina." N.C.G.S. § 15A-1415(b)(4) (2015). We recognized in *Stubbs* that the State can seek review by certiorari from a "ruling on a motion for appropriate relief pursuant to G.S. 15A-1415." *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76 (quoting N.C.G.S. § 15A-1422(c) (2015)). N.C.G.S. § 15A-1420(d), in turn, provides that "[a]t any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion." N.C.G.S. § 15A-1420(d) (2015). But section 15A-1422 does not mention review of relief granted "pursuant to" subsection 1420(d). So the parties disagree on whether the trial court's sua sponte motion was "pursuant to" subsection 15A-1415(b) or "pursuant to" subsection 15A-1420(d), as both were necessary here to give the trial court the authority to grant relief on its own motion.

We ultimately do not need to decide this question because, in either case, the Court of Appeals would have jurisdiction to issue the writ. If the trial court made its motion "pursuant to" subsection 15A-1415(b), then the holding in *Stubbs* directly controls. But even if the trial court made its motion "pursuant to" subsection 15A-1420(d), the Court of Appeals still has jurisdiction because nothing in the Criminal Procedure Act, or any other statute that defendant has referenced, revokes the jurisdiction in this specific context that subsection 7A-32(c) confers more generally.

Section 15A-1422 includes a number of provisions that address appellate review of rulings on motions for appropriate relief, but makes no mention of subsection 15A-1420(d) or sua sponte motions. In defendant's view, this means that the Court of Appeals lacks jurisdiction to review sua sponte grants of relief. But, as discussed above, just the opposite is true. The absence of "limiting language," *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76, regarding review of sua sponte motions means that the jurisdiction prescribed by subsection 7A-32(c) remains unchanged. We therefore hold that the Court of Appeals had subject-matter jurisdiction to issue a writ of certiorari in this case.

The presence of provisions in section 15A-1422 that limit the Court of Appeals' jurisdiction to review motions for appropriate relief in *other* contexts confirms that the General Assembly knows how to restrict that court's jurisdiction when it elects to do so. For example, subsection (b) states that "[t]he grant or denial of relief sought pursuant to G.S. 15A-1414 is subject to appellate review *only* in an appeal regularly taken." N.C.G.S. § 15A-1422(b) (2015) (emphasis added). Subsection (d) states that "[t]here is *no right to appeal* from the denial of a motion for appropriate relief when the movant is entitled to a trial de novo upon

appeal." *Id.* § 15A-1422(d) (2015) (emphasis added). And subsection (f) attempts to limit the jurisdiction of *this* Court, stating that "[d]ecisions of the Court of Appeals on motions for appropriate relief that embrace matter set forth in G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise." *Id.* § 15A-1422(f) (2015), *invalidated in part as stated in State v. Blackwell*, 359 N.C. 814, 618 S.E.2d 213 (2005), *vacated in part on other grounds by State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 550 U.S. 948 (2007). In contrast, the conspicuous absence of any mention in section 15A-1422 of either subsection 15A-1420(d) or sua sponte motions compels the conclusion that the Court of Appeals lawfully issued the writ of certiorari in this case.

Finally, defendant argues that the Court of Appeals was not authorized by Rule 21 of the North Carolina Rules of Appellate Procedure to issue the writ of certiorari in this case. But, as we explained in *Stubbs*, if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away. *Stubbs*, 368 N.C. at 43-44, 770 S.E.2d at 76 (quoting N.C. R. App. P. 1(c) ("These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.")). To the extent that *State v. Starkey* holds otherwise, it is overruled.

[2] The parties have briefed a second issue—namely, whether the decision by the Court of Appeals petition panel to issue the writ constituted a ruling on jurisdiction that bound the subsequent opinion panel. Because we have addressed the underlying subject-matter jurisdiction question de novo, however, this additional issue is now moot. We also express no opinion on whether the State had a right pursuant to N.C.G.S. § 15A-1445(a)(3)(c) to appeal the trial court's grant of appropriate relief. In a footnote in its brief before the Court of Appeals, the State argued that it did, but it has abandoned that argument in this Court. In any event, the Court of Appeals had jurisdiction to issue the writ of certiorari that the State sought. We therefore affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Johnston County
	)	
JONATHAN DOUGLAS RICHARDSON	)	

No. 272A14

ORDER

The following order has been entered on the motion filed on the 4th of August 2016 by defendant and designated Motion for an Order or Orders Regarding Deadline for Transcript Preparation. The time for preparation of the transcripts is extended until 7 October 2016.

By order of the Court in Conference, this 8th day of August, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of August, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. YOUNG

[369 N.C. 29 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Buncombe County
	)	
DAVID MARTIN BEASLEY YOUNG	)	
_____	)	
	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford County
	)	
DOMINIQUE JEVON PERRY	)	
_____	)	
	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Davidson County
	)	
SETHY TONY SEAM	)	

No. 80A14
No. 81A14
No. 82A14

ORDER

The Court, on its own motion, ordered that the parties submit supplemental briefs on the effect of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), on the proceedings in these cases.

The Court, on its own motion, now orders that these three cases are consolidated for oral argument. Pursuant to Rule 30(b), appellants will have a total of thirty minutes for oral argument and appellees will have a total of thirty minutes for oral argument.

By order of the Court in Conference, this the 18th day of August 2016.

s/Martin, C.J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of August 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

s/M.C. Hackney
Assistant Clerk

Justice Ervin is recused in No. 82A14, State v. Sethy Tony Seam.

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

18 AUGUST 2016

013P11-3	State v. Tracy Lamont Clark	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion for Petition to a Constitutional Challenge	1. Denied **07/14/2016** 2. Dismissed
039P14-3	Robert S. Chamberlain v. D.W. Bray	1. Petitioner's *Pro Se* Motion for Petition/Grievance/Complaint 2. Petitioner's *Pro Se* Motion for Notice of Appeal	1. Dismissed 2. Dismissed **Ervin, J., recused**
039P16	State v. John David Watson	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 (COA15-715)	1. Allowed **02/09/2016** Dissolved **08/18/2016** 2. Denied 3. Denied
042P04-8	State v. Larry McLeod Pulley	Def's *Pro Se* Motion for PDR (COA15-91)	Dismissed
045P16	Montessori Children's House of Durham v. Philip Blizzard and Patricia Blizzard	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-406)	Denied
046P16	In the Matter of Todd W. Short	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-40) 2. Petitioner's *Pro Se* Motion for ADA Accommodations 3. Petitioner's *Pro Se* PDR Prior to a Decision of COA (COA16-580) 4. Petitioner's *Pro Se* Motion for Expedited Consideration of Petition for *Writ of Certiorari* (COAP16-40) 5. Petitioner's *Pro Se* Motion for Expedited Consideration of PDR (COA16-580) 6. Petitioner's *Pro Se* Motion for Stay of Order Entered by COA (COA16-580) 7. Petitioner's *Pro Se* Motion for Leave to Amendment Certificate of Service on Petitioner's Motion for Expedited Consideration of Petitioner's *Writ of Certiorari*, *inter alia* Filed on 30 June 2016 8. Petitioner's *Pro Se* Motion to Strike	1. Denied **07/13/2016** 2. Dismissed as moot **07/13/2016** 3. Denied **07/13/2016** 4. Dismissed as moot **07/13/2016** 5. Dismissed as moot **07/13/2016** 6. Denied **07/05/2016** 7. Allowed **07/05/2016** 8. Denied **07/13/2016**

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

18 AUGUST 2016

		9. Petitioner's *Pro Se* Renewed Motion to Expedite Petitioner's *Writ of Certiorari* from Order of COA	9. Dismissed as moot **07/13/2016**
047P02-17	State v. George W. Baldwin	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/28/2016** **Ervin, J., recused**
048P15-2	State v. Ronald Dewayne Deese, III	1. Def's *Pro Se* Motion for Notice of Appeal (COAP16-378) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed
063P15-2	State v. Isidro Garcia Hernandez	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Motion for Subpoena *Duces Tecum*	1. Dismissed 2. Dismissed **Ervin, J., recused**
064A16-2	In re Price	Def's *Pro Se* Motion to Reconsider	Dismissed
066A16	State v. Shamele Collins	Def's Motion for Leave to File Reply Brief Out of Time	Denied **07/01/2016**
066A16	State v. Shamele Collins	Def's Attorney's Motion to Withdraw as Counsel	Allowed **07/12/2016**
068P16	State v. Corey Demond Phillips	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-730)	Denied
078P16	State v. Terry Cherrelle Gray, Jr. and Charles Hezekiah Gilchrist, Jr.	1. Def's (Charles Hezekiah Gilchrist, Jr.) PDR Under N.C.G.S. § 7A-31 (COA15-500) 2. Def's (Terry Cherrelle Gray, Jr.) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
079P16	State v. Marko Stasiv	Def's PDR Under N.C.G.S. § 7A-31 (COA15-806)	Denied
080A14	State v. David Martin Beasley Young		Special Order **08/18/2016**
081A14	State v. Dominique Jevon Perry		Special Order **08/18/2016**
082A14	State v. Sethy Tony Seam		Special Order **08/18/2016** **Ervin, J., recused**

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

18 AUGUST 2016

085P16	State v. Kalvin Michael Smith	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County 2. State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	1. Dismissed 2. Allowed **03/24/2016**
086A16	In re Redmond	Johanna Schoen, Ph.D's Motion for Leave to File *Amicus* Brief	Denied **08/18/2016**
087A16	In re Hughes	Johanna Schoen, Ph.D's Motion for Leave to File *Amicus* Brief	Denied **08/18/2016**
088P15-3	State v. Mason W. Hyde	1. Def's *Pro Se* Motion for Notice in Advance 2. Def's *Pro Se* Motion for Notice of Request for Assistance 3. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 4. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1260) 5. Def's *Pro Se* Motion to Show Cause 6. Def's *Pro Se* Motion to Allow Applicant the Opportunity to Correct/ Amend Any Defects, Errors, Flaws in the Application	1. 2. 3. Denied **07/05/2016** 4. 5. Dismissed **07/19/2016** 6. Dismissed as moot **07/19/2016** **Ervin, J., recused**
088A16	In re Smith	Johanna Schoen, Ph.D's Motion for Leave to File *Amicus* Brief	Denied **08/18/2016**
103P16	Louis Cherry and Marsha Gordon v. Gail Wiesner, City of Raleigh, and Raleigh Board of Adjustment ——————— City of Raleigh, a Municipal Corporation v. Raleigh Board of Adjustment, Louis W. Cherry, III, Marsha G. Gordon and Gail P. Wiesner	Respondent's (Gail Wiesner) PDR Under N.C.G.S. § 7A-31 (COA15-155)	Denied
104P16-2	State v. William Gerald Price	Def's *Pro Se* Motion to Reconsider	Dismissed

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

18 AUGUST 2016

114P16	State v. Larry Cook	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-278)	Denied
129P16	State v. Dwain Bell	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Bill of Complaint 3. Petitioner's *Pro Se* Motion for Objection to Order of Bill of Complaint Dismissed	1. Denied 2. Dismissed 3. Dismissed
132P11-10	State v. Gregory Lynn Gordon	1. Def's *Pro Se* Petition for W*rit of Mandamus* 2. Def's *Pro Se* Motion for PDR (COAP15-180)	1. Denied 2. Denied
133P16	State v. William Gerald Price	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1073)	1. Dismissed *ex mero motu* 2. Denied
138P12-2	State v. Dartanya Levon Eaton	Def's PDR Under N.C.G.S. § 7A-31 (COA15-255)	Denied
140P16	Timothy S. Boyd v. Gregory M. Rekuc, M.D., and Raleigh Adult Medicine, P.A.	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-780)	Denied
144P16	State v. Anton Tolandis Smith	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-921) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
151P16	State v. James L. Johnson	1. State's Motion for Temporary Stay (COA15-793) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/2016** 2. Allowed 3. Allowed
154P16	State v. Justin Duane Hurd	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-588)	Denied **Ervin, J., recused**
158P06-8	State v. Derrick D. Boger	Def's *Pro Se* Motion to Appeal an Consolidation of Sentences (COAP16-234)	Dismissed
158P16-2	Larry Brandon Moore v. Judge Jesse B. Caldwell, III	Petitioner's *Pro Se* Motion for Order and Proposed Order	Dismissed

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

18 AUGUST 2016

159P16	State v. Ronald Perry, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-967)	Denied
160A16	Thomas A.E. Davis, Jr., Administrator of the Estate of Lisa Mary Davis (Deceased) v. Hulsing Enterprises, LLC, Hulsing Hotels NC Management Company, Hulsing Hotels North Carolina, Inc., Hulsing Hotels, Inc., d/b/a Crowne Plaza Tennis & Golf Resort Asheville and Mulligan's	1. Defs' Notice of Appeal Based Upon a Dissent (COA15-368) 2. Defs' PDR As to Additional Issues	1. --- 2. Allowed
165P16	State v. Simaron Demetrius Hill	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Peremptory Setting	1. Dismissed 2. Dismissed as moot
166P16	State v. Jaahkii Quran Harris	1. State's Motion for Temporary Stay (COA15-770) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/09/2016** Dissolved **08/18/2016** 2. Denied 3. Denied
169P16	State v. Matthew Chad Beaver	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1179)	Denied
170P16	State v. Dennis Sherwood Lewis	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-191) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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171P16	In the Matter of the Appeal Of: Michelin North America, Inc. From the Decision of the Mecklenburg County Board of Equalization and Review Concerning the Discovery of Certain Business Personal Property and the Proposed Discovery Values for Tax Years 2006-2011	1. Mecklenburg County's PDR Under N.C.G.S. § 7A-31 (COA15-415) 2. Michelin North America, Inc.'s Conditional PDR Under N.C.G.S. § 7A-31 3. Wake County's Conditional Motion for Leave to File *Amicus* Brief	1. Denied 2. Dismissed as moot 3. Dismissed as moot
172P15-5	State v. Mohammed Nadder Jilani	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Writ of Prohibition 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied 2. Denied 3. Denied
173A16	State v. Morris Leavett Stith	1. Def's Motion to Extend Time to File Brief 2. Def's Motion to Deem Brief Timely Filed	1. Allowed 2. Allowed
174P16	State v. Travis Taylor Dail	1. State's Motion for Temporary Stay (COAP16-291) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **05/11/2016** Dissolved **08/18/2016** 2. Denied 3. Denied
176P16	State v. Larry James Waters	Def's PDR Under N.C.G.S. § 7A-31 (COA15-686)	Denied
179A16	Peter Jerard Farrell v. United States Army Brigadier General, Retired, Kelly J. Thomas, Commissioner of N.C. Division of Motor Vehicles, in his Official Capacity	1. Petitioner's Notice of Appeal Based Upon a Dissent (COA15-257) 2. Petitioner's Notice of Appeal Based Upon a Constitutional Question 3. Respondent's Motion to Dismiss Appeal	1. --- 2. --- 3. Allowed

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181A93-4	State v. Rayford Lewis Burke (DEATH)	Def's Motion to Supplement the Printed Record on Appeal	Allowed **Ervin, J., recused**
181A16	Lawrence Piazza and Salvatore Lampuri v. David Kirkbride, Gregory Brannon, and Robert Rice	1. Def's (Gregory Brannon) Notice of Appeal Based Upon a Dissent (COA15-48) 2. Def's (Gregory Brannon) PDR as to Additional Issues	1. --- 2. Allowed
183P16	City of Charlotte, a Municipal Corporation v. University Financial Properties, LLC, a North Carolina Limited Liability Company f/k/a University Bank Properties Limited Partnership, a North Carolina Limited Partnership, et al.	1. Def's (University Financial Properties, LLC) PDR Under N.C.G.S. § 7A-31 (COA15-473) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
185P16	Robert Samuel Chamberlain v. State	Petitioner's *Pro Se* Motion for Petition to Renounce Citizenship	Dismissed **Ervin, J., recused**
186P16	State v. Terry Thorne	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-404)	Denied
194A16	State v. Michael Antonio Bullock	1. State's Motion for Temporary Stay (COA15-731) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **05/23/2016** 2. Allowed **06/16/2016** 3. ---
195P16	State v. James David Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1052)	Denied
199P16	State v. Joseph M. Romano	1. State's Motion for Temporary Stay (COA15-940) 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 **05/24/2016** 2. Allowed 3. Allowed 4. Allowed

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200P07-5	State v. Kenneth E. Robinson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Halifax County	Dismissed
200P16-2	North Carolina State Bar v. Dianne Michele Carter El Bey v. State, et al.	Def's *Pro Se* Motion for Responsive Pleading Regarding Dismissal	Dismissed **Ervin, J., recused**
201P16	State v. Timothy Wiley, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Jackson County	Dismissed
203P16	State v. Robert Lee Baker, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-723)	Denied
204P16	Matthew S. Lennon v. N.C. Department of Justice and the N.C. Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-660)	Denied
207P16	State v. Anthony Tyrone Brown	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-825) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
208P16	State v. Joshua Earl Holloman	1. State's Motion for Temporary Stay (COA15-1042) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/27/2016** 2. Allowed 3. Allowed
209P16	State v. Willie Bernard Melvin	Def's *Pro Se* Motion for PDR of the Order of COA (COAP16-139)	Dismissed
210P16	State v. Dale Patrick Martin	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-830) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
214P16	State v. Robert Thomas Pole	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County 2. Def's *Pro Se* Motion for the Appointment of Counsel	1. Denied 2. Dismissed as moot

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215P16	State v. Mickey Gene Mellon	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-459)	1.
		2. State's Motion for Temporary Stay	2. Allowed **06/15/2016**
		3. State's Petition for *Writ of Supersedeas*	3.
		4. State's PDR Under N.C.G.S. § 7A-31	4.
217P16	State v. Ali Mahamed Sheikh and Abdulkadir Sharif Ali	1. Def's (Abdulkadir Sharif Ali) PDR Under N.C.G.S. § 7A-31 (COA15-688)	1. Denied
		2. Def's (Ali Mahamed Sheikh) PDR Under N.C.G.S. § 7A-31	2. Denied
		3. Def's (Abdulkadir Sharif Ali) Motion to Amend PDR	3. Allowed
218P16	Mike Campbell, Rhonda Campbell, Gail Campbell, John Fox, Jr., Sylvia Fox, Alan Harpe, Robin Harpe, Bill Sherrill, Norma Jean Sherrill, Richard Gordon, Susanne Gordon, Joe Brown, Patty Hewitt, Larry Marlin, First RX Pharmacy, Beth Bush, Charles McNiel, Carol McNiel, Nga Amador, Jack Moore, Maria Moore, Jody Parlier, Cathy Parlier, David Lynch, Judith Lynch, Victor McIntyre, Louise McIntyre, Brian Fox, Carrie Norman, Charles Johnson, Mary Johnson Landrea, Rhyne, Tom Brandon, Sara Brandon, Michael Kepley, Sandy Kepley, Vince Cherry, James Fox Worthy, Sheila Fox Worthy, Chuck Dockery, Kim Dockery, Bill Murdock, Jeannie Murdock, Shirley Silva, Brent Warren, Michelle Warren, Jim Howard,	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA15-329)	Denied

	Janet Howard, HCRI North Carolina Properties III, LP DBA Brookdale Senior Living Center, Louise Gordon, Travis Blackwelder, Statesville Bovine and Equine Center, Jared Reimann, Aimee Reimann, Lee Shepard, Cecil Davis, Imogene Davis, John Strikeleather, III, Heritage Knitting Company, LLC, Judy Voelske, Voelske Automotive, Cooney Properties, LLC, and Dr. Chip Cooney v. The City of Statesville, North Carolina, Love's Travel Stops & Country Stores, Inc., and Roserock Holdings, L.L.C.		
220P16	State v. Julie Watkins	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1221)	Denied
222P16	State v. Jeffrey Castillo	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-855) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
223P16	North Carolina Department of Public Safety v. Chauncey John Ledford	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-595)	Allowed
225P16	Charles Anthony Ball v. James M. Ellis, Administrator of Estate	Plt's *Pro Se* Motion for PDR	Denied **06/30/2016**

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226P16	In re Foreclosure of Deed of Trust From Burman Howard Maine, Betty Farmer Maine and Brandon Travis Maine, Grantor, to PBRE, Inc., Trustee, Recorded in Book 405, Page 2169, in the Ashe County Public Registry by Morrison Trustee Services, LLC, Substitute Trustee	1. Petitioners' *Pro Se* Motion for Notice of Appeal 2. Petitioners' *Pro Se* Petition for *Writ of Mandamus* 3. Petitioners' *Pro Se* Motion for Notice of Appeal	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed *ex mero motu*
230A16	Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.	1. Def's Motion to Strike Issue II from Notice of Appeal Based on Dissent in COA (COA15-260; 15-517) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Allowed **07/07/2016** 2. Dismissed **07/07/2016** 3. Allowed **07/07/2016**
230A16	Town of Beach Mountain v. Genesis Wildlife Sanctuary, Inc.	Plt's Motion to Amend New Brief (COA15-260; 15-517)	Allowed **08/16/2016**
232P01-3	State v. Michael Eugene Reed, II	Def's *Pro Se* Motion to Appoint Counsel	Denied **Hudson, J., recused**
232P16	State v. Jeremy Jerome Oliver	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
233P16	State v. Alonzo Antonio Murrell	1. State's PDR Under N.C.G.S. § 7A-31 (COA15-1097) 2. State's Motion to Deem Petition Timely Filed 3. State's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 4. State's Motion for Temporary Stay 5. State's Petition for *Writ of Supersedeas*	1. 2. 3. 4. Allowed **06/22/2016** 5.
234P16	State v. Willie James Steele, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-827)	Denied

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236P16	In the Matter of: C.N.H-P., M.S.N.P., A.D.S., M.C-N.H-P.	Respondent-Mother's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1199)	Denied
237P16	Avery M. Riggsbee v. W. Baine Jones, Jr., Judge Government Employees	1. Plt's *Pro Se* Motion for Petition for Constitutional Violation 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
238P16	State v. Corey L. Hendricks-Bey	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
239P16	State v. Chad Braxton Bumpers	1. State's Motion for Temporary Stay (COA16-1) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/24/2016** 2. 3.
241P16	Robert Samuel Chamberlain v. North Carolina Department of Public Safety, et al.	1. Petitioner's *Pro Se* Motion for Petition for Court Order to Receive Medical Care for Pretrial Detainees and Put a Stop to Pretrial Detainees Sick Calls Going Unanswered 2. Petitioner's *Pro Se* Motion for Petition to Seek a Court Order to Remove Locking Devices/Latches and Chains from Cell Doors	1. Dismissed 2. Dismissed **Ervin, J., recused**
242P16	State v. Greggory G. Mosher, Jr.	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
243P16	State v. Jimmy Lee Gann	1. State's Motion for Temporary Stay (COA15-1344) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/27/2016** 2.
244P16	State v. Sandra Meshell Brice	1. State's Motion for Temporary Stay (COA15-904) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2016** 2. 3.
245P16	Triando M. Stroud v. Pate Dawson, Inc.	Petitioner's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1066)	Denied

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246P16	Christopher Charles Friscia and Maria Adriana Friscia v. Nathan J. Taylor, et al. d.b.a. Nathan J. Taylor, McGuire Woods, et al. Law Firm	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/13/2016**
247P16	State v. Jonathan Eugene Brunson	Def's *Pro Se* PDR	Dismissed
249P11-5	State v. Bobby Ray Grady	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-433) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Motion to Procure Documents and Transcripts at the Government's Expense	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
252PA14-2	State v. Thomas Craig Campbell	Def's Motion to Strike Section D of the State's Brief as Outside the Scope of this Court's Special Order Allowing the State's PDR in Part and Denying the State's PDR in Part	Denied **08/10/2016**
252PA15	In re D.L.W., D.L.N.W., V.A.W.	1. Respondent-Mother's *Pro Se* Petition for Rehearing 2. Respondent-Mother's *Pro Se* Motion to Stay the Mandate	1. Denied **06/29/2016** 2. Denied **06/29/2016**
257P16	William Gerald Price v. Pamela Barlow, et al., d.b.a. Clerk of Superior Court of Ashe, North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Respondent's (Federal Mortgage Association a/k/a Fannie Mae) Motion for Sanctions	1. Denied 2. Dismissed without prejudice
258P16	State v. Richard Lee Nealen	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **07/11/2016**
259P16	In the Matter of O.D.S.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA15-1153)	Denied
262P16	Ronald G. Keaton, Jr., Employee v. ERMC, III, Employer, New Hampshire Insurance Company, Carrier (Carl Warren & Company, Third-Party Administrator)	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 4. Def's Motion to Hold PDR in Abeyance	1. Allowed **07/13/2016** 2. 3. 4.

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265A16	State v. Jose Merlin Henriquez Portillo	1. Def's Notice of Appeal of Right Pursuant to N.C.G.S. § 7A-30(1) Raising Allegedly Substantial Constitutional Question 2. State's Motion to Dismiss Notice of Appeal	1. --- 2. Allowed
268P16	Owen D. Leavitt v. Willie Hargrove	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-351) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
272A14	State v. Jonathan Douglas Richardson (DEATH)	Def's Motion for an Order or Orders Regarding Deadline for Transcript Preparation	Special Order **08/08/2016**
272P16	Jeffrey Lee McBride v. State	Def's *Pro Se* Motion for Complaint/Claim	Dismissed
273A16	State v. Jamison Christopher Goins	1. State's Motion for Temporary Stay (COA15-1183) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **07/22/2016** 2. Allowed **08/01/2016** 3. ---
274P16	Michael P. Long and Marie C. Long v. Currituck County, North Carolina and Elizabeth Letendre	1. Respondent's (Elizabeth Letendre) Motion for Temporary Stay (COA15-376) 2. Respondent's (Elizabeth Letendre) Petition for *Writ of Supersedeas* 3. Respondent's (Elizabeth Letendre) PDR Under N.C.G.S. § 7A-31	1. Allowed **07/28/2016** 2. 3.

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282P16	Jeremy Bruns and Jenny Bruns v. Rhonda Bryant, Dalton Bryant, Sr., Dalton Bryant, Jr., Pat McCrory, as Governor of North Carolina, Frank Perry, as Secretary of the North Carolina Department of Public Safety, Anthony Tata, as Secretary of the North Carolina Department of Transportation, Veronica McClain, USAA, and State of North Carolina	1. Plts' *Pro Se* PDR Prior to a Determination of COA (COA16-699) 2. Plts' *Pro Se* Petition for *Writ of Mandamus*	1. Denied **08/18/2016** 2. Denied **08/18/2016**
287P16	State v. Arvin Roscoe Hayes	1. State's Motion for Temporary Stay (COA16-207) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/05/2016** 2. 3.
289P15	United Community Bank (Georgia) v. Thomas L. Wolfe and Barbara J. Wolfe, Trustees of the Thomas L. Wolfe and Barbara J. Wolfe Irrevocable Trust, Thomas L. Wolfe, individually and Barbara J. Wolfe, individually	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1309)	Allowed
290P16	Michael Eugene Hunt v. Mr. Frank L. Perry, Secretary of N.C. Department of Public Safety	Petitioner's *Pro Se* Motion for PDR (COAP16-493)	Denied **08/12/2016**
291P16	State v. John Frede Sabbaghrabaiotti	1. State's Motion for Temporary Stay (COA15-1028) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/10/2016** 2. 3.

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307P15-2	The Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue	1. State's Motion for Temporary Stay (COA15-896) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **07/25/2016** 2.
308A15	State v. Zachary David Thomsen	Def's Motion to Amend Brief	Allowed
326P15-2	Burl Anderson Howell v. N.C. Wayne County Department of Health and Human Services, by and through Reese Phelps; Lou Jones	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* (COAP16-339) 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **06/29/2016** 2. Allowed **06/29/2016** 3. Denied **06/29/2016**
339P15	State v. Terry Lyn Pegram	Def's PDR Under N.C.G.S. § 7A-31 (COA14-921)	Denied
368P12-4	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Incorporated; Paul Bolin, M.D.; Ralph Whatley, M.D.; Sanjay Patel, M.D.; and Cynthia Brown, M.D.	1. Plt's *Pro Se* Motion for Petition for Reconsideration of Recusal Honorable Judge Richard L. Doughton 2. Plt's *Pro Se* Motion to Stay Execution of Judgment	1. Denied **07/22/2016** 2. Denied **07/22/2016**
379P10-5	State v. Ralph Franklin Fredrick	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Rutherford County	1. Dismissed 2. Dismissed
382P15-2	State v. Richard Jackson Hall	Def's *Pro Se* Motion for Petition for Rehearing of Denial of Petition for *Writ of Certiorari*	Denied
407P15-2	State v. Larry Ricardo Tart	Def's *Pro Se* Motion for Certificate of Appealability	Dismissed
409PA15	Gregory P. Nies and Diane S. Nies v. Town of Emerald Isle, a North Carolina Municipality	*Amici Curiae*'s Motion to Withdraw and Substitute North Carolina Counsel	Allowed **06/22/2016**

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409PA15	Gregory P. Nies and Diane S. Nies v. Town of Emerald Isle, a North Carolina Municipality	Plts' Motion for Extension of Time to File Reply Brief	Allowed **08/10/2016**
429PA13	Morris v. Scenera Research, LLC, et al.	1. Plt's Motion for Attorneys' Fees and Expenses Incurred on Appeal 2. Plt's Motion in the Alternative to Issue a Mandate Remanding this Motion to the Trial Court for Further Proceedings	1. — **06/30/2016** 2. Allowed **06/30/2016**
438A15	Hanesbrands, Inc. v. Kathleen Fowler	Def's Motion for Continuance of Oral Argument	Allowed **06/28/2016**
441P92-8	Johnnie L. Harrington v. Christie S. Cameron Roeder, Clerk of Court	Def's *Pro Se* Motion to Compel	Denied **Ervin, J., recused**
446A13	State v. Mario Andrette McNeill (DEATH)	Def's Motion to Amend Record on Appeal	Allowed
449P11-14	State v. Charles Everett Hinton	1. Def's *Pro Se* Motion for *Ex Parte* Inquiry into Restraints on Liberty by Judicial *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion for Judicial Notice of Adjudicative Facts 3. Def's *Pro Se* Motion for Oral Hearing Opportunity to be Heard 4. Def's *Pro Se* Motion for Findings by the Court and Interrogatories to All Interested Persons, Individuals, and Third-Parties	1. Denied **08/18/2016** 2. Dismissed **08/18/2016** 3. Dismissed **08/18/2016** 4. Dismissed **08/18/2016** **Ervin, J., recused**
509P13-2	State v. Robert Lee Golden	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **06/29/2016**
514P13-5	State v. Raymond Dakim Harris Joiner	Def's *Pro Se* Motion to Dismiss for Lack of Territorial Jurisdiction	Dismissed
579P01-3	Antorio Rice Smarr v. State	Def's *Pro Se* Petition for W*rit of Certiorari* to Review Order of Superior Court, Gaston County	Dismissed
669P03-3	State v. Tony Robert Jones	Def's *Pro Se* Motion for PDR *de novo* (COAP16-107)	Dismissed **Ervin, J., recused**

COMMSCOPE CREDIT UNION, PLAINTIFF
v.
BUTLER & BURKE, LLP, A NORTH CAROLINA LIMITED LIABILITY PARTNERSHIP,
DEFENDANT AND THIRD-PARTY PLAINTIFF
v.
BARRY D. GRAHAM, JAMES L. WRIGHT, ED DUTTON, FRANK GENTRY, GERAL HOLLAR, JOE CRESIMORE, MARK HONEYCUTT, ROSE SIPE, TODD POPE, JASON CUSHING, AND SCOTT SAUNDERS, THIRD-PARTY DEFENDANTS

No. 5PA15

Filed 23 September 2016

1. Fiduciary Relationship—auditor—duties to third parties—not a fiduciary relationship

The trial court erred by allowing a motion to dismiss under Rule 12(b)(6) and for judgment on the pleadings under Rule 12(c) in an action for breach of fiduciary duty and other claims arising from an auditor's failure to discover that plaintiff's General Manager had not filed required tax returns for plaintiff (which was exempt from federal tax) for several years. Independent auditors often have significant obligations to third parties or to the public at large that would prevent them from acting solely in their audit clients' best interests, and a fiduciary relationship therefore does not arise as a matter of law, although it may exist in fact.

2. Appeal and Error—evenly divided Supreme Court—Court of Appeals ruling stands—no precedential authority

The decision of an evenly divided Supreme Court left intact the ruling of the Court of Appeals on whether certain defenses were sufficiently alleged in the complaint, although the Court of Appeals opinion was without precedential authority.

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, 237 N.C. App. 101, 764 S.E.2d 642 (2014), reversing an order entered on 26 September 2013 by Judge Richard L. Doughton in Superior Court, Catawba County. Heard in the Supreme Court on 1 September 2015.

Carlton Law PLLC, by Alfred P. Carlton, Jr. and Ian S. Richardson; and Patrick, Harper & Dixon, LLP, by L. Oliver Noble, Jr., for plaintiff-appellee.

Sharpless & Stavola, P.A., by Frederick K. Sharpless; and Wiley Rein LLP, by Richard A. Simpson, pro hac vice, and Ashley E. Eiler, pro hac vice, for defendant/third-party plaintiff-appellant.

Alston & Bird LLP, by Brian D. Boone, for Chamber of Commerce of the United States of America, amicus curiae.

Womble Carlyle Sandridge & Rice, LLP, by Brent F. Powell, C. Mark Wiley, and Michael R. Cashin, for Cherry Bekaert LLP, CliftonLarsonAllen LLP, and Dixon Hughes Goodman LLP, amici curiae.

Allen, Pinnix & Nichols, P.A., by Noel L. Allen and Nathan E. Standley, for National Association of State Boards of Accountancy, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, Michael W. Mitchell, and Lauren H. Bradley, for North Carolina Association of Certified Public Accountants, American Institute of Certified Public Accountants, and Center for Audit Quality, amici curiae.

Hedrick Gardner Kincheloe & Garofalo LLP, by Mel J. Garofalo, for North Carolina Chamber, amicus curiae.

MARTIN, Chief Justice.

Plaintiff CommScope Credit Union seeks damages from defendant Butler & Burke, LLP, the certified public accounting firm that plaintiff hired to conduct annual independent audits of its financial statements. We allowed discretionary review to address whether defendant owed a fiduciary duty to plaintiff and whether plaintiff's claims against defendant are barred by the doctrines of contributory negligence and *in pari delicto*.

I

Plaintiff is a North Carolina state-chartered credit union with its principal place of business in Catawba County. Defendant is the CPA

firm that plaintiff engaged to provide independent audit services from 2001 to 2010. Federal tax law required that plaintiff annually file Form 990, entitled "Return of Organization Exempt From Income Tax," with the Internal Revenue Service. *See* 26 U.S.C. § 6033(a)(1) (2006); *id.* § 6033(a)(1) (2000); *see also id.* § 501(a), (c)(14)(A) (2006); *id.* § 501(a), (c)(14)(A) (2000). Plaintiff filed a complaint in Superior Court, Catawba County, alleging that, in performing its annual audits, defendant had "fail[ed] to request and review Plaintiff's tax returns, and thereby fail[ed] to discover that Plaintiff's then[-]General Manager had not filed" Form 990 "from 2001 to 2009." Plaintiff alleged that defendant's inaction "resulted in the Internal Revenue Service's assessment of penalties upon Plaintiff in the . . . amount of . . . $374,200." Plaintiff asserted claims for breach of contract, negligence, breach of fiduciary duty, and professional malpractice.

Defendant answered the complaint and pleaded seven affirmative defenses, including contributory negligence and *in pari delicto*. Defendant subsequently moved to dismiss all of plaintiff's claims under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and for judgment on the pleadings under Rule 12(c). The trial court granted defendant's motion and entered judgment for defendant. Plaintiff appealed.

The Court of Appeals reversed the trial court's decision. The court stated that the relationship between an independent auditor and its audit client may give rise to a fiduciary duty as a matter of law because that relationship "appears much more like that between attorney and client, [or] broker and principal, than that between mutually interdependent businesses." *CommScope Credit Union v. Butler & Burke, LLP*, 237 N.C. App. 101, 105, 764 S.E.2d 642, 647 (2014) (citations and internal quotations omitted). The court determined that, even if no fiduciary duty exists as a matter of law, the specific allegations in plaintiff's complaint were sufficient to state a claim for breach of fiduciary duty because the terms of the audit engagement letters discussed in the complaint "assur[ed] Plaintiff that [defendant] had the expertise to review financial statements to identify 'errors [and] fraud[,]' even by Plaintiff's own management and employees." *Id.* (third and fourth alterations in original). The court concluded that defendant had thus "sought and received '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 *Harrold v. Dowd*, 149 N.C. App. 777, 784, 561 S.E.2d 914, 919 (2002)).

Next, the Court of Appeals addressed defendant's motion to dismiss as applied to plaintiff's claims for breach of contract, negligence, and

professional malpractice. Defendant's motion had stated affirmative defenses based on the doctrines of *in pari delicto* and contributory negligence, and based on the terms of the engagement letters. The court concluded that defendant's affirmative defenses of *in pari delicto* and contributory negligence would not entitle defendant to dismissal at this stage because "nothing in the pleadings establishes either that [plaintiff's General Manager's] failure to file the tax returns was (1) negligent rather than intentional wrongdoing or excusable conduct or (2) imputed to Plaintiff as a matter of law." *Id.* at 110-11, 764 S.E.2d at 651. The court also concluded that the terms of the engagement letters were too ambiguous to warrant dismissal of plaintiff's claims based on the pleadings alone. *Id.* at 111-12, 764 S.E.2d at 651-52.

The court therefore reversed the trial court's order granting defendant's motion to dismiss and for judgment on the pleadings. *Id.* at 112, 764 S.E.2d at 652. We allowed defendant's petition for discretionary review and now affirm in part and reverse in part.

II

We review de novo the grant of a motion to dismiss under Rule 12(b)(6) and for judgment on the pleadings under Rule 12(c). *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013); *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. rev. denied*, 360 N.C. 78, 623 S.E.2d 263 (2005).

In considering a motion to dismiss under Rule 12(b)(6), the Court must decide "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Bridges*, 366 N.C. at 541, 742 S.E.2d at 796 (quoting *Coley v. State*, 360 N.C. 493, 494, 631 S.E.2d 121, 123 (2006)).

On a motion for judgment on the pleadings, "[a]ll well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682-83, 360 S.E.2d 772, 780 (1987) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). As with a motion to dismiss, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Id.* at 682, 360 S.E.2d at 780 (quoting *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499). A Rule 12(c) movant must show that "the complaint . . . fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar" to a cause of action. *Jones v. Warren*, 274 N.C. 166, 169, 161 S.E.2d 467, 470

(1968) (quoting *Van Every v. Van Every*, 265 N.C. 506, 510, 144 S.E.2d 603, 606 (1965)).

[1] We now address whether the facts pleaded in plaintiff's complaint, if true, would establish that defendant owed a fiduciary duty to plaintiff when defendant performed its independent audits of plaintiff's financial statements. For a fiduciary duty to exist, there must be a fiduciary relationship between the parties. *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). This Court has defined a fiduciary relationship as one in which "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*, 353 N.C. at 651, 548 S.E.2d at 707). All fiduciary relationships are characterized by "a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014).

The very nature of some relationships, such as the one between a trustee and the trust beneficiary, gives rise to a fiduciary relationship as a matter of law. *See, e.g.*, *Wachovia Bank & Tr. Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967). The list of relationships that we have held to be fiduciary in their very nature is a limited one, *see Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266 (listing categories), and we do not add to it lightly. We have not previously included the relationship of an independent auditor and its audit client in this list, and for good reason. Independent auditors often have significant obligations to third parties or to the public at large that would prevent them from acting solely in their audit clients' best interests. Though an auditor contracts to audit an individual client, the audit report is frequently intended to benefit and to be relied on by third parties such as investors or creditors. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 211, 367 S.E.2d 609, 615 (1988). Because of this, we have held that an independent auditor owes a duty to avoid negligent misrepresentations not only to the auditor's client, but also "to any other person, or one of a group of persons, whom the accountant or his client intends the information to benefit." *Id.* at 210, 214, 367 S.E.2d at 614, 617 (summarizing and adopting Restatement (Second) of Torts § 552 (Am. Law Inst. 1977)).

The obligation to third parties is even more pronounced when a CPA firm audits the financial statements of a company that is subject to the reporting requirements of the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78j–1 (2012). For instance, as amici point out, the

Sarbanes–Oxley Act of 2002 prohibits these auditors from providing additional services—such as investment advising or legal services—to their audit clients that could compromise their ability to act impartially and in the public interest. *Id.* § 78j–1(g)(7)-(8). Federal law also prohibits independent auditors who audit these companies from "[p]roviding an expert opinion or other expert service for an audit client." 17 C.F.R. § 210.2–01(c)(4)(x) (2016). And the United States Supreme Court has recognized that independent auditors "assume[ ] a *public* responsibility transcending any employment relationship with the client," and that they "owe[ ] ultimate allegiance to the [client's] creditors and stockholders, as well as to the investing public," rather than to the audit client. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). These federal requirements—whether or not they apply to audits of state-chartered credit unions—underscore why we cannot conclude that an independent auditor is always in a fiduciary relationship with its audit client.

Though no fiduciary relationship arises here as a matter of law, one may arise in fact. We have recognized that the existence of a fiduciary relationship "depends ultimately on the circumstances." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991). Specifically, a fiduciary relationship arises whenever "there is confidence reposed on one side, and resulting domination and influence on the other." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (quoting 25 C. J. *Fiduciary* § 9 (1921)). Thus, we must determine whether the specific allegations in plaintiff's complaint could, if true, give rise to a fiduciary relationship in fact between plaintiff and defendant.

The complaint alleges that, each year from 2001 to 2009, defendant agreed to audit plaintiff's financial statements and other related records "in accordance with generally accepted auditing standards," also known as GAAS. As the complaint indicates, when a CPA firm performs an independent audit, North Carolina law defines GAAS as including the Statements on Auditing Standards issued by the American Institute of Certified Public Accountants (AICPA). 21 N.C. Admin. Code 08N .0403 (2016).

Under the AICPA Statements on Auditing Standards in effect when defendant conducted its audits, the object of a financial statement audit was to express an opinion on whether the financial statements fairly presented the financial position of the audit client. Codification of Accounting Standards and Procedures, Statement on Auditing Standards, AU § 110.01 (Am. Inst. of Certified Pub. Accountants 1972) [hereinafter "AU"]. The independent auditor had to "maintain independence in

mental attitude in all matters relating to the audit." *Id.* § 220.01 (Am. Inst. of Certified Pub. Accountants 2006); *accord id.* § 220.01 (Am. Inst. of Certified Pub. Accountants 1972). This required that the independent auditor be "without bias with respect to the client" and demonstrate "a judicial impartiality that recognizes an obligation for fairness not only to management and owners of a business but also to . . . those who may otherwise rely . . . upon the independent auditor's report." *Id.* § 220.02 (Am. Inst. of Certified Pub. Accountants 1972).

To protect the public's confidence in the independence of independent auditors, this standard required not only that an auditor "*be* independent," but that the auditor also "be *recognized* as independent." *Id.* § 220.03. To be recognized as independent, an auditor had to "be free from any obligation to . . . the client, its management, or its owners." *Id.* So under AICPA standards, and thus under the terms of the audit engagement, defendant had to maintain its independence from plaintiff and be free from obligations to or bias about plaintiff. Defendant was required to consider the interests of third parties who might rely on the audit, and to further those interests, even though they could conflict with the interests of the audit client. By contrast, a fiduciary must act in the best interests of its principal. *See Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266. Defendant's commitment to audit plaintiff's financial statements in accordance with GAAS thus did not create a "fiduciary relationship . . . in fact." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (quoting *Abbitt*, 201 N.C. at 598, 160 S.E. at 906).

Nor does the complaint allege that defendant agreed to perform any additional services for plaintiff that could give rise to a fiduciary relationship in fact. In reaching the contrary conclusion below, the Court of Appeals relied on *Estate of Smith v. Underwood*, 127 N.C. App. 1, 487 S.E.2d 807, *disc. rev. denied*, 347 N.C. 398, 494 S.E.2d 410 (1997), "where the accountants were providing accounting and tax-related services," *CommScope*, 237 N.C. App. at 105, 764 S.E.2d at 647. Here, however, plaintiff's complaint does not allege that defendant provided tax-related services or, as we discuss below, agreed to do anything other than conduct an audit in accordance with GAAS.

The Court of Appeals reasoned that, under the facts pleaded in the complaint, defendant sought and received a special confidence from its audit client, through defendant's pledge to "plan and perform [ ]audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to . . . acts by management

or employees acting on behalf of" plaintiff. *CommScope*, 237 N.C. App. at 105-06, 764 S.E.2d at 648 (brackets in original). The Court of Appeals held that this pledge, read in the light most favorable to plaintiff, gave rise to a fiduciary duty. *Id.* at 106, 764 S.E.2d at 648. But defendant's pledge simply mirrored what the provisions of GAAS required. In *every* independent audit engagement that complied with GAAS, the auditor had to "plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud." AU § 110.02 (Am. Inst. of Certified Pub. Accountants 1997). In other words, defendant's pledge was well within the realm of what an independent auditor was obligated to do under GAAS in the first place. That pledge did not elevate defendant's relationship with plaintiff into a fiduciary one.

The complaint also alleges that plaintiff retained defendant to "notif[y] . . . appropriate credit union personnel of recommended improvement in administrative or accounting functions." Viewed in isolation, this allegation might be construed to mean that defendant agreed to provide accounting or consulting services outside the scope of an independent audit. But the rest of the complaint makes it clear that defendant did not, and that defendant's promises simply tracked what GAAS requires for an independent audit. According to the complaint, defendant specifically represented to plaintiff that the engagement would "include obtaining an understanding of internal control *sufficient to plan the audit* and to determine the nature, timing, and extent of audit procedures to be performed." (Emphasis added.) Defendant also agreed that "*[i]n the course of performing audit procedure*s, [it] would be alert to situations for which [it] could make recommendations for improvement in administrative or accounting functions" (emphasis added), and that it would "communicate those recommendations to the Supervisory Committee in a letter separate from [the] report on [plaintiff's] financial statements."

This is simply what defendant had to do when following the AICPA standards. When defendant first agreed to conduct independent audits of plaintiff's financial statements, GAAS Standard of Field Work No. 2 required an independent auditor to obtain a "sufficient understanding of internal control . . . to plan the audit and to determine the nature, timing, and extent of tests to be performed." AU § 150.02 (Am. Inst. of Certified Pub. Accountants 1972). Although later amended, this standard did not significantly change the nature of the auditor's responsibilities. *See id.* § 150.02 (Am. Inst. of Certified Pub. Accountants 2006). The auditor did not have to actively search for deficiencies in the audit client's internal

controls. *Id.* § 325.04 (Am. Inst. of Certified Pub. Accountants 2009); *id.* § 325.04 (Am. Inst. of Certified Pub. Accountants 2006); *id.* § 325.04 (Am. Inst. of Certified Pub. Accountants 1997). If the auditor became aware of sufficiently serious deficiencies during the course of the audit, however, it generally had to report them to the client. *Id.* § 325.17 (Am. Inst. of Certified Pub. Accountants 2009); *id.* § 325.20 (Am. Inst. of Certified Pub. Accountants 2006); *id.* § 325.02 (Am. Inst. of Certified Pub. Accountants 1997). But the audit's purpose was still "to report on the financial statements *and not to provide assurance on internal control*." *Id.* § 325.11 (Am. Inst. of Certified Pub. Accountants 1989) (emphasis added); *accord id.* § 325.22 (Am. Inst. of Certified Pub. Accountants 2009); *id.* § 325.25 (Am. Inst. of Certified Pub. Accountants 2006). Defendant operated within this framework and agreed to find internal control deficiencies only to the extent necessary to perform its audits. Because defendant did not agree to affirmatively search for deficiencies outside of the performance of its audits, it did not agree to do anything beyond what an independent auditor normally does.

Thus, plaintiff's allegations, treated as true, do not establish that defendant owed it a fiduciary duty in fact. And as we have seen, the relationship between an independent auditor and its audit client does not categorically give rise to a fiduciary duty as a matter of law. The trial court correctly dismissed plaintiff's breach of fiduciary duty claim. We therefore reverse the decision of the Court of Appeals on this issue.

III

[2] Our disposition of plaintiff's breach of fiduciary duty claim leaves us with one other issue. As we have said, the Court of Appeals also held that plaintiff's complaint withstood defendant's motion to dismiss plaintiff's other claims. *See CommScope*, 237 N.C. App. at 112, 764 S.E.2d at 652. Defendant argued before the Court of Appeals, and again argues in this Court, that those claims are barred by the affirmative defenses of contributory negligence and *in pari delicto*. The members of the Court are equally divided, however, on whether the facts alleged in the complaint establish these defenses. The decision of the Court of Appeals on this issue is accordingly left undisturbed and stands without precedential value. *See*, *e.g.*, *State v. Long*, 365 N.C. 5, 705 S.E.2d 735 (2011) (per curiam); *State v. Greene*, 298 N.C. 268, 258 S.E.2d 71 (1979) (per curiam).

We therefore affirm the decision of the Court of Appeals in part and reverse it in part, and remand this case to the Court of Appeals for

further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

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

DANIEL AND LISA HOLT, ADMINISTRATORS OF THE ESTATE OF HUNTER DANIEL HOLT; STEVEN GRIER PRICE, INDIVIDUALLY; STEVEN GRIER PRICE, ADMINISTRATOR OF THE ESTATE OF MCALLISTER GRIER FURR PRICE; AND STEVEN GRIER PRICE, ADMINISTRATOR OF THE ESTATE OF CYNTHIA JEAN FURR

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 76A16

Filed 23 September 2016

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. ___, 781 S.E.2d 697 (2016), affirming a decision and order filed on 29 December 2014 by the North Carolina Industrial Commission. Heard in the Supreme Court on 29 August 2016.

DeVore Acton & Stafford PA, by Fred W. DeVore, III, F. William DeVore IV, and Derek P. Adler, for Price plaintiff-appellees; and Rawls Scheer Foster & Mingo PLLC, by Amanda A. Mingo, for Holt plaintiff-appellees.

Roy Cooper, Attorney General, by Melody R. Hairston and Amar Majmundar, Special Deputy Attorneys General, for defendant-appellant.

PER CURIAM.

AFFIRMED.

IN RE C.L.S.

[369 N.C. 58 (2016)]

IN THE MATTER OF C.L.S.

No. 54A16

Filed 23 September 2016

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. ___, 781 S.E.2d 680 (2016), affirming an order entered on 4 March 2015 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Supreme Court on 29 August 2016.

Jennifer G. Cooke for New Hanover County Department of Social Services, petitioner-appellee; and Ellis & Winters LLP, by Steven A. Scoggan, for appellee Guardian ad Litem.

David A. Perez for respondent-appellant father.

PER CURIAM.

AFFIRMED.

STATE v. ANDERSON

[369 N.C. 59 (2016)]

STATE OF NORTH CAROLINA
v.
APRIL JEAN ANDERSON

No. 432PA15

Filed 23 September 2016

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 780 S.E.2d 758 (2015), finding no error after appeal from judgments entered on 16 July 2014 by Judge Linwood O. Foust in Superior Court, Catawba County. Heard in the Supreme Court on 31 August 2016.

Roy Cooper, *Attorney General*, *by Kimberley A. D'Arruda*, *Special Deputy Attorney General*, *for the State.*

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

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
SHAMELE COLLINS

No. 66A16

Filed 23 September 2016

Appeal and Error—preservation of issues—failure to object below—failure to raise on appeal

The decision of the Court of Appeals on an evidence question in a criminal prosecution was affirmed by the Supreme Court where defendant did not raise the issue at trial and so did not preserve it for appeal. The decision of the Court of Appeals on the remaining issue was not affected.

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. ___, 782 S.E.2d 350 (2016), finding no error in the trial court's denial of defendant's motion to suppress, but vacating the judgment entered on 8 September 2014 by Judge William Z. Wood in Superior Court, Forsyth County, and remanding for resentencing. Heard in the Supreme Court on 29 August 2016.

Roy Cooper, *Attorney General*, *by Douglas W. Corkhill*, *Special Deputy Attorney General*, *for the State.*

Erik R. Zimmerman for defendant-appellant.

PER CURIAM.

This matter is before the Court based upon a dissent at the Court of Appeals. *State v. Collins*, ___ N.C. App. ___, ___, 782 S.E.2d 350, 360-62 (2016). The majority at the Court of Appeals upheld the trial court's denial of defendant's motion to suppress evidence seized at the time of his arrest, concluding, *inter alia*, that "defendant failed to raise the timing of [the police officer's] observation of powder on the floor" before the trial court. *Id.* at ___, 782 S.E.2d at 358. We agree that defendant failed to preserve his timing argument for appeal because he did not raise this argument before the trial court. *See State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds

for the ruling sought if the specific grounds are not apparent." (citing N.C. R. App. P. 10(b) (recodified 2009 as N.C. R. App. P. 10(a)(1)))). We therefore modify and affirm the decision of the Court of Appeals solely on this ground. The remaining issue addressed in the majority opinion of the Court of Appeals concerning defendant's right to be present at sentencing is unchallenged and unaffected by our decision.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
ARCHIMEDE NGADIENE NKIAM

No. 385PA15

Filed 23 September 2016

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 778 S.E.2d 863 (2015), reversing and remanding an order denying defendant's motion for appropriate relief entered on 26 November 2013 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court on 29 August 2016.

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

Hale Blau & Saad, *by Daniel M. Blau and Robert H. Hale*, *Jr.*, *for defendant-appellee.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

DEPARTMENT OF TRANSPORTATION	)	
	)	
v.	)	From Mecklenburg County
	)	
ADAMS OUTDOOR ADVERTISING OF CHARLOTTE LIMITED PARTNERSHIP	)	

No. 206P16

ORDER

The petition for discretionary review is allowed for the limited purpose of addressing the following issues as set forth in the petition:

> 1. Did the Court of Appeals err in failing to conclude that N.C. Gen. Stat. § 136-131 is the specific and controlling statute in this case involving the condemnation of a billboard location?
>
> 2. Did the Court of Appeals' decision violate the due process of law principles under the 14th Amendment to the United States Constitution and violate the law of the land clause of the Article 1, Section 19 of the North Carolina Constitution for denying Adams an effective and adequate remedy for just compensation?
>
> 7. Did the Court of Appeals err in concluding that the status of Adams' compliance with zoning and other land use laws and the effect of having in place a State permit for the use of the CHS Lot for outdoor advertising cannot be factors for the jury to consider in determining just compensation for the condemned lease?
>
> 8. Did the Court of Appeals err in concluding that a reasonable expectation of lease renewal cannot be considered by the jury as a factor in determining just compensation for the condemned lease?

The petition is denied as to any remaining issues.

By Order of the Court in Conference, this 22nd day of September, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of September, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. LEDBETTER

[369 N.C. 64 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Rowan County
	)	
DONNA HELMS LEDBETTER	)	

No. 402P15

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *State v. Thomsen*, ___ N.C. ___, 789 S.E.2d 639 (2016), and *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015). *See Thomsen*, ___ N.C. at ___, 789 S.E.2d at 642 (recognizing N.C.G.S. § 7A-32(c) "creates a default rule that the Court of Appeals has jurisdiction to review a lower court judgment by writ of certiorari"); *Stubbs*, 368 N.C. at 44, 770 S.E.2d at 76 (recognizing that Rule 21 of the North Carolina Rules of Appellate Procedure cannot take away jurisdiction given to the Court of Appeals by N.C.G.S. § 7A-32(c)).

By Order of the Court in Conference, this 22nd day of September, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of September, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE C-BASS MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-RP2	)	
v.	)	From Forsyth County
WILLIE LEE PINKNEY, CLARA PINKNEY, SIDDCO, INC., AND POORE SUBSTITUTE TRUSTEE, LTD	)	

No. 229P16

ORDER

The petition for discretionary review is allowed for the purpose of addressing the issues set forth in the petition and the following additional issue: "Whether any provision of North Carolina law, including, but not limited to, N.C.G.S. §§ 25-3-203, -3-301 (2015), would preclude dismissal with prejudice of the claims asserted in plaintiff's complaint, including the claim for judicial foreclosure, despite the apparent absence of a complete chain of indorsements?"

By Order of the Court in Conference, this 22nd day of September, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of September, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

22 SEPTEMBER 2016

018A14-2	State v. Paris Jujuan Todd	1. State's Motion for Temporary Stay (COA15-670) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **09/02/2016** 2. Allowed 3. ---
063P10-3	State v. Myron Roderick Nunn	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP16-566) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
067P16	The Assurance Group, Inc. v. Samuel Allen Bare and Deborah Lynn Bare, Marcheta Perry Sawyer, Timothy Mark Byrd, Gregory Todd Byrd, James Chandler Beck, Michael Wayne Anderson, Jeffrey A. Heybrock, Charles Bernard Moore, Jr.	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-386)	Denied
077P16	Franklin Falin, Employee v. The Roberts Company Field Services, Inc., Employer Self-Insured (Key Risk Management Services, Inc., Third-Party Administrator)	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-565)	Denied

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

22 SEPTEMBER 2016

088P15-3	State v. Mason W. Hyde	1. Def's *Pro Se* Motion for Notice in Advance 2. Def's *Pro Se* Motion for Notice of Request for Assistance 3. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 4. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1260) 5. Def's *Pro Se* Motion to Show Cause 6. Def's *Pro Se* Motion to Allow Applicant the Opportunity to Correct/ Amend Any Defects, Errors, Flaws in the Application	1. Dismissed 2. Dismissed 3. Denied **07/05/2016** 4. Denied 5. Dismissed **07/19/2016** 6. Dismissed as moot **07/19/2016** **Ervin, J., recused**
102P16	Kenneth C. Adams v. The City of Raleigh	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-782)	Denied
119P16	Freddie Wayne Huff, II v. N.C. Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-703)	Denied
131P01-13	State v. Anthony Dove	1. Def's *Pro Se* Petition for W*rit of Mandamus* 2. Def's *Pro Se* Motion for Impartial Jurist	1. Dismissed 2. Dismissed **Ervin, J., recused**
131P16-2	Somchoi Noonsab v. State of North Carolina Judge Paul Gessner	Petitioner's *Pro Se* Motion to Dismiss	Dismissed
141P16	Christenbury Eye Center, P.A. v. Medflow, Inc. and Dominic James Riggi	1. Plt's Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Plt's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 (COA15-1120)	1. Allowed 2. Dismissed as moot

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152P16	Catawba County, by and through its Child Support Agency, ex rel., Shawna Rackley v. Jason Loggins	1. Plt Catawba County's Motion for Temporary Stay (COA15-711) 2. Plt Catawba County's Petition for *Writ of Supersedeas* 3. Plt Catawba County's PDR Under N.C.G.S. § 7A-31 4. N.C. Department of Health and Human Services' Conditional Motion for Leave to File *Amicus* Brief	1. Allowed **04/25/2016** 2. Allowed 3. Allowed 4. Allowed
156P16	Polyfield Harris, William Harris, Tonya Barkley, Samantha Davis, and Patricia Perkins v. Myra H. Gilchrist, Valerie Harris, The Estate of Thomas Harris, Roosevelt Harris, Dorothy Morant, and Helen Howard	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-437)	Denied
158P06-9	State v. Derrick Boger	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/20/2016**
167P16	State v. William Edward Godwin, III	1. State's Motion for Temporary Stay (COA15-766) 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 **05/09/2016** 2. Allowed 3. Allowed 4. Allowed
168A16	Thomas A. Stokes, III v. Catherine C. Crumpton (formerly Stokes)	1. Plt's Notice of Appeal Based Upon a Dissent (COA14-1344) 2. Plt's PDR as to Additional Issues 3. Plt's Motion for Leave to Amend Notice of Appeal and PDR	1. --- 2. Allowed 3. Allowed **Edmunds, J., recused**

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172P16	Crystal Whicker, Employee v. Compass Group USA, Inc./ Crothall Services Group, Employer, Self-Insured (Gallagher Bassett Services, Inc., Administrator); and Novant Health, Inc., Alleged Joint Employer, Self-Insured	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1201)	Denied
181A93-4	State v. Rayford Lewis Burke (DEATH)	Petitioner-Appellant's Motion to Amend Petitioner-Appellant's Brief	Allowed **09/09/2016** **Ervin, J., recused**
182A16	Kimberly Ledford v. Ingles Markets, Inc., Employer, Self-Insured	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA15-522) 2. Def's Motion to Dismiss Appeal	1. --- 2. Allowed
184P16	Corey Scott Hart v. James Patrick Brienza and Gaston County	Def's (James Patrick Brienza) PDR Under N.C.G.S. § 7A-31 (COA15-1078)	Denied
187P16	Kornegay Family Farms, LLC, et al. v. Cross Creek Seed, Inc.	1. Def's Petition for *Writ of Certiorari* to Review Decision of the Business Court 2. N.C. Association of Defense Attorneys' Conditional Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed
189P16	State v. Shawn Jarmine Murchison	Def's PDR Under N.C.G.S. § 7A-31 (COA15-563)	Denied
192P16-2	Owen D. Leavitt v. State	Petitioner's *Pro Se* Motion for *Certiorari*/Appeal Notice and Objection	Dismissed
196P16	State v. Jimmy Lee Williams, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-826) 2. State's Motion to Dismiss Appeal	1. Denied 2. Allowed
197P16	State v. Javonta Marquez Ellis and Stephon Deandre Jennings	1. Def's (Ellis) PDR Under N.C.G.S. § 7A-31 (COA15-665) 2. Def's (Jennings) PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal of Defendant Ellis	1. Denied 2. Denied 3. Dismissed

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202P16	Odina Wesley and Norris Wesley, co-Administrators of the Estate of Hasani N'Namdi Wesley, Deceased v. Winston-Salem/ Forsyth County Board of Education and Billy Roger Bailey	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-648)	Denied
205P16	State v. Robert Stanley Brown, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA15-1192) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
206P16	Department of Transportation v. Adams Outdoor Advertising of Charlotte Limited Partnership	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-589) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
208PA15	N.C. State Bar v. Tillett	Plt's Motion to Amend New Brief	Allowed **08/23/2016**
211P16	SED Holdings, LLC v. 3 Star Properties, LLC, James Johnson, TMPS LLC, Mark Hyland, and Home Servicing, LLC	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-747)	Allowed
213P16	State v. Christopher Allen McKiver	1. State's Motion for Temporary Stay (COA15-1070) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/06/2016** 2. Allowed 3. Allowed
215P16	State v. Mickey Gene Mellon	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-459) 2. State's Motion for Temporary Stay 3. State's Petition for *Writ of Supersedeas* 4. State's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Allowed **06/15/2016** Dissolved **09/22/2016** 3. Denied 4. Denied

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221P16	State v. Cornelius Demetric Griffin	Def's PDR Under N.C.G.S. § 7A-31 (COA15-492)	Denied
224P16	State v. James Michael Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA15-614)	Denied
227P16	State v. Brandon Williams	1. Def's *Pro Se* Motion for Notice of Removal 2. Def's *Pro Se* Motion for Notice of Appeal	1. Dismissed 2. Dismissed
229P16	U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset-Backed Certificates, Series 2006-RP2 v. Willie Lee Pinkney, Clara Pinkney, SIDDCO, Inc., and Poore Substitute Trustee, LTD	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-797)	Special Order
231P16	Ervin Rainey, Employee v. City of Charlotte, Employer, and Self-Insured, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-953)	Denied
233P16	State v. Alonzo Antonio Murrell	1. State's PDR Under N.C.G.S. § 7A-31 (COA15-1097) 2. State's Motion to Deem Petition Timely Filed 3. State's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 4. State's Motion for Temporary Stay 5. State's Petition for *Writ of Supersedeas*	1. Allowed 2. Allowed 3. Dismissed as moot 4. Allowed **06/22/2016** 5. Allowed

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235P16	CSX Transportation, Inc. v. City of Fayetteville and Public Works Commission of the City of Fayetteville, a/k/a Fayetteville Public Works Commission v. City of Fayetteville, Third Party Plaintiff v. Time Warner Cable Southeast, LLC, Third Party Defendant	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-1286)	Denied
246P16-2	In the Matter of the Foreclosure of a Deed of Trust Executed by Christopher C. Friscia and Maria A. Friscia in the Original Amount of $161,600.00 Dated March 10, 2006, Recorded in Book 20146, Page 24, Mecklenburg County Registry	Petitioners' *Pro Se* Motion for Notice of Appeal	Dismissed
251P16	Kimarlo Ragland v. Nash-Rocky Mount Board of Education	1. Petitioner's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-862) 2. Petitioner's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal 4. Petitioner's *Pro Se* Motion for Addendum to Notice of Appeal and PDR	1. — 2. Denied 3. Allowed 4. Dismissed as moot
253P16	State v. Chalmers Gray Bohannon, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-389)	Denied

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256P16	State v. Jonathan James Newell	1. Def's *Pro Se* Motion to Disclose the Past and the Present Relationships, Associations, and Ties Between Defense Attorney and Victim's Father (COAP16-233)	1. Dismissed
		2. Def's *Pro Se* Motion for Notice of Appeal	2. Dismissed
		3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	3. Dismissed
		4. Def's *Pro Se* Motion for *Nunc Pro Tunc* Order to Correct Judicial and Procedural Act on Subject Matter Jurisdiction	4. Dismissed
		5. Def's *Pro Se* Motion for a Subpoena *Duces Tecum*	5. Dismissed
		6. Def's *Pro Se* Motion to Grant Belated Appeal	6. Dismissed
		7. Def's *Pro Se* Motion to Dismiss First Degree Murder Bill of Information	7. Dismissed
		8. Def's *Pro Se* Motion to Plead to Lesser Degree or Offense	8. Dismissed
		9. Def's *Pro Se* Motion to Proceed No Security for Costs in Criminal Appeal	9. Dismissed
260P16	Archie David Powell, Jr. v. State	Plt's *Pro Se* Motion for Complaint/Claim	Dismissed
261P16	State v. John Sinclair	Def's *Pro Se* Motion for Notice of Appeal	Dismissed
263P16	State v. Norman Johnson Oakley, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1126)	Denied
266P16	State v. Timothy Terrell Crandell	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-461)	1. —
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Dismissed
		3. Def's Petition for *Writ of Certiorari* to Review Decision of COA	3. Denied
		4. State's Motion to Dismiss Appeal	4. Allowed

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274P16	Michael P. Long and Marie C. Long v. Currituck County, North Carolina and Elizabeth Letendre	1. Respondent's (Elizabeth Letendre) Motion for Temporary Stay (COA15-376) 2. Respondent's (Elizabeth Letendre) Petition for *Writ of Supersedeas* 3. Respondent's (Elizabeth Letendre) PDR Under N.C.G.S. § 7A-31 4. Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **07/28/2016** Dissolved **09/22/2016** 2. Denied 3. Denied 4. Dismissed as moot
276P16	In the Matter of the Estate of Richard Dixon Peacock Date of Death: 12/19/2013	Respondent's PDR Under N.C.G.S. § 7A-31 (COA15-1238)	Denied
278P16	State v. Michael Lawrence Klingler	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
281P16	State v. Dequonta McKinnon	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wayne County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
283P16	In re Alexander White	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
285P97-2	State v. Darryl Anthony Howard	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **07/16/2014** Dissolved *ex mero motu nunc pro tunc* **08/31/2016** 2. Dismissed as moot **08/31/2016**
286P16	State v. Justin Kyle Mills	Def's PDR Under N.C.G.S. § 7A-31 (COA16-64)	Denied

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287P16	State v. Arvin Roscoe Hayes	1. State's Motion for Temporary Stay (COA16-207) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Modify Temporary Stay	1. Allowed **08/05/2016** Dissolved **08/31/2016** 2. Denied **08/31/2016** 3. Denied **08/31/2016** 4. Dismissed as moot **08/31/2016**
288P16	The Town of Beech Mountain v. John Milligan and wife, Sharon Milligan	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1267)	Denied
292P13-2	State v. Jose Ismael-Ruiz Zuniga	1. Def's *Pro Se* Motion for Petition for Writ of Error 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
299P16	State v. Robert Craig Barbee	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP16-542) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
300P16	Ninti El Bey v. County of Mecklenburg, Register of Deeds David Granberry, Official and Individual Capacity	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County	Dismissed
301P16	Michael Anthony Taylor v. Ola Mae Lewis, Senior Resident Superior Court Judge of Brunswick County	1. Petitioner's *Pro Se* Motion for Notice of Appeal (COAP16-462) 2. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Dismissed *ex mero motu* **09/02/2016** 2. Dismissed as moot **09/02/2016**
308P16	State v. Robert William Ashworth	1. State's Motion for Temporary Stay (COA15-1279) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/22/2016** 2. 3.
315P16	State v. Rodney Maurice Lutz	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1081)	Denied

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317PA14-2	State v. Rodney Nigee Pledger Taylor	Def's PDR Under N.C.G.S. § 7A-31 (COA14-21-2)	Denied
317P16	State v. Ronald Thompson Corbett	Def's *Pro Se* Motion for Writ of Prohibition	Dismissed **09/12/2016**
318P16	In the Matter of the Foreclosure of a Deed of Trust Executed by Donald R. Bagwell and Sylvia J. Bagwell Dated February 26, 2003 and Recorded in Book 2910 at Page 533 in the Orange County Public Registry, North Carolina, et al.	1. Petitioner's (Donald R. Bagwell) *Pro Se* Motion for Writ of Prohibition and/or Temporary Restraining Order 2. Petitioner's (Donald R. Bagwell) *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed **08/30/2016** 2. Dismissed **08/30/2016**
318P16-2	In the Matter of the Foreclosure of a Deed of Trust Executed by Donald R. Bagwell and Sylvia J. Bagwell Dated February 26, 2003 and Recorded in Book 2910 at Page 533 in the Orange County Public Registry, North Carolina, et al.	1. Petitioner's *Pro Se* Motion for Writ of Prohibition and/or Temporary Restraining Order 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed **09/08/2016** 2. Dismissed **09/08/2016**
319P16	James E. Price v. Larry Smith, Interim Chief of Police, Durham Police Department, and Michael D. Andrews, Sheriff of Durham County, North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County (COAP16-290) 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **08/29/2016** 2. Allowed **08/29/2016**
323P16	Danielle Star Maldonado-Reynolds v. Frank L. Perry, Secretary, N.C. Department of Public Safety	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **09/01/2016**

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326P15-3	Burl Anderson Howell v. North Carolina Wayne County Department of Health and Human Services, By and Through, Reese Phelps; Lou Jones Petitioner's	Petitioner's *Pro Se* Motion for Appeal *In Forma Pauperis* (COAP16-339)	Dismissed
326P16	State v. Pedro Berrero	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
328P16	Linwood Wilson v. Barbara Wilson	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA15-1141) 2. Plt's *Pro Se* Motion for Temporary Stay 3. Plt's *Pro Se* Petition for *Writ of Supersedeas*	1. 2. Denied **09/06/2016** 3.
329P14-2	State v. Dwayne Demont Haizlip	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-617) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **09/19/2016** 2. Allowed **09/19/2016** 3. Dismissed as moot **09/19/2016** **Ervin, J., recused**
330A16	Allscripts Healthcare, LLC v. Etransmedia Technology, Inc.	Plt's Motion to File and Maintain Certain Documents from the Record on Appeal Under Seal	Allowed **09/06/2016**
331A16	State v. Amanda Gayle Reed	1. State's Motion for Temporary Stay (COA15-363) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/06/2016** 2.

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332P16	Sandra D. Snipes and William J. Snipes v. Britthaven, Inc., Principle Long Term Care, Inc., Spruce LTC Group, LLC d/b/a Richmond Pines Healthcare and Rehabilitation Center, and Fred McQueen, Jr., M.D.	1. Defs' (Britthaven, Inc., Principle Long Term Care, Inc., and Spruce LTC Group, LLC d/b/a Richmond Pines Healthcare and Rehabilitation Center) Motion for Temporary Stay (COA16-291) 2. Defs' (Britthaven, Inc., et al.) Petition for *Writ of Supersedeas* 3. Defs' (Britthaven, Inc., et al.) Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **09/07/2016** 2. 3.
338A95-2	State v. Keith Antonia Wagner	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
345P16	State v. Dwayne Demont Haizlip	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-616) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **09/19/2016** 2. Allowed **09/19/2016** 3. Dismissed as moot **09/19/2016** **Ervin, J., recused**
346P16	Gurney B. Harris v. Southern Commercial Glass, Auto Owners Insurance, and Southeastern Installation, Inc., Cincinnati Insurance Company	1. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) Motion for Temporary Stay (COA15-1363) 2. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) *Writ of Supersedeas* 3. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) PDR Under N.C.G.S. § 7A-31 4. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) Motion to Hold PDR in Abeyance	1. Allowed **09/20/2016** 2. 3. 4.
362P15-2	State v. Bryant T. Dennings	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

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402P15	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414)	1. Special Order
		2. State's Motion to Strike Def's Reply to State's Response	2. Allowed
		3. Def's Motion to Hold PDR in Abeyance	3. Allowed **04/13/2016** ---
		4. Def's Motion for Temporary Stay	4. Allowed **12/17/2015** ---
		5. Def's Petition for *Writ of Supersedeas*	5. Dismissed as moot
		6. Def's Motion to Lift the Abeyance of the PDR	6. Allowed
409PA15	Nies v. Town of Emerald Isle	Russell Walker's *Pro Se* Motion for Leave to File *Amicus* Brief (COA15-169)	Denied **09/01/2016**
451P07-2	Carl Wayne Moore, Sr. v. Superintendent Faye Daniels	Petitioner's Petition for a *Writ of Habeas Corpus*	Denied **09/12/2016**
532P11-2	State v. Douglas Harold McMickle	Def's *Pro Se* Motion to Appoint Counsel	Dismissed **Beasley, J., recused** **Ervin, J., recused**

CITY OF ASHEVILLE, A MUNICIPAL CORPORATION
v.
STATE OF NORTH CAROLINA AND THE METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY

No. 391PA15

Filed 21 December 2016

Constitutional Law—North Carolina—prohibited local act—health and sanitation—water and sewage system

Where the General Assembly passed legislation that effectively required the City of Asheville to involuntarily transfer the assets it used to operate a public water system to a new metropolitan water and sewerage district, the Supreme Court held that the legislation was a prohibited local act relating to health and sanitation, in violation of Article II, Section 24(1)(a) of the state constitution. First, the legislation was crafted such that the involuntary transfer provision would apply only to the City of Asheville, and this classification bore no reasonable relationship to the stated justification of the legislation. Second, in light of its stated purpose and practical effect regarding public water and sewer services, the legislation had a material connection to issues involving health, sanitation, and the abatement of nuisances.

Justice NEWBY dissenting.

Chief Justice MARTIN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) from a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 92 (2015), affirming in part and reversing and remanding in part a summary judgment order entered on 9 June 2014, as clarified by means of a consent order entered on 3 July 2014, both by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 17 May 2016 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Ellis & Winters LLP, by Matthew W. Sawchak, Paul M. Cox, and Emily E. Erixson; Campbell Shatley, PLLC, by Robert F. Orr; Long, Parker, Warren, Anderson & Payne, P.A., by Robert B. Long, Jr.;

and City of Asheville City Attorney's Office, by Robin T. Currin, for plaintiff-appellant.

Roy Cooper, Attorney General, by I. Faison Hicks, Special Deputy Attorney General, for defendant-appellee State of North Carolina.

Cauley Pridgen, P.A., by James P. Cauley, III and Gabriel Du Sablon, for City of Wilson, amicus curiae.

Allegra Collins Law, by Allegra Collins, and Alexandra Davis, for International Municipal Lawyers Association, amicus curiae.

Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel III, Associate General Counsel, for North Carolina League of Municipalities, amicus curiae.

ERVIN, Justice.

In 2013, the General Assembly enacted legislation that effectively required the City of Asheville to involuntarily transfer the assets that it uses to operate a public water system to a newly created metropolitan water and sewerage district. *See* Act of May 2, 2013, ch. 50, 2013 N.C. Sess. Laws 118, amended by Act of July 22, 2013, ch. 388, secs. 4-5, 2013 N.C. Sess. Laws 1605, 1618. Following the enactment of this legislation, the City sought a declaratory judgment and injunctive relief in Superior Court, Wake County. The trial court concluded that this involuntary transfer violated various provisions of the North Carolina Constitution, declared the relevant statutory provisions to be void and unenforceable, and permanently enjoined the State from enforcing the legislation. On appeal, the Court of Appeals reversed the trial court's order, in part, and directed the trial court to enter summary judgment in favor of the State. *City of Asheville v. State*, ___ N.C. App. ___, ___, 777 S.E.2d 92, 102 (2015). In view of our determination that the legislation in question constitutes a prohibited "[l]ocal . . . act . . . [r]elating to health[and] sanitation" in violation of Article II, Section 24(1)(a) of the North Carolina Constitution, we reverse the Court of Appeals' decision. N.C. Const. art. II, § 24(1)(a).

The City is a municipal corporation that is authorized, among other things, to own and acquire property. N.C.G.S. §§ 160A-1(2), -11 (2015). Pursuant to N.C.G.S. §§ 160A-311(2) and 160A-312, along with Chapter 399 of the 1933 Public-Local Laws, Chapter 140 of the 2005

Session Laws, and Chapter 139 of the 2005 Session Laws (the last three of which are referred to collectively as "the Sullivan Acts" and individually as "Sullivan I," "Sullivan II," and "Sullivan III," respectively, *see City of Asheville v. State*, 192 N.C. App. 1, 4-5, 665 S.E.2d 103, 109 (2008) (*Asheville I*), *appeal dismissed & disc. rev. denied*, 363 N.C. 123, 672 S.E.2d 685 (2009)), the City owns and operates a system for the supply, treatment, and distribution of water and for the operation of sanitary disposal systems serving individuals and entities both within and outside of its corporate limits.[1] *See* N.C.G.S. §§ 160A-311(2), -312 (2015); Act of Apr. 28, 1933 (Sullivan I), ch. 399, 1933 N.C. Pub.-Local Laws 376 (captioned "An Act to Regulate Charges Made by the City of Asheville for Water Consumed in Buncombe County Water Districts"); Act of June 29, 2005 (Sullivan III), ch. 139, 2005 N.C. Sess. Laws 243 (captioned "An Act Regarding the Operation of Public Enterprises by the City of Asheville"); Act of June 29, 2005 (Sullivan II), ch. 140, 2005 N.C. Sess. Laws 244 (captioned "An Act Regarding Water Rates in Buncombe County"). As of 29 August 2013, the City provided water service to approximately 124,000 customers, approximately 48,000 of whom received service outside the City's municipal limits. The City's water system has been built and maintained over the course of the past century using a combination of taxes, service fees, connection charges, bonded indebtedness, federal and state grants, contributions from Buncombe County, and donations from property owners and developers.[2]

Customers in Buncombe County served by the City's water system receive sewer service from the Metropolitan Sewerage District of Buncombe County,[3] a political subdivision that is authorized, among other things, to own, operate, and maintain a system for the treatment and disposal of sewerage in its assigned service area. *See* N.C.G.S.

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1. As of June 2014, the City's water system consisted of a sizeable watershed; two impoundments; three water treatment plants; 29 treated water storage reservoirs; 1,661 miles of transmission and distribution lines; at least 40 pump stations; and certain intangible assets, including, but not limited to, approximately 147 trained and certified employees, numerous licenses, wholesale water supply contracts, contracts for the supply of goods and services, and revenue accounts containing more than $2,218,000.00 that are held for the purpose of ensuring repayment of outstanding bonded indebtedness.

2. Although some of the assets of Asheville's water system were, at one time, owned by Buncombe County, the County conveyed its interest in those assets to the City on 15 May 2012.

3. Although the Metropolitan Sewerage District has been joined as a party defendant in this case, it has not taken a position with respect to the merits of any of the claims asserted in the City's pleadings.

§§ 162A-65(8), -69 (2015). The Metropolitan Sewerage District has never provided water service to any customer.

In May 2013, House Bill 488, which is entitled "An Act to Promote the Provision of Regional Water and Sewer Services by Transferring Ownership and Operation of Certain Public Water and Sewer Systems to a Metropolitan Water and Sewerage District," became law. Ch. 50, 2013 N.C. Sess. Laws 118. According to Section 2 of the legislation, two or more political subdivisions are authorized to voluntarily establish a new type of entity, to be known as a "metropolitan water and sewerage district," which is "authorized and empowered" to "exercise any power of a Metropolitan Water District under G.S. 162A-36, except subdivision (9) of that section"; to "exercise any power of a Metropolitan Sewer District under G.S. 162A-69, except subdivision (9) of that section"; and "[t]o do all acts and things necessary or convenient to carry out the powers granted by" the newly created Article 5A. *Id.*, sec. 2, at 119-24. Pursuant to Section 1(a) of the legislation, "[a]ll assets, real and personal, tangible and intangible, and all outstanding debts of any public water system" meeting certain statutorily specified criteria "are by operation of law transferred to the metropolitan sewerage district operating in the county where the public water system is located" regardless of whether the municipality in question consents to the required transfer.[4] *Id.*, sec. 1(a), at 118-19. Finally, Section 5.5 of the legislation provides that no metropolitan sewerage district can be created in any county which currently lacks such an entity without the consent of all the affected political subdivisions in the proposed district, *id.*, sec. 5.5, at 125, a provision that has the effect of preventing any involuntary transfers of the type required by Section 1 in the future.

On 14 May 2013, the City filed a complaint and a motion seeking temporary, preliminary, and permanent injunctive relief in which the City alleged that the involuntary transfer provisions of the legislation, which were specifically designed to apply to the City and to no other municipality in North Carolina, constituted an invalid local act "[r]elating to health, sanitation, and the abatement of nuisances" prohibited by Article II, Section 24(1)(a) of the North Carolina Constitution and "[r]elating to non-navigable streams" prohibited by Article II, Section 24(1)(e) of the North Carolina Constitution; violated the City's due process and equal protection rights as guaranteed by Article I, Section 19

4. The first six sentences of Chapter 50 of the 2013 North Carolina Session Laws are titled Sections 1(a) through 1(f). Chapter 388 of the 2013 Session Laws added Section 1(g). The parties regularly referred to these seven sections as simply "Section 1."

of the North Carolina Constitution; worked an unlawful taking of the City's property in violation of Article I, Sections 19 and 35 of the North Carolina Constitution; impaired the City's contracts with the holders of the bonds that had been issued to finance the construction of the City's water system in violation of Article I, Section 10 of the United States Constitution; impaired the City's obligations to its bondholders under N.C.G.S. § 159-93; and, in the alternative, took the City's property without just compensation in violation of Article I, Sections 19 and 35 of the North Carolina Constitution. Based upon these claims, the City sought a declaration that Section 1 of the legislation is unconstitutional; asked that the enforcement of Section 1 of the legislation be temporarily restrained and preliminarily and permanently enjoined; and requested that, in the alternative, the City be awarded monetary damages sufficient to indemnify the City from any loss that might result from the enactment of the legislation. On 14 May 2013, Judge Donald W. Stephens entered a temporary restraining order precluding the implementation or enforcement of Section 1 of the legislation.[5]

On 23 August 2013, the Governor signed Chapter 388 of the 2013 Session Laws, which had been enacted by the General Assembly on 22 July 2013 and which amended Section 1 of the Act in two ways. Ch. 388, secs. 4-5, 2013 N.C. Sess. Laws at 1618. More specifically, the newly enacted legislation repealed Section 1(a)(2) of Chapter 50 of the 2013 Session Laws so as to effectively eliminate one of the original criteria necessary to trigger an involuntary transfer of a covered municipality's water system, *id.*, sec. 4, at 1618 (stating that "Section 1(a)(2) of S.L. 2013-50 is repealed"), and added a new exemption from the existing involuntary transfer requirement, *id.*, sec. 5, at 1618 (amending "S.L. 2013-50 . . . by adding a new section" 1.(g)). As a result, the trial court entered a consent order providing, among other things, that the parties would be allowed to amend their pleadings to reflect these modifications to the legislation.

On 2 October 2013, the City filed an amended complaint in which it asserted the same substantive claims that had been raised in its initial pleading.[6] On 7 November 2013, the State filed a responsive pleading in which it alleged, among other things, that the City lacked the capacity

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5. The enforcement of Section 1 of the legislation has been enjoined throughout the course of this litigation.

6. The City predicated its amended impairment of contract claim upon both Article I, Section 10 of the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

and standing to bring its claims against the State and denied the material allegations of the City's complaint. On 27 February 2014, the State and the City filed motions seeking summary judgment in their favor. On 9 June 2014, the trial court entered an order finding that there were no genuine issues of material fact and determining that the legislation (1) "was specifically drafted and amended to apply only to Asheville and the Asheville Water System," making it "a local act which relates to health and sanitation in violation of Article II, Section 24(1)(a) of the North Carolina Constitution" and "a local act relating to non-navigable streams . . . in violation of Article II, Section 24(1)(e) of the North Carolina Constitution"; (2) "is contrary to the law of the land in violation of Article I, Section 19 of the North Carolina Constitution as the means utilized to achieve what the legislation sought to obtain bears no relation, rational basis or otherwise, to the Act's stated purpose"; and (3) "is not a valid exercise of the sovereign power of the legislative branch of government (or the State of North Carolina) to take or condemn property for a public use" in violation of Article I, Sections 19 and 35 of the North Carolina Constitution. In the alternative, the trial court further determined that, in the event that the General Assembly had the authority to order the involuntary transfer of the City's water system, "Asheville, as the owner of the Asheville Water System, is entitled to be paid just compensation." In light of these determinations, the trial court permanently enjoined enforcement of the legislation. As a result of its decision to grant the relief that had been requested by the City on other grounds, the trial court "decline[d] to address" the claims that the City asserted pursuant to the state and federal contract clauses.[7] On 3 July 2014, the trial court entered a consent order indicating that it had declined to rule on the claims that the City had asserted pursuant to the contract clauses and N.C.G.S. § 159-93 on the grounds that they had "been rendered moot by the Court's ruling on the other claims." The State noted an appeal to the Court of Appeals from the trial court's orders.

Before the Court of Appeals, the State argued that the trial court had erred by concluding (1) that the City had the capacity and standing to bring its claims against the State; (2) that the Act is a "local[ ] . . . act" "[r]elating to health[and] sanitation," N.C. Const. art. II, § 24(1)(a), and "non-navigable streams," *id.* art. II, § 24(1)(e); (3) that Section 1 of the legislation violated the City's state equal protection and substantive due process rights; and (4) that Section 1 of the legislation effected an

7. Although the trial court did not directly reference the City's claim pursuant to N.C.G.S. § 159-93, it did not address this claim either.

unlawful taking of the City's property and, alternatively, that the City would be entitled to just compensation in the event that the involuntary transfer of its water system was lawful. In response, the City asserted (1) that it "unquestionably has standing to challenge the constitutionality" of the Act; (2) that Section 1 of the legislation is an unconstitutional "local act" "relating to health and sanitation" in violation of Article II, Section 24(1)(a) and "relating to non-navigable streams" in violation of Article II, Section 24(1)(e); (3) that, although the Court of Appeals "need not reach the[se] issue[s,]" the legislation "violates both the takings element . . . and the due process and equal protection elements of" Article I, Section 19 of the North Carolina Constitution; and (4) that, if the Court of Appeals were to reverse the trial court, the City's bond-related claims "would remain for consideration" before the trial court.

After determining that the City had standing to challenge the constitutionality of the legislation "because it ha[d] not accepted any benefit from" the Act, *City of Asheville*, ___ N.C. App. at ___, 777 S.E.2d at 95 (citing *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 790, 488 S.E.2d 144, 146 (1997)),[8] the Court of Appeals held that the trial court had erred by invalidating the legislation, *id.* at ___, 777 S.E.2d at 102. After assuming for purposes of argument that the legislation "constitute[d] a 'local law,' " the court held that "it is not *plain and clear* and *beyond reasonable doubt*" that Section 1 "falls within the ambit of" Article II, Section 24(1)(a) or Article II, Section 24(1)(e) of the North Carolina Constitution. *Id.* at ___, 777 S.E.2d at 97. Instead, the legislation "appear[s] to prioritize concerns regarding the governance over water and sewer systems and the quality of the services rendered." *Id.* at ___, 777 S.E.2d at 98 (citing ch. 50, sec. 2, 2013 N.C. Sess. Laws at 119-24 (codified at Article 5A in N.C.G.S. Chapter 162A)).[9] In addition, the Court of Appeals concluded that the legislation did not violate the City's right to equal protection under the state constitution, *id.* at ___, 777 S.E.2d at 99-101, effectuate a taking of Asheville's water system for an invalid purpose, *id.* at ___, 777 S.E.2d at 101, or result in a valid taking for which the City was entitled to just compensation, *id.* at ___, 777 S.E.2d at 101-02.[10]

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8. The State has not sought review of the Court of Appeals' decision with respect to the standing issue.

9. On the basis of a similar analysis, the Court of Appeals concluded that "[t]here is nothing in the . . . Act which suggests that its purpose is to address some concern regarding a non-navigable stream." *Id.* at ___, 777 S.E.2d at 98. The City has not requested review of this aspect of the Court of Appeals' decision.

10. The City has not sought review by this Court of the Court of Appeals' decision to reject its due process and equal protection claims.

Finally, with respect to the claims that the City had asserted pursuant to the contract clauses and N.C.G.S. § 159-93, the Court of Appeals stated that, because the City had not argued that those claims constituted "an alternative basis in law for supporting" the relief sought, it had waived the right to assert those claims in the future. *Id.* at ___, 777 S.E.2d at 95 n.2 (quoting N.C. R. App. P. 10(c)); *id.* at ___, 777 S.E.2d at 102-03. As a result, the Court of Appeals reversed, in part, the trial court's order and remanded the case to the trial court for the entry of summary judgment in the State's favor. *Id.* at ___, 777 S.E.2d at 102. After the City unsuccessfully sought rehearing of the Court of Appeals' decision with respect to, among other things, the claims that the City had asserted in reliance upon the contract clauses and N.C.G.S. § 159-93, this Court retained jurisdiction over the City's notice of appeal and allowed the City's petition for discretionary review.

In seeking relief from this Court, the City argues that the Court of Appeals erred (1) by concluding that Section 1 of the legislation is not an unconstitutional local act relating to health and sanitation prohibited by Article II, Section 24(1)(a) of the North Carolina Constitution; (2) in holding that Section 1 of the legislation does not effectuate a taking for which Asheville is entitled to compensation pursuant to Article I, Section 19 of the North Carolina Constitution; and (3) by appearing to hold that the City had abandoned any right to assert its claims pursuant to the contract clauses and N.C.G.S. § 159-93 on remand by failing to raise them on appeal pursuant to Rule 10(c) of the North Carolina Rules of Appellate Procedure. For the reasons set forth below, the Court of Appeals' decision is reversed.[11]

> It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

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11. Although we need not reach the issue of whether the Court of Appeals erred by apparently holding that the City had waived the right to have the claims that it had asserted pursuant to the contract clauses and N.C.G.S. § 159-93 considered on remand by failing to assert those claims as an alternative basis for upholding the trial court's order pursuant to Rule 10(c) of the North Carolina Rules of Appellate Procedure, we disavow that holding in order to avoid confusion in subsequent cases. Simply put, nothing in the relevant provisions of the North Carolina Rules of Appellate Procedure or any of our prior cases requires an appellee to challenge legal decisions that the trial court declined to make on the grounds that the case could be fully resolved on some other basis on appeal pursuant to Rule 10(c) of the North Carolina Rules of Appellate Procedure at the risk of losing the right to assert those claims at a later time.

Glenn v. Bd. of Educ., 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936). In determining "the constitutionality of a legislative act it is not for this Court to judge its wisdom and expediency. These matters are the province of the General Assembly." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 690, 249 S.E.2d 402, 406 (1978). On the other hand, " '[i]f there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.' " *Id.* at 690, 249 S.E.2d at 406 (quoting *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969) (citation omitted)).

Article II, Section 24 of the North Carolina Constitution, which expressly forbids the General Assembly from "enact[ing] any local, private, or special act or resolution" concerning fourteen "[p]rohibited subjects," N.C. Const. art. II, § 24(1), "is the fundamental law of the State and may not be ignored," *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965). More specifically, Article II, Section 24 of the North Carolina Constitution provides that:

> (1) Prohibited subjects. – The General Assembly shall not enact any local, private, or special act or resolution:
>
> (a) Relating to health, sanitation, and the abatement of nuisances;
>
> . . . .
>
> (3) Prohibited acts void. – Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

N.C. Const. art. II, § 24(1)(a), (3). Although the General Assembly shall not "enact any local, private, or special act" regarding any of the fourteen prohibited subjects listed in Article II, Section 24(1) "by the partial repeal of a general law," *id.* art. II, § 24(2), it "may . . . repeal local, private, or special laws enacted by it," *id.*, and "enact general laws regulating the matters set out" in the relevant constitutional provision, *id.* art. II, § 24(4).

As the history of Article II, Section 24 of the North Carolina Constitution[12] demonstrates:

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12. At the time of its original adoption, the language now contained in Article II, Section 24 appeared in Article II, Section 29.

> The organic law of the State was originally drafted and promulgated by a convention which met at Halifax in December, 1776. During the ensuing 140 years, the Legislature of North Carolina possessed virtually unlimited constitutional power to enact local, private, and special statutes. This legislative power was exercised with much liberality, and produced a plethora of local, private, and special enactments. As an inevitable consequence, the law of the State was frequently one thing in one locality, and quite different things in other localities. To minimize the resultant confusion, the people of North Carolina amended their Constitution at the general election of 1916 so as to deprive their Legislature of the power to enact local, private, or special acts or resolutions relating to many of the most common subjects of legislation.
>
> . . . .
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> In thus amending their organic law, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this section shall be void [. . . .]"

Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 185-86, 581 S.E.2d 415, 426-27 (2003) (quoting *Idol v. Street*, 233 N.C. 730, 732-33, 65 S.E.2d 313, 314-15 (1951) (first alteration in original) (quoting N.C. Const. of 1868, art. II, § 29 (1917) (now art. II, § 24(3)))).

> It was the purpose of the amendment to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by *general laws* to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State.

High Point Surplus Co., 264 N.C. at 656, 142 S.E.2d at 702. We are called upon to evaluate the constitutionality of Section 1 of the legislation against this historical backdrop.

"The first issue [that must be resolved in this case] is whether the Act is a *local act* prohibited by Article II, section 24 of the Constitution or is a *general law* which the General Assembly has the power to enact." *Adams*, 295 N.C. at 690, 249 S.E.2d at 406. "A statute is either 'general' or 'local'; there is no middle ground." *High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702. "[N]o exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether [it is] general." *McIntyre v. Clarkson*, 254 N.C. 510, 517, 119 S.E.2d 888, 893 (1961). The primary test that this Court has employed for the purpose of differentiating between general and local acts for the past half-century has been the "reasonable classification" test adopted in *McIntyre*, *id.* at 517-19, 525-26, 119 S.E.2d at 893-95, 898-99. *See*, *e.g.*, *Williams*, 357 N.C. at 183-85, 581 S.E.2d at 425-26; *City of New Bern v. New Bern–Craven Cty. Bd. of Educ.*, 338 N.C. 430, 435-37, 450 S.E.2d 735, 738-39 (1994); *Adams*, 295 N.C. at 690-91, 249 S.E.2d at 406-07; *Treasure City of Fayetteville*, *Inc. v. Clark*, 261 N.C. 130, 133, 134 S.E.2d 97, 99 (1964). In applying this test, we must remember that "the number of counties included or excluded [from the ambit of an act] is not necessarily determinative." *High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702.

> Conceivably, a statute may be local if it excludes only one county. On the other hand, it may be general if it includes only one or a few counties. It is a matter of classification. For the purposes of legislating, the General Assembly may and does classify conditions, persons, places and things, and classification does not render a statute "local" if the classification is reasonable and based on rational difference of situation or condition; "[u]niversality is immaterial so long as those affected are reasonably different from those excluded and for the purpose of the [act] there is a logical basis for treating them in a different manner." A law is local "where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, [ ] where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where [the] classification does not rest on circumstances distinguishing the places included from those excluded."

Id. at 656-57, 142 S.E.2d at 702 (first alteration in original) (quoting *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894) (citations omitted)). Put another way, a local law "discriminates between different localities without any real, proper, or reasonable basis or necessity ~~a~~ necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless or detrimental to the others." *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894 (quoting 50 Am. Jur. *Statutes* § 8, at 25 (1944) (footnotes omitted)).

> On the other hand, a law is general " 'if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law.' [ ] Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction and operate the same on all parts of the [S]tate under the same conditions and circumstances. Classification must not be discriminatory, arbitrary or capricious."

High Point Surplus Co., 264 N.C. at 657, 142 S.E.2d at 702-03 (quoting *McIntyre*, 254 N.C. at 519, 119 S.E.2d at 894) (citation omitted)). As noted by a leading scholar cited with regularity by this Court, *e.g.*, *Adams*, 295 N.C. at 690-91, 249 S.E.2d at 407:

> In barest outline, a statutory classification is held to be "reasonable" if it satisfies the following five tests: (1) the classification must be based upon substantial distinctions which make one class really different from another; (2) the classification adopted must be germane to the purpose of the law; (3) the classification must not be based upon existing circumstances only; (4) to whatever class a law may apply, it must apply equally to each member thereof; and (5) if the classification meets these requirements, the number of members in a class is wholly immaterial.

Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev. 340, 391-92 (1967) [hereinafter Ferrell, *Local Legislation*] (footnotes omitted). The reasonable classification test utilized to distinguish between general and local legislation is not equivalent to the rational basis test utilized in due process and equal protection cases. *See id.* at 391-92 (footnotes omitted).

In *Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987), this Court articulated a different test for determining whether an act is

general or local that focused on "the extent to which the act in question affects the general public interests and concerns," *id.* at 651, 360 S.E.2d at 763 (applying this test to legislation that provided for a specific public pedestrian beach access point and related facilities at Bogue Inlet in Carteret County), which we have not utilized in any subsequent case. We "departed from the reasonable classification method of analysis" in *Town of Emerald Isle* because it was " 'ill-suited to the question presented [there], since by definition a particular public pedestrian beach access facility must rest in but one location.' " *City of New Bern*, 338 N.C. at 436, 450 S.E.2d at 739 (quoting *Town of Emerald Isle*, 320 N.C. at 650, 360 S.E.2d at 762). The City contends that the legislation is a local law under either test while the State advances the opposite contention. We find the City's argument persuasive.

The legislation states that:

> Whereas, regional water and sewer systems provide reliable, cost-effective, high-quality water and sewer services to a wide range of residential and institutional customers; and
>
> Whereas, in an effort to ensure that the citizens and businesses of North Carolina are provided with the highest quality services, the State recognizes the value of regional solutions for public water and sewer for large public systems; Now, therefore,

Ch. 50, pmbl., 2013 N.C. Sess. Laws at 118. Simply put, the General Assembly stated that large, public regional water and sewer systems will better ensure that North Carolina citizens have access to higher quality, cost-effective water and sewer services and that the creation of regional water and sewer systems should be encouraged for that reason. In view of the fact that the stated purpose of the legislation contains no indication that it was site-specific in nature, we conclude that the reasonable classification test should be utilized in determining whether the legislation is local or general in nature. *See*, *e.g.*, *Williams*, 357 N.C. at 184-85, 581 S.E.2d at 426 (applying the "reasonable classification" test on the grounds that, while "the enabling legislation and the Ordinance allowing for the creation of a comprehensive civil rights ordinance apply only to Orange County, this legislation is not site-specific as in *Emerald Isle* because '[s]uch a legislated change could be effected as easily in [Orange County] as in any other [county] in the state' " (alterations in original) (quoting *City of New Bern*, 338 N.C. at 436, 450 S.E.2d at 739)).

According to Section 1 of the legislation, as amended, the involuntary transfer of a municipal water system to a metropolitan water and sewerage system is required if, and only if, (1) "[t]he public water system is owned and operated by a municipality located in a county where a metropolitan sewerage district is operating" and (2) "[t]he public water system serves a population of greater than 120,000 people." Ch. 50, sec. 1(a), 2013 N.C. Sess. Laws at 118-19, as amended by Ch. 388, sec. 4, 2013 N.C. Sess. Laws at 1618. In other words, the involuntary transfer provisions of Section 1 do not apply to any municipality that operates a water system unless that municipality serves more than 120,000 customers and is located in a county in which a metropolitan sewerage district provides sewer service pursuant to Article 5 of Chapter 162A of the North Carolina General Statutes, N.C.G.S. §§ 162A-64 to -81 (2015). Although the legislation appears to create a class of municipalities to which the involuntary transfer provisions of Section 1 apply, an examination of the criteria delineating the composition of that class demonstrates that the involuntary transfer provision has been crafted in such a manner that it does not and will not apply to any municipality other than the City.

According to the undisputed record evidence, there are only three metropolitan sewerage districts presently operating in North Carolina: the Metropolitan Sewerage District of Buncombe County, the Contentnea Metropolitan Sewerage District in Pitt County, and the Bay River Metropolitan Sewerage District in Pamlico County. The only municipal water system located in a county served by one of these three metropolitan sewerage districts that has over 120,000 customers is that owned and operated by the City. Although existing population growth trends create some possibility that the water system operated by the City of Greenville could reach the 120,000 person threshold in the foreseeable future,[13] the General Assembly took affirmative action to eliminate any risk that Greenville would ever have to involuntarily transfer its water system to the Contentnea Metropolitan Sewerage District.

As originally enacted, the legislation contained a third criterion that had to be met before an involuntary transfer was required, which was that "[t]he public water system has not been issued a certificate for an interbasin transfer." Ch. 50, sec. 1(a)(2), 2013 N.C. Sess. Laws at 119. In view of the fact that Greenville possessed an interbasin transfer

13. The record clearly establishes that none of the municipal water systems located in the territory in which the Bay River Metropolitan Sewerage District operates have any prospect of serving the requisite number of customers in the foreseeable future.

certificate, it was exempt from the involuntary transfer requirement contained in the original version of the legislation. Although the enactment of Chapter 388, Section 4 of the 2013 Session Laws eliminated the interbasin transfer certificate exception from the involuntary transfer provision of the legislation, Section 5 of Chapter 388 of the 2013 Session Laws added Section 1(g), which provides that, "[f]or purposes of this section, a public water system shall not include any system that is operated simultaneously with a sewer system by the same public body, in conjunction with the provision of other utility services for its customers," to the legislation. Ch. 388, sec. 5, 2013 N.C. Sess. Laws at 1618. In view of the fact that Greenville provides both sewer and water service to its customers in conjunction with a system for the supply of electricity and natural gas, the enactment of Section 1(g) had the effect of preserving Greenville's exception from the involuntary transfer requirement.

In addition, we note that Section 5.5 of the legislation prohibits the creation of any new metropolitan sewerage districts without the consent of all relevant local governmental entities. Ch. 50, sec. 5.5, 2013 N.C. Sess. Laws at 125. The inclusion of Section 5.5 ensured that all of the other municipalities that currently operate water systems that serve more than 120,000 customers, such as Charlotte, Durham, Fayetteville, Greensboro, and Winston-Salem, or will operate such systems in the future will never be subjected to the involuntary transfer provisions of the legislation. Thus, the undisputed record evidence clearly shows that the City is the only entity that will ever be required to involuntarily transfer its water system to a metropolitan sewerage district under the legislation.

Although the fact that the City is the only municipality that will ever be subject to the involuntary transfer provisions of the legislation does not, standing alone, mean that the legislation is, per se, a "local" act, *see High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702 (stating that a statute "may be general if it includes only one or a few counties"), it does, however, indicate the existence of a serious question concerning the extent to which the classification contained in the legislation is "reasonable and germane to the law" and "based on a reasonable and tangible distinction," *id.* at 657, 142 S.E.2d at 702 (quoting *McIntyre*, 254 N.C. at 519, 119 S.E.2d 894 (citation omitted)). Nothing in the legislation in any way explains why every other municipality in North Carolina except the City should have the right to decide for itself whether to transfer its water system to a metropolitan water and sewerage district. Moreover, nothing in the legislation does anything to explain why the benefits that the General Assembly expects to result from the creation

of metropolitan water and sewerage districts should not be made available to the customers of every large municipal water system in North Carolina. The total absence of any justification for singling out the City's water system from other large municipally owned systems and the steps taken during the drafting process to ensure that the involuntary transfer provisions of the legislation did not apply to any municipality except the City demonstrate that the involuntary transfer provisions were never intended to apply to any municipal water system except that owned by the City. As a result, given the absence of any reasonable relationship between the stated justification underlying the legislation and the classification adopted by the General Assembly for the purpose of achieving its stated goal, the legislation is, without doubt, a local rather than a general law. *See*, *e.g.*, *Treasure City of Fayetteville*, 261 N.C. at 133-36, 134 S.E.2d at 99-101 (holding that a statute prohibiting sales of certain goods on Sunday that did not apply to all or portions of twenty-nine counties for the stated reason that the excluded territories were resort or tourist areas was a local, rather than a general, act given that the legislation did not apply to all of North Carolina's resort and tourist areas and given that some of the goods and services whose sale was prohibited by the legislation were of primary interest to permanent residents rather than tourists); *see also* Ferrell, *Local Legislation* 394 (noting the Court's holding that the statutory provision at issue in *Treasure City* was a local act given that the classification embodied in the challenged legislation was "a sham").

In spite of the absence of "any real, proper, or reasonable basis or . . . necessity springing from manifest peculiarities clearly distinguishing . . . and imperatively demanding" the involuntary transfer of the City's water system to a metropolitan water and sewerage district in the face of an apparent determination that similar treatment would be "useless or detrimental to [every] other[ ]" North Carolina municipality, *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894 (quoting 50 Am. Jur. *Statutes* § 8, at 25 (1944) (footnotes omitted)), the State hypothesizes that the General Assembly's decision to treat the City differently than all other North Carolina municipalities might hinge upon the "unique facts" and history of the "Asheville-Buncombe-Henderson region," which the State claims to consist of a "prolonged history of conflict between" the City and residents of Buncombe and Henderson Counties who are dependent on the City's water system that has been "characterized by charges of discrimination and the misuse of public monies and other resources" and has "engendered a toxically high level of public distrust and cynicism concerning local government in that region which itself makes

sound democratic governance there difficult to achieve." More specifically, the State asserts, as a purely hypothetical matter, that the General Assembly "could have" singled out the City's water system for involuntary transfer due to "fundamental and serious governance problems" that affect extraterritorial customers located in portions of Buncombe County outside the City's municipal limits and in Henderson County. In addition, the State hypothesizes that, given the area's status as a tourist destination, the General Assembly "could reasonably have concluded" that an involuntary transfer of the City's water system would prevent the "atmosphere of conflict in this region" from "tarnish[ing] . . . this region in the eyes of the public generally" and "threaten[ing], among other things, the vitality of a local tourist industry which is enormous and is of tremendous importance to all the citizens of this State." We do not find this argument persuasive.

At the outset, we note that this aspect of the State's defense of the legislation seems rooted in the rational basis test employed in the due process and equal protection context. *See*, *e.g.*, *In re R.L.C.*, 361 N.C. 287, 295, 643 S.E.2d 920, 924 (noting that, in the context of an as-applied due process challenge, evaluating "whether the law in question is rationally related to a legitimate government purpose" does not require "courts to determine the actual goal or purpose of the government action at issue" and allows the reviewing court to uphold the legislation on the basis of "any conceivable legitimate purpose" (citations omitted)), *cert. denied*, 552 U.S. 1024, 128 S. Ct. 615, 169 L. Ed. 2d 396 (2007). However, nothing in our Article II, Section 24 jurisprudence suggests that we should focus on a hypothetical, rather than the actual, justification for the challenged legislation in determining whether it should be deemed general or local in nature. Furthermore, a decision to approve the use of the hypothetical purpose approach suggested by the State would deprive Article II, Section 24 of the North Carolina Constitution of any meaningful effect by rendering it indistinguishable from the substantive due process provisions of Article I, Section 19 of the North Carolina Constitution. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 628 n.27, 171 L. Ed. 2d 637, 679 n.27, 128 S. Ct. 2783, 2818 n.27 (2008) (rejecting such a result under the federal constitution and, more specifically, stating that, "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect"). As a result, we will focus our analysis upon the extent, if any, to which there is record support for the State's argument to the effect that the legislation is a general, rather than a local, act.

Although the State has directed the Court's attention to "[t]he documented historical record" reflected in this Court's decision in *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958), and the Court of Appeals' 2008 decision in *City of Asheville*, these materials provide no support for the State's argument that the legislation is a general, rather than a local, law. Instead, we explicitly stated in *Candler* that "[t]here is nothing on this record which tends to show that the rate or rates to be charged" to extraterritorial customers "are unjust and confiscatory." *Id.* at 410, 101 S.E.2d at 479. Although the Court of Appeals did note the existence of "ample support in the record to justify the Legislature's findings that Asheville and Buncombe County have experienced a 'complicated pattern of dealings' with respect to the development and maintenance of its water distribution system" in *Asheville I*, 192 N.C. App. at 31-32, 665 S.E.2d at 125 (quoting Sullivan II, ch. 140, 2005 N.C. Sess. Laws at 246), the court also stated that (1) it was "not clear from the record that this history is one of 'manifest peculiarities clearly distinguishing' Asheville and Buncombe County from other municipalities and counties across the State," *id.* at 32, 665 S.E.2d at 125 (quoting *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894); (2) it was "not persuaded that the history of the development of the [Asheville] water distribution system" justified a decision to treat the City as unique for legislative classification purposes, *id.* at 32, 665 S.E.2d at 126; and (3) the statutory provisions at issue in *Asheville I* appeared to "embrace[ ] less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed," *id.* at 32, 665 S.E.2d at 126 (alteration in original) (quoting *Williams*, 357 N.C. at 184, 581 S.E.2d at 426 (quoting *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894)). Based upon these determinations, the court in *Asheville I* held that the challenged statutory provisions were "local acts." *Id.* at 32, 665 S.E.2d at 126. Moreover, the State conceded during oral argument that the present record contains no support for any assertion that the City continued to engage in abusive or discriminatory behavior after 2008. Finally, even if the legislation is intended to ensure the availability of better water service at a lower cost in Buncombe County by fostering the creation of a large, regional water and sewer system, the classification upon which the legislation relies "embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed," *Williams*, 357 N.C. at 184, 581 S.E.2d at 426 (quoting *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894), given that none of the other public water systems owned and operated by Buncombe County municipalities receiving service from the Metropolitan Sewerage District, including Biltmore Forest, Black

Mountain, Montreat, Weaverville, and Woodfin, are subject to the statute's involuntary transfer provision despite the fact that several of those municipalities charge higher rates to extraterritorial customers than to municipal residents and given that the Town of Hendersonville, which is located in Henderson County, owns and operates a municipal water system that charges higher rates to extraterritorial customers than to municipal residents as well. Thus, for all these reasons, the State's effort to establish that the legislation is a general, rather than a local, act necessarily fails.

Having determined that Section 1 of the Act is a local law, we must next consider whether the legislation "[r]elat[es] to health[and] sanitation." N.C. Const. art. II, § 24(1)(a). In answering this question in the negative, the Court of Appeals began by noting that, in the 2008 *City of Asheville* case, it had concluded that "the mere implication of water or a water system in a legislative enactment does not necessitate a conclusion that it relates to health and sanitation in violation of the Constitution," *id.* at ___, 777 S.E.2d at 97 (quoting *Asheville I*, 192 N.C. App. at 37, 665 S.E.2d at 129); that this Court's precedent "instructs" that a local law does not relate to health or sanitation "*unless* (1) the law plainly 'state[s] that *its purpose is to regulate* [this prohibited subject],' *or* (2) the reviewing court is able to determine 'that the purpose of the act is to regulate [this prohibited subject after] careful perusal of the entire act,' " *id.* at ___, 777 S.E.2d at 97-98 (second and third alterations in original) (quoting *Asheville I*, 192 N.C. App. at 33, 665 S.E.2d at 126 (first alteration in original) (citing and quoting *Reed v. Howerton Eng'g Co.*, 188 N.C. 39, 44, 123 S.E. 479, 481 (1924))); and "that the best indications of the General Assembly's purpose are 'the language of the statute, the spirit of the act, and what the act seeks to accomplish,' " *id.* at ___, 777 S.E.2d at 98 (quoting *Asheville I*, 192 N.C. App. at 37, 665 S.E.2d at 129 (quoting *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980))). As a result, the Court of Appeals "first look[ed] to see if the . . . Act expressly states that its purpose is to regulate health or sanitation" and answered that question in the negative on the theory that the Act's "*stated* purpose," as reflected in its preamble, "is to address concerns regarding the quality of the service provided to the customers of public water and sewer systems." *Id.* at ___, 777 S.E.2d at 98. Secondly, the Court of Appeals "peruse[d] the entire . . . Act to determine whether it is plain and clear that the Act's purpose is to regulate health or sanitation" and determined that "there are no provisions in the Act which 'contemplate[ ] . . . prioritizing the [Asheville Water System's] health or sanitary condition[.]' " *Id.* at ___, 777 S.E.2d at 98 (alterations in original) (quoting *Asheville I*, 192 N.C.

App. at 36-37, 665 S.E.2d at 128). On the contrary, the fact that Section 2 of the legislation "allows for the 'denial or discontinuance of [water and sewer] service,' by [a metropolitan water and sewerage district] based on a customer's non-payment," *id.* at ___, 777 S.E.2d at 98 (first alteration in original) (quoting Ch. 50, sec. 2, 2013 N.C. Sess. Laws at 122 (codified at N.C.G.S. § 162A-85.13(c))), "belies Asheville's argument that the purpose of the Act relates to health and sanitation," *id.* at ___, 777 S.E.2d at 98 (citing *Asheville I*, 192 N.C. App. at 35, 665 S.E.2d at 127). As a result, the Court of Appeals concluded that the legislation "appear[s] to prioritize concerns regarding the governance over water and sewer systems and the quality of the services rendered," *id.* at ___, 777 S.E.2d at 98 (citing Ch. 50, sec. 2, 2013 N.C. Sess. Laws at 119-24), rather than health and sanitation.

In making this determination, the Court of Appeals distinguished several cases upon which the City relied before finding this Court's decision in *Reed v. Howerton Engineering Co.* controlling with respect to the health and sanitation issue. *Id.* at ___, 777 S.E.2d at 98-99. After noting that our decision in *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928), was "[t]he most compelling of" the cases cited in support of the City's position, the Court of Appeals stated that this Court "base[d] its ruling [in *Drysdale*] on the fact that the act [was] a local law" and did not make "any determination regarding which of the 14 'prohibited subjects' was implicated by the act" at issue in that case, *City of Asheville*, ___ N.C. App. at ___, 777 S.E.2d at 98. In addition, the Court of Appeals distinguished *City of New Bern*, 338 N.C. at 437-38, 450 S.E.2d at 739-40, *Idol*, 233 N.C. at 733, 65 S.E.2d at 315, and *Sams v. Board of County Commissioners*, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940), on the grounds that they "deal[t] with legislation that empowers a political subdivision with authority *to enforce health regulations* in a county" while the legislation at issue in this case "does not empower anyone to enforce health regulations" or "impose any health regulations on the Asheville Water System," *City of Asheville*, ___ N.C. App. at ___, 777 S.E.2d at 99. Moreover, the Court of Appeals pointed to our decision in *Reed*, which rejected a challenge to legislation that "created sewer districts in Buncombe County," "because the language in the act did not suggest [that health or sanitation was] the act's purpose" and because the challenged act "merely sought to create political subdivisions through which sanitary sewer service could be provided." *Id.* at ___, 777 S.E.2d at 98-99 (citing *Reed*, 188 N.C. at 42-45, 123 S.E. at 479-82). Finally, the Court of Appeals concluded that our decision in *Lamb v. Board of Education*, 235 N.C. 377, 70 S.E.2d 201 (1952), which invalidated a statute that "imposed a duty on the Randolph County Board of

Education to provide 'a sewerage system and an adequate water supply' for its schools" because it "relat[ed] to health and sanitation" given "that 'its sole purpose' was to make sure that school children in Randolph County had access to 'healthful conditions' while at school," did not support the City's position given the directness with which the statute addressed health and sanitation issues.[14] *City of Asheville*, ___ N.C. App. at ___, 777 S.E.2d at 99 (quoting *Lamb*, 235 N.C. at 379, 70 S.E.2d at 203). Thus, the Court of Appeals concluded that its decision was fully consistent with this Court's precedent concerning the proper application of Article II, Section 24(a)(1) of the North Carolina Constitution.

The City claims that the Court of Appeals utilized an overly narrow construction of Article II, Section 24 of the North Carolina Constitution that conflicted with its purpose, ignored the distinction between "[r]elating to" and "regulat[ing]," and employed a " 'regulation' standard" stemming from our decision in *Reed* in preference to the approach utilized in our more recent decisions. In addition, the City asserts that the Court of Appeals' decision conflicts with three lines of decisions from this Court, including (1) a line of decisions, such as *Drysdale*, *City of New Bern*, and *Lamb*, that hold that water and sewer services are inherently related to health and sanitation; (2) a line of cases, such as *City of New Bern*, *Idol*, *Board of Health v. Board of Commissioners*, 220 N.C. 140, 16 S.E.2d 677 (1941), and *Sams*, that hold that local laws addressing the governance of health-related services relate to health and sanitation; and (3) a line of cases, such as *City of New Bern* and *Williams*, that indicate that the "practical effect" of challenged legislation must be considered in determining whether the act involves one of the prohibited subjects specified in Article II, Section 24(1). On the other hand, the State contends that the analysis employed by the Court of Appeals is firmly grounded in our decision in *Reed*, which remains good law, and that *Lamb* merely establishes that an act involving water and sewer services relates to health and sanitation if it does nothing other than to prescribe the manner in which sewer and water service is provided. In

14. As the City points out, the law at issue in *Lamb* did not require the County Board of Education to provide water and sewer services to public school children and to ensure the provision of healthful conditions for Randolph County school children. Instead, the law "purport[ed] to limit the power of the County Board of Education to provide for sanitation and healthful conditions in the schools by means of a sewerage system and an adequate water supply," *Lamb*, 235 N.C. at 379, 70 S.E.2d at 203, by prohibiting the County Board of Education "from expending 'in excess of two thousand dollars ($2,000.00) under any one project or contract for the purpose of extending any public or private water or sewer system so that such extended system will serve any public school in Randolph County' " absent approval by a majority of voters at a special election, *id.* at 379, 70 S.E.2d at 203 (quoting Act of Apr. 14, 1951, ch. 1075, sec. 1, 1951 N.C. Sess. Laws 1079).

addition, the State contends that the Court of Appeals' decision, rather than impermissibly narrowing the term "[r]elating to," correctly focused upon the purpose of the Act, which, in the State's view, was intended to work a change in the governance of the City's water system. Once again, we find the City's argument persuasive.

In concluding that the legislation is not unconstitutional because it does not "expressly state[ ] that its purpose is to regulate health or sanitation" and because "it is [not] plain and clear," when viewing the Act as a whole, that its "purpose is to regulate health or sanitation," the Court of Appeals placed principal reliance upon our decision in *Reed*. *City of Asheville*, ___ N.C. App. at ___, 777 S.E.2d at 98. In *Reed*, we considered whether legislation that established a procedure pursuant to which the Buncombe County Board of Commissioners could create sanitary districts for the purpose of providing water and sewer service in rural areas of the county was a local act relating to health, sanitation, and the abatement of nuisances. 188 N.C. at 40-41, 44, 123 S.E. at 479-80, 481. Although this Court upheld the legislation because it was not a local law and did not relate to health and sanitation because it did "not state that its purpose [was] to regulate sanitary matters, or to regulate health or abate nuisances" and was, instead, intended "to provide districts in Buncombe County wherein sanitary sewers or sanitary measures may be provided in rural districts," *id.* at 44, 123 S.E. at 481, the second of these two holdings was substantially limited four years later in *Drysdale*, 195 N.C. at 726-28, 143 S.E. at 532-33, in which this Court invalidated a statute that created a single, special sanitary district in Henderson County as an impermissible local act.[15] In reaching this result, *Drysdale* distinguished *Reed* on the grounds that the legislation at issue in that case "*applied generally to the entire county of Buncombe*." Drysdale, 195 N.C. at 728, 143 S.E. at 533. While the State contends that this Court's decision in *Town of Kenilworth v. Hyder*, 197 N.C. 85, 147 S.E. 736 (1929), treats the "health and sanitation" holding in *Reed* "with unambiguous approval," we decline to read *Hyder* that expansively given that it did not utilize the regulation standard employed in *Reed*; looked to *Reed* for the primary purpose of noting that the relevant sanitary district had been established pursuant to the legislation that had been challenged in that earlier case;

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15. In spite of the fact that the Court of Appeals expressed uncertainty about the prohibited subject to which the statute at issue in *Drysdale* "related," it is clear from our opinion that the statute in question was deemed to impermissibly relate to health and sanitation, which is how subsequent opinions of this Court have understood that decision. *E.g.*, *Gaskill v. Costlow*, 270 N.C. 686, 688, 155 S.E.2d 148, 149 (1967); *Sams*, 217 N.C. at 285, 7 S.E.2d at 541.

and stated, in essence, that, since the legislation at issue in *Hyder* was little more than a continuation of the legislation at issue in *Reed* and since the legislation at issue in *Reed* had been upheld by this Court, there was "no convincing reason" for concluding that the legislation at issue in *Hyder* constituted a prohibited local act. *Id.* at 89, 147 S.E. at 738 (citations omitted). As a result, *Reed* provides no basis for a determination that the legislation does not relate to health and sanitation.

In addition, while the stated purpose of the legislation is undoubtedly relevant to the determination of whether a local law violates Article II, Section 24(a), our recent precedent clearly indicates that the practical effect of the legislation is pertinent to, and perhaps determinative of, the required constitutional inquiry. *E.g.*, *Williams*, 357 N.C. at 189, 581 S.E.2d at 429 (concluding that, while "the record demonstrates that . . . the intent of the enabling legislation and the Ordinance [enacted pursuant to the authority granted by the challenged legislation] is to prohibit discrimination in the workplace, the effect of these enactments is to govern the labor practices of [certain businesses] in Orange County"); *City of New Bern*, 338 N.C. at 434-42, 450 S.E.2d at 737-42 (concluding that the challenged legislation, which shifted the responsibility for enforcing the State Building Code with respect to certain buildings from the City of New Bern to Craven County, constituted unconstitutional local acts related to health and sanitation). As a result, the approach adopted by the Court of Appeals for determining whether the legislation constituted an impermissible local law relating to health and sanitation departs from that required by our precedents, properly understood.

Admittedly, this Court has not, to date, clearly indicated when a local act does and does not "relate" to a prohibited subject for purposes of Article II, Section 24. Although "related" can be defined as "[c]onnected in some way; having a relationship to or with something else," *Related*, *Black's Law Dictionary* (10th ed. 2014), we cannot conclude that the existence of a tangential or incidental connection between the challenged legislation and health and sanitation is sufficient to trigger the prohibition worked by Article II, Section 24(1)(a) of the North Carolina Constitution. On the other hand, we recognize that, as a purely textual matter, "relating to" is not equivalent to "regulating." *Compare* N.C. Const. art. II, § 24(1)(a) ("[r]elating to health, sanitation, and the abatement of nuisances"), *with id.* art. II, § 24(1)(j) ("[r]egulating labor, trade, mining, or manufacturing"); *see generally Williams*, 357 N.C. at 189, 581 S.E.2d at 429 (defining "regulate" as " 'to govern or direct according to rule[,] . . . to bring under [ ] control of law or constituted authority' " (quoting *State v. Gulledge*, 208 N.C. 204, 208, 179 S.E. 883, 886 (1935)

(ellipsis in original), (quoted in *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 559, 359 S.E.2d 792, 798 (1987) (applying that definition of "regulate" to Article II, Section 24(1)(j))). As a result, in light of the relevant constitutional language and the import of our prior decisions interpreting and applying the prohibition set out in Article II, Section 24 of the North Carolina Constitution, the ultimate issue that we must decide in this case is whether, in light of its stated purpose and practical effect, the legislation has a material, but not exclusive or predominant, connection to issues involving health, sanitation, and the abatement of nuisances.

In view of the fact that "[p]ure water is the very life of a people," *Drysdale*, 195 N.C. at 732, 143 S.E. at 535, and the broad interpretation that this Court has given to Article II, Section 24(1)(a) since *Reed*,[16] we have no hesitation in concluding that the legislation impermissibly relates to health and sanitation. As an initial matter, we note that the stated purpose of the legislation is to "provide reliable, cost-effective, high-quality water and sewer services" to affected customers. Ch. 50, pmbl., 2013 N.C. Sess. Laws at 118. Although the State contends that the purpose-related language contained in the legislation implicates issues such as customer service rather than the healthfulness of the water that is provided to customers for cooking, cleaning, and personal consumption, the substantiality of the relationship between the purity of the water that customers receive and the quality of service provided to water customers is beyond serious dispute. Thus, the stated purpose for the enactment of the legislation demonstrates the existence of a material connection between the reason for its enactment and issues involving public health and sanitation.[17]

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16. The only time that this Court has rejected a claim that a local law impermissibly "related to" health and sanitation after *Reed* occurred in *Piedmont Ford Truck Sale, Inc. v. City of Greensboro*, 324 N.C. 499, 380 S.E.2d 107 (1989), in which we held that a local act obligating the City of Greensboro to provide solid waste collection to newly annexed areas did not relate to health and sanitation given that the "effect" of the local act was to make a general law of statewide application applicable to an annexation being effectuated by the adoption of a local act and given that the challenged legislation did not "subject the annexed area to a different treatment than" would have been the case if Greensboro "had annexed the area under the general annexation law." *Id.* at 505, 380 S.E.2d at 111.

17. Although the Court of Appeals reasoned, in reliance upon its 2008 decision in *Asheville I*, that a provision in the legislation at issue here allowing for the discontinuance of water and sewer services by a metropolitan water and sewerage district for nonpayment "belies [the City's] argument that the purpose of the [legislation] relates to health and sanitation," *City of Asheville*, ___ N.C. App. at ___, 777 S.E.2d at 98, we do not find this argument persuasive. A careful analysis of the Sullivan Acts reveals that each of them was intended to address economic, rather than health and sanitation, issues given that they prohibited the City from charging higher extraterritorial rates, required the City to place

An analysis of the practical effect of the legislation reinforces the strength of the connection between the issues addressed in the legislation and public health and sanitation. As an initial matter, we note that the City, in the course of operating its water system, is required to ensure compliance with the North Carolina Drinking Water Act, N.C.G.S. §§ 130A-311 to -329 (2015), which appears in a chapter of the General Statutes entitled "Public Health" (Chapter 130A) and which is intended "to regulate water systems within the State which supply drinking water that may affect the public health," *id.* § 130A-312. In view of the fact that the City's water system is a "public water system" for purposes of the North Carolina Drinking Water Act, *see id.* § 130A-313(10), the City must show compliance with the North Carolina Drinking Water Act and related regulations in order to obtain approval from the North Carolina Department of Environmental Quality for the construction, alteration, and additions to water system facilities, *see id.* § 130A-317 (c), (d); Asheville, N.C., Code of Ordinances, ch. 21 (2016). In addition, the City is required to ensure that its water treatment operators are certified pursuant to N.C.G.S. §§ 90A-20 to 90A-32 in order to "protect the public health and to conserve and protect the water resources of the State." N.C.G.S. § 90A-20 (2015). Finally, the City is required to provide annual reports concerning the source and quality of the water that it provides to its customers, including the existence of any identified risks to human health stemming from consumption of the water provided by its system. *See* 40 C.F.R. §§ 141.151–.155 (2016). As a result, consistent with its stated purpose, the legislation has material health and sanitation effects.

The fact that the legislation changes the governance of the City's water system does not operate to remove it from the prohibition worked by Article II, Section 24(1)(a) of the North Carolina Constitution. As we have clearly held, a local act that shifts responsibility for enforcing health and safety regulations from one entity to another clearly relates to health and sanitation. *E.g.*, *City of New Bern*, 338 N.C. at 440, 450 S.E.2d at 741 (invalidating local legislation that shifted responsibility for enforcing the State Building Code with respect to certain buildings from the City of New Bern to Craven County given that "the Building Code Council's stated purposes for the different inspections under the Code evince an intent to protect the health of the general public,"

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funds derived from its water system in a separate account, and precluded the City from transferring monies derived from the operation of the water system to any fund that was not related to the operation and maintenance of the system. *Asheville I*, 192 N.C. App. at 36-39, 665 S.E.2d at 127-30.

that "[t]he Code regulates plumbing in an effort to maintain sanitary conditions," and that "enforcement of the fire regulations protects lives from fire, explosion and health hazards"); *see also Idol*, 233 N.C. at 733, 65 S.E.2d at 315 (finding it clear "beyond peradventure" that legislation authorizing the consolidation of the Winston-Salem and Forsyth County health departments and providing for the appointment of a joint city-county board for administering the public health laws in the affected jurisdictions was a prohibited "local act relating to health"); *Bd. of Health v. Bd. of Comm'rs*, 220 N.C. at 143, 16 S.E.2d at 679 (emphasizing this Court's "commit[ment] to the proposition that a law affecting the selection of officers to whom is given the duty of administering the health laws is a law 'relating to health' " in the course of invalidating a local law requiring that the county health officer appointed by the county board of health be confirmed by the Nash County Board of Commissioners) (citing *Sams*, 217 N.C. 284, 7 S.E.2d at 540)). As a result, given the fact that the legislation works a change in the governance of the City's water system, our prior decisions reinforce, rather than undercut, our conclusion that the legislation impermissibly relates to health and sanitation in violation of Article II, Section 24(1)(a) of the North Carolina Constitution.

As the State and our dissenting colleague note, Article VII, Section 1 of the North Carolina Constitution provides, in pertinent part, that

> [t]he General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1. Although North Carolina is not a home rule jurisdiction, and although our constitution, consistent with the language of this provision, gives the General Assembly exceedingly broad authority over the "powers and duties" delegated to local governments, *id.*, that authority is subject to limitations imposed by other constitutional provisions.[18] Aside from the fact that the legislation does not actually

18. The legislation cannot be properly understood as nothing more than an exercise of the General Assembly's plenary authority to create new units of local government. Instead of simply creating a new unit of local government, the General Assembly took a number of actions in the legislation, including creating the Metropolitan Water and Sewerage District through a repurposing of the Metropolitan Sewerage District and effectively eliminating the City's ability to operate its existing water system. In similar instances, such as *Idol*,

prohibit the City from operating a water system, the General Assembly's authority over the "powers and duties" delegated to local governments is expressly subject to the limitations set out in Article II, Section 24, which "is the fundamental law of the State and may not be ignored." *High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702. As a result,[19] for all these reasons, we reverse the Court of Appeals' decision and instruct that court to reinstate the trial court's order granting summary judgment in favor of the City.[20]

REVERSED.

Justice NEWBY dissenting.

Throughout our history, when communities needed a governmental provision of water and sewer services, the General Assembly, by local act, would grant a local government unit the authority to act. Here the majority's holding ignores this historic constitutional understanding of the plenary authority of the General Assembly to oversee local government subdivisions and create new ones when necessary. Our history and our constitution recognize this plenary authority is necessary because the General Assembly is uniquely situated to oversee local government

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233 N.C. at 733, 65 S.E.2d at 315, which involved legislation creating a joint city-county board of health, and *Sams*, 217 N.C. at 285-86, 7 S.E.2d at 541, which involved legislation creating a county board of health, this Court invalidated the challenged legislation as impermissible local laws relating to health and sanitation even though the legislation at issue in those cases involved the creation of new units of local government like the one at issue here.

19. In view of our conclusion that the legislation is an unconstitutional local law relating to health and sanitation, we need not address the City's challenge to the Court of Appeals' holding that the legislation did not result in a compensable taking and express no opinion concerning its correctness.

20. Although the General Assembly has, in the past, enacted legislation authorizing various units of local government to operate systems for the provision of water service, we do not believe that our decision in this case in any way impairs the ability of the affected units of local government to operate their water systems in a lawful manner. Aside from the fact that we do not know whether such legislation could be properly characterized as local, rather than general, in nature or relates to health and sanitation under the test that we have deemed appropriate in this case and the fact that the legislation in question appears to have allowed the initial provision of water service rather than requiring the reallocation of the responsibility for providing water and sewer service from one entity of local government to another, the current effect of any such legislation would be to allow the affected unit of local government to do what has otherwise been authorized by general legislation, an outcome which this Court held did not result in a violation of Article II, Section 24 in *Piedmont Ford Truck Sale*, 324 N.C. at 502, 380 S.E.2d at 111.

and address changing needs. Now the Court brings uncertainty as to whether there are any lawfully established water or sewer districts in North Carolina. Even assuming the legislation at issue is a local act, the legislature first gave the City of Asheville, and countless other municipalities across our State, its water district by local act. If it is unlawful to modify that district by local act, then it was unlawful to establish it by local act initially. The majority's complicated analysis casts this Court in the ill-suited role of legislating which local governmental authorities shall govern various water and sewer services. Because the General Assembly exercises its plenary authority in creating a water and sewer district, its action is constitutional. Accordingly, I respectfully dissent.

This Court presumes that legislation is constitutional absent an express constitutional prohibition on the legislature's otherwise plenary police power and until its unconstitutionality is plainly and clearly demonstrated beyond a reasonable doubt. *E.g.*, *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015); *see also Kornegay v. City of Goldsboro*, 180 N.C. 441, 445, 105 S.E. 187, 189 (1920) ("[C]ourts always presume[,] in the first place[,] that the act is constitutional . . . [and] that the Legislature acted with integrity and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution." (quoting *Lowery v. Bd. of Graded Sch. Trs.*, 140 N.C. 33, 40, 52 S.E. 267, 269 (1905)). The presumptive constitutional power of the General Assembly to act is consistent with the principle that a restriction on the General Assembly is in fact a restriction on the people. *See Baker v. Martin*, 330 N.C. 331, 336-37, 410 S.E.2d 887, 890 (1991). Thus, this Court is powerless to review an act of the people through the General Assembly for its political propriety so long as it reasonably relates to the need sought to be remedied and falls within legislative discretion. *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946).

The General Assembly has long enjoyed plenary power to create political subdivisions of local government,[1] and this authority has been

1. Before its express inclusion in the 1868 state constitution, this Court recognized the General Assembly's historic duty and plenary power to create and abolish political subdivisions of local government. *See*, *e.g.*, *White v. Comm'rs of Chowan Cty.*, 90 N.C. 437, 438 (1884) (County subdivisions "are indeed a necessary part and parcel of the subordinate instrumentalities employed in carrying out the general policy of the state in the administration of government . . . [and their functions] may be enlarged, abridged, or modified at the will of the legislature . . . [as] they are intended only to be essential aids and political agencies."); *see also Lilly v. Taylor*, 88 N.C. 489, 494-95 (1883) (affirming the legislature's creation and subsequent repeal of the charter of the Town of Fayetteville); *Mills v. Williams*, 33 N.C. (11 Ired.) 558, 563-64 (1850) (upholding the legislature's "power to create and abolish" Polk County).

reaffirmed with each adoption of our state constitution. N.C. Const. art. VII, § 1; N.C. Const. of 1868, Amends. of 1875, art. VII, § 14 ("The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions" pertaining to municipalities.); *id.*, art. VIII, § 4 ("It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages . . . ."); *see also Report of the North Carolina State Constitution Study Commission* 143 (1968) [hereinafter *1968 Constitution Commission Report*] (recognizing "the General Assembly['s] full power to revise or abolish the form and powers of county and township governments").

The General Assembly creates governmental subdivisions to facilitate local self-government, dividing governing authority between local governmental units that may otherwise compete for jurisdiction. *See Hailey v. City of Winston-Salem*, 196 N.C. 17, 22, 144 S.E. 377, 380 (1928) ("When a new governmental agency is established by the Legislature, such as a municipal corporation, it takes control of all the affairs over which it is given authority, to the exclusion of other governmental agencies."). Local governmental subdivisions are "parts and parcels of the State, organized for the convenience of local self-government," *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 222 (1875), which the General Assembly may create, organize, abolish, arrange, and rearrange to meet local needs. *See also Town of Boone v. State*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2016) (No. 93A15-2); *Holmes v. City of Fayetteville*, 197 N.C. 740, 746, 150 S.E. 624, 627 (1929) (recognizing municipalities as "mere instrumentalities of the State for the more convenient administration of local government"), *appeal dismissed per curiam*, 281 U.S. 700, 50 S. Ct. 353, 74 L. Ed. 1126 (1930).

Moreover, the legislature can create "separate corporate agenc[ies] to serve [ ] particular governmental purposes" and "call upon them to perform such functions as the Legislature may deem best." *Johnson*, 226 N.C. at 9-10, 36 S.E.2d at 809 (citing *Brockenbrough v. Bd. of Water Comm'rs*, 134 N.C. 1, 17, 46 S.E. 28, 33 (1903)). "A municipality acting in its governmental capacity is an agency of the State for the better government of those residing within its corporate limits . . . ." *Candler v. City of Asheville*, 247 N.C. 398, 406, 101 S.E.2d 470, 476 (1958); *see also McCormac v. Commr's of Robeson Cty.*, 90 N.C. 441, 444 (1884) ("[I]t is within the power and is the province of the legislature to . . . invest the inhabitants . . . with corporate functions, more or less extensive and varied in their character, for the purposes of government . . . ."). The General Assembly is the political body designated to oversee local government and to make necessary modifications as local conditions

change. In organizing local government, and making necessary modifications, the General Assembly must weigh competing local interests and needs. Ultimately, the legislature alone must determine the propriety of changes in local government by exercising its political judgment.

This broad historic power of the General Assembly, acknowledged by our case law, has remained unchanged and is now expressly incorporated into Article VII, Section 1 of our current constitution, adopted in 1971:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1. As such, Article VII, Section 1 "is not a delegation of power to the General Assembly" but "a general description" and "merely a recognition" of "the General Assembly's power to provide for the organization and powers of local government," *1968 Constitution Commission Report* 85, as affirmed in the 1875 amendment, which "gave the General Assembly full power to revise or abolish the form and powers of county and township governments," *id.* at 143.

By its plain meaning, the text of the first clause, "[t]he General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions," mandates the statutory creation and structuring of local governmental subdivisions. *See State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510-11 (2004) (The constitution is construed for its plain meaning.); *see also Dunn v. Pac. Emp'rs Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (Ordinary rules of grammar apply.). "Organization" means something "put together into an orderly, functional, [and] structured whole." *Organize*, *The American Heritage Dictionary* 926 (new coll. ed. 1979). "Government" is defined as "[t]he act or process of governing; especially, the administration of public policy in a political unit; political jurisdiction." *Government*, *id.* at 570. The "fixing of boundaries" means establishing borders or limits. *See Fix* and *Boundary*, *id.* at 497, 156. "Other governmental subdivisions" includes a "special-purpose district or authority," *Local Government*, *Black's Law Dictionary* (10th ed. 2014), such as an administrative water district, operated in compliance with principles, rules, and regulations, *see id.* (listing examples of local

government units). Thus, the plain meaning of the phrase "organization and government and the fixing of boundaries" embraces the creation, expansion, retraction, and dissolution of all forms of local government, including "other governmental subdivisions."[2]

Our case law has historically treated "other governmental subdivisions" similarly to traditional political subdivisions. *See Town of Saluda v. Polk County*, 207 N.C. 180, 186, 176 S.E. 298, 301-02 (1934) ("[T]he legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, . . . to effectuate the purposes of the government . . . . Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation." (quoting *McCormac*, 90 N.C. at 444-45)); *see also* N.C.G.S. § 162A-65 (2015) (defining "political subdivision" for purposes of water and sewer authorities as "any county, city, town, incorporated village, sanitary district, water district, sewer district, special purpose district or other political subdivision," *id.* § 162A-65(a)(8), and "governing body" as "the board, commission, council or other body . . . of a political subdivision in which the general legislative powers . . . of such political subdivision are exercised," *id.* § 162A-65(a)(6)). As such, the text of the first clause of Article VII, Section 1 contemplates the legislative creation of local governmental subdivisions, along with counties, cities, and towns, without constitutional limitation.

The second clause of Article VII, Section 1 concerns the authority of the General Assembly to confer specific "powers and duties" on local governmental units. Unlike the first clause, the second clause in Article VII, Section 1 includes an express limitation; namely, it prohibits any legislative delegation of "powers and duties" to local governmental units that is "otherwise prohibited by this Constitution." Only under the second clause, then, is the General Assembly's authority over local governments expressly subject to limitations imposed by other constitutional provisions, including the constraints on local acts listed in Article II, Section 24 first adopted in 1917. For example, under the Article II, Section 24 prohibition on certain local acts, the General Assembly cannot grant to one county the power to enact local employment legislation,

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2. *See Town of Boone*, ___ N.C. at ___, ___ S.E.2d at ___ (Ervin, J., concurring in result) ("[T]he plain language in which the provision in question is couched suggests to me that 'organization and government' refers to the creation of units of local government and the manner in which those units of local government are governed . . . .").

see Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 191, 581 S.E.2d 415, 430 (2003), or remove a city's power to enforce certain ordinances regarding specific properties within its municipal limits, *see City of New Bern v. New Bern–Craven Cty. Bd. of Educ.*, 338 N.C. 430, 442, 450 S.E.2d 735, 742 (1994).[3] *See also Town of Boone*, ___ N.C. at ___, ___ S.E.2d at ___.

The question before this Court is whether the legislation at issue, Act of May 2, 2013, ch. 50, 2013 N.C. Sess. Laws 118 (the District Act), which creates a new regional district to govern water and sewer services within certain areas of Buncombe and Henderson Counties, is an exercise of the General Assembly's plenary authority to "provide for the organization and government and the fixing of boundaries" of local government under the first clause of Article VII, Section 1 or whether it confers specific "powers and duties" on a local governmental unit under the second clause. If the General Assembly's action creating the regional water and sewer district arises under its plenary authority recognized in the first clause of Article VII, Section 1, the analysis ends, and there is no need to address the application of the second clause and any restrictions imposed by Article II, Section 24.

As admitted by the City, the District Act creates a new political subdivision. Moreover, the statutory text of the District Act provides for

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3. This approach of conducting an Article II, Section 24 analysis only when the challenged statute specifies a specific "power" or "duty" is consistent with our prior decisions. In *Piedmont Ford Truck Sale, Inc. v. City of Greensboro*, the plaintiffs challenged a local act annexing certain land to the City of Greensboro. 324 N.C. 499, 501, 380 S.E.2d 107, 108 (1989). While the annexation clearly arose under the authority to "fix the boundaries of cities" acknowledged in Article VII, Section 1, *id.* at 503, 380 S.E.2d at 110, because the act also contained a specific "provision regarding solid waste collection," the plaintiffs argued the statute violated Article II, Section 24, *id.* at 504, 380 S.E.2d at 110. Because the statute specified a particular "power," this Court conducted an analysis under Article II. *Id.* at 504-06, 380 S.E.2d at 110-11. When viewed as a whole, the explicit grant of power was a "small part" of the legislation, *id.* at 506, 380 S.E.2d at 111, and this Court concluded that "[t]he provision . . . regarding solid waste collection" did not violate Article II, Section 24, *id.* at 506, 380 S.E.2d at 111. *See also, e.g.*, *Lamb v. Bd. of Educ.*, 235 N.C. 377, 379-80, 70 S.E.2d 201, 203 (1952) (concluding that an act expressly restricting certain express powers of the Randolph County Board of Education violated the Article II limitations on local acts); *Idol v. Street*, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951) (concluding that an act that "confer[red] power upon the Board of Aldermen of the City of Winston-Salem and the Board of Commissioners of Forsyth County" to, *inter alia*, "name a joint city-county board of health," which varied from general law, "[wa]s a local act relating to health" in violation of the Article II limitations on local acts); *Bd. of Health v. Bd. of Comm'rs*, 220 N.C. 140, 143-44, 16 S.E.2d 677, 678-79 (1941) (concluding that an act removing from the Nash County Board of Health the power to appoint a county health officer was a local act relating to health in violation of the Article II limitations on local acts).

the organization and government of that new political subdivision. The stated purpose of the District Act is to enhance services to users by creating a regional water and sewer system to "provide reliable, cost-effective, high-quality water and sewer *services*." Ch. 50, 2013 N.C. Sess. Laws at 118 (emphasis added). Creating this type of local governmental subdivision to enhance water and sewer services falls squarely within the legislature's plenary power as described in the first clause of Article VII, Section 1, and thus the District Act is constitutional.

Initially established by local act in 1883, the City's public water "system currently serves approximately 124,000 customers, some 48,000 of whom are located outside Asheville's city limits" in portions of Buncombe and Henderson Counties. *See* N.C.G.S. § 160A-312(a) (2015) (authorizing a city to operate a water supply and distribution system inside and "outside its corporate limits, within reasonable limitations"). In 2013 the General Assembly created a new local governmental subdivision to provide regional water and sewer services to the City and those portions of Buncombe and Henderson Counties. Ch. 50, 2013 N.C. Sess. Laws 118 (captioned "An Act to Promote the Provision of Regional Water and Sewer Services by Transferring Ownership and Operation of Certain Public Water and Sewer Systems to a Metropolitan Water and Sewerage District.").

The "transfer provision" regionalizes water and sewer services by combining the City's public water system with the Metropolitan Sewerage District operating in the same county to form a new governmental subdivision. The transfer provision provides in part: "All assets, real and personal, tangible and intangible, and all outstanding debts . . . are by operation of law transferred to the metropolitan sewerage district operating in the county where the public water system is located, to be operated as a Metropolitan Water and Sewerage District . . . ." *Id.*, sec. 1(a), at 118. All assets and all outstanding debts of both the City's water system and the Metropolitan Sewerage District transfer to the new regional district. *Id.*, sec. 1(b)-(c), (f), at 119.[4] The transfer between the City and the Metropolitan Sewerage District occurs by operation of law[5] because both systems operate in the same county and meet certain criteria. *See id.*, sec. 1(a)-(f), at 118-19.

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4. "All necessary permits for operation" are also "transferred to the Metropolitan Water and Sewerage District . . . to ensure that no current and paid customer loses services due to the regionalization of water and sewer services." *Id.*, sec. 1(e), at 119. Moreover, the General Trust Indenture, which governs the bonds issued and secured by a pledge of "[a]ll Net Revenues of the Water System," contemplates a transfer "to another political subdivision or public agency in the State authorized by law to own and operate such systems." The trustee allows a transfer "if such political subdivision . . . assumes all of the

By its terms and stated purpose, the District Act creates a regional governance solution for water and sewer systems and defines a "metropolitan water and sewerage district" as a political subdivision and deems it "a public body . . . exercising . . . essential governmental functions to provide for the preservation and promotion of the public health and welfare." *Id.*, sec. 2, at 121.[6] The newly created regional district combines the authority of the previously separate water and sewer districts "[t]o do all acts and things necessary or convenient to carry out the powers granted by this Article." *Id.* at 122. Overall, the regional district operates with the same power as a city in enforcing its ordinances, and the district board may not privatize its water and sewer services. *See id.*

Likewise, the District Act amends N.C.G.S. § 162A-85.3 to provide for the organization and governance of metropolitan water and sewerage districts like the one created here, including a governing board with regional representation. *Id.* at 120-21.[7] The District Act requires

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obligations of the City under this Indenture" and if the transfer does not produce a "material adverse effect on the ability of the Water System to produce Revenues," on the bond rating, or with regard to tax treatment. These revenue bonds do not rely upon the City's taxing power. *See also* Ch. 50, sec. 2, 2013 N.C. Sess. Laws, at 122 (requiring that the rates and fees "pledged to the payment of revenue bonds" be sufficient to maintain the system).

5. Governing bodies of other political subdivisions may establish regional systems by joint resolution. *See* Ch. 50, sec. 5.5, 2013 N.C. Sess. Laws, at 125 (requiring consent from county commissioners and all municipal governing boards affected before creation of district).

6. The District Act amended the definitions of "unit of local government" and "municipality" to include "metropolitan water and sewerage districts" and added "metropolitan water and sewerage districts" to the list of political subdivisions that may borrow money and issue bonds. Ch. 50, sec. 2, 2013 N.C. Sess. Laws, at 119-20; *see also* N.C.G.S. § 159-44(4) (2015) (defining a "unit of local government"); *id.* § 159-48(e) (2015) (borrowing and bond issuing); *id.* § 159-81(1) (2015) (defining a "municipality"); *id.* § 159-81(3) (2015) (revenue-bond issuing).

7. Generally, the District Act requires that the apportionment of members on the district board be representative of the area serviced while considering population. *See* Ch. 50, sec. 2, 2013 N.C. Sess. Laws, at 120 (two from each county served); *id.* (one from each municipality served); *id.* (two from each municipality served with a population greater than 200,000); *id.* (one from each county served with a population greater than 200,000); *id.* ("One individual from a list submitted by the governing body of a county in which a watershed serving the district board is located in a municipality not served by the district . . . ."); *id.*, at 121 ("One individual by the governing body of any elected water and sewer district wholly contained within the boundaries of the district."). "[T]he district board may expand to include other political subdivisions if" the additional political subdivision "become[s] a participant in the district board." *Id.*

The District Act also sets terms for members and provides procedures for meetings, removal of members, filling vacancies on the district board, and the election and compensation of officers. *Id.* Until all appointments are made, the district board of the County's

the regional district board to work with local municipalities under its jurisdiction for the benefit of the district.[8] The district board performs administrative tasks such as fixing rates, fees, rents, and other charges for the services furnished or to be furnished by the district water and sewer system. *See id.* at 122 ("Such rates, fees, and charges may not apply differing treatment within and outside the corporate limits of any city or county within the jurisdiction of the district board" and "shall not be subject to supervision or regulation by any . . . agency of the State or of any political subdivision."). In sum, as admitted by the City, the act creates a new "governmental subdivision" and provides for the "organization and government" thereof.

The broad constitutional authority acknowledged in the text of the first clause of Article VII, Section 1 clearly affirms the legislature's ability to create and organize political subdivisions to meet changing needs, resolve disputes between local governments, and provide new governance solutions. The General Assembly's constitutional authority to do so remains even if its solution combines, divides, or regionalizes the political power of preexisting subdivisions that once governed local issues. Here it seems the General Assembly, in its discretion and in accordance with the District Act's stated purpose, finds regional governance over certain water systems will ensure high quality water and sewer services.

> The role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials . . . [but] only to measure the balance struck by the legislature against the required minimum standards of the constitution.

Henry v. Edmisten, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986). The General Assembly's policy decision here falls within legislative discretion and, as an exercise of legislative authority under the first clause of

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metropolitan sewerage district "shall function as the district board of the Metropolitan Water and Sewerage District." *Id.*, sec. 1(d), at 119.

8. The District Act outlines the permissible authority for the local governing bodies within the regional district's jurisdiction. *See, e.g.*, Ch. 50, sec. 2, 2013 N.C. Sess. Laws, at 122-23 (regulating the transfer of jurisdiction from smaller systems to the regional district system for the benefit of the district, contracting with the district, revising rates or collecting taxes to pay obligations to the district, and submitting to its electors agreements with the district). When possible, the district board must coordinate with the local municipalities when constructing any system improvements. *Id.* at 123.

Article VII, Section 1, does not implicate the constitutional constraints described in Article II, Section 24.

Assuming the District Act is a local act[9] as held by the majority, notably the legislature first created a water district for Asheville by local act.[10] When creating and organizing political subdivisions under its plenary power as recognized in the first clause of Article VII, Section 1, the

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9. The statutory definition of "local act" in reference to cities and towns "means an act of the General Assembly applying to one or more specific cities by name, or to all cities within one or more specifically named counties." N.C.G.S. § 160A-1(5) (2015). The District Act does not refer to the City of Asheville by name.

10. In 1883 the General Assembly appointed the Asheville Committee on Permanent Improvements as trustee to oversee a $20,000 fund provided for "water supply." Act of Feb. 28, 1883, ch. 66, sec. 2, 1883 N.C. Priv. [Sess.] Laws 752, 753. The legislature followed suit with other municipalities and subdivisions. *E.g.*, Act of Mar. 11, 1889, ch. 219, sec. 105, 1889 N.C. Priv. [Sess.] Laws 899, 924 (appointing the Board of Alderman for City of Greensboro to manage and regulate "water-works" which "may be established, or land on which water-pipes are run to and from said works"); *id.* sec. 107, at 924 (same for "system of sewerage"); Act of Dec. 20, 1815, ch. XVII, sec. II, 1815 N.C. [Sess.] Laws 18, 18 (empowering and appointing City of Charlotte board of commissioners to "erect pumps or wells").

The General Assembly revised the charter of the City of Asheville to provide for its water authority in 1901, conferring upon the Board of Alderman the power "[t]o provide a sufficient supply of pure water for said city, fix charges and rates therefor, and prescribe rules and regulations governing the use of same," Act of Mar. 13, 1901, ch. 100, sec. 30, 1901 N.C. Priv. [Sess.] Laws 222, 232, which included "construction, operation, repair and control of such water-works," *id.*, sec. 66, at 259. The legislature designated a separate subdivision of government, the Board of Health, to take "general charge and supervision of . . . the healthfulness of the water supply." *Id.*, sec. 32, at 234. In 1923 the General Assembly revised the charter and restructured the local government, empowering a Board of Commissioners to "build and construct" waterworks and sewerage systems, Act of Jan. 26, 1923, ch. 16, sec. 306, 1923 N.C. Priv. [Sess.] Laws 88, 154, both within the City limits and beyond, *id.*, sec. 353, at 167, as well as a Commissioner of Public Works to supervise the systems, *id.*, sec. 25, at 96.

In 1931 the legislature revised the charter again, which remains the charter today, subject to various amendments. Act of Mar. 30, 1931, ch. 121, 1931 N.C. Priv. [Sess.] Laws 154. Under this charter, the General Assembly created a Department of Finance to take charge of "the supervision and control of and over the water system and supply," *id.*, sec. 32, at 161, and to "collect for the use of water," *id.* at 163; *see also* Act of Apr. 6, 1951, ch. 618, 1951 N.C. Sess. Laws 554, 554 (allowing "the City of Asheville, Buncombe County and political units therein to contract" for the water system).

In 1981 the legislature expressly repealed these charter provisions related to the supervision and control of the water system, Act of Feb. 16, 1981, ch. 27, sec. 3, 1981 N.C. Sess. Laws 13, 14, removing control from the Department of Finance and appointing a new political subdivision to handle the authority. In 1981 the City and Buncombe County then entered into a comprehensive local agreement that established, *inter alia*, an agency to administer the jointly-owned water supply and distribution systems.

legislature often must address the local needs and competing political pressures of a geographic area. *See Town of Boone*, ___ N.C. at ___, ___ S.E.2d at ___. If, as the majority declares, creating and organizing a new water and sewer district is unconstitutional, would not the original act establishing Asheville's water district also be unconstitutional? The need to organize water and/or sewer systems arose in localities across the state at different times. The General Assembly authorized various units of local government or created new ones to meet those needs as they arose or changed. Under the majority's reasoning, all of the locally legislated and similarly empowered districts would have been illegally created.[11] If the creation of a local governmental subdivision, as in the District Act, is scrutinized under the second clause of Article VII, Section 1, all such water and sewer districts would receive the same review if challenged, and would be struck down as prohibited local acts. Moreover, the majority, in contravention of our heightened standard for reviewing the constitutionality of legislative acts, presumes the legislature enacted the District Act in bad faith and that its enactment will result in poor local governance. *See Kornegay*, 180 N.C. at 445, 105 S.E. at 189 (presuming "the Legislature acted with integrity and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution").

The General Assembly is the only body politic with the oversight and authority to create and organize local political subdivisions in its discretion. It alone has the ability to resolve local governance disputes such as those undergirding the litigious past of the water system at issue.

Spanning almost a century, legislation and litigation chronicle the strained relationship between the City of Asheville's water system

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11. *See*, *e.g.*, Act of June 29, 1967, ch. 1019, sec. 1, 1967 N.C. Sess. Laws 1463, 1463 (permitting the Town of Taylorsville and Alexander County to purchase a water system); Act of Apr. 5, 1951, ch. 550, secs. 1, 2, 1951 N.C. Sess. Laws 461, 461 (appointing Town of Dunn as new entity to acquire, build, manage, and operate the "water and sewerage system" for the "unincorporated village of Erwin in Harnett County"); Act of Apr. 5, 1947, ch. 1040, sec. 3, 1947 N.C. Sess. Laws 1519, 1520 (creating a "Board of Power, Water and Airport Commissioners of the City of High Point . . . to construct, to improve, [and] to better . . . [the] water system"); Act of Jan. 30, 1945, ch. 24, sec. 1, 1945 N.C. Sess. Laws 37, 37 (moving all water-related property from the Board of Water Commissioners to the City of Charlotte, a separate corporation); Act of Jan. 18, 1939, ch. 1, sec. 1, 1939 N.C. Pub.-Local [Sess.] Laws 11, 11 (establishing "sanitary districts" in Forsyth County); Act of May 3, 1935, ch. 418, sec. 1, 1935 N.C. Pub.-Local [Sess.] Laws 378, 378 (establishing joint water and sewer systems for Haywood County municipalities); Act of Jan. 26, 1923, ch. 1, sec. 1, 1923 N.C. Priv. [Sess.] Laws 1, 1 (extending the "waterworks system" for the Town of Lenoir); Act of Jan. 1, 1917, ch. 71, sec. 2, 1917 N.C. Priv. [Sess.] Laws 134, 134 (establishing a separate entity, the Board of Water Commissioners, to "provide for the better management and proper operation of the . . . water-works system of the city of Durham").

and its County water customers. *See* Act of Apr. 28, 1933 (Sullivan I), ch. 399, 1933 N.C. Pub.-Local [Sess.] Laws 376 (captioned "An Act to Regulate Charges Made by the City of Asheville for Water Consumed in Buncombe County Water Districts"); *Candler*, 247 N.C. at 411, 101 S.E.2d at 479 (recognizing the legislature's power to prevent by statute the City of Asheville from charging certain county residents higher rates than it charged to city residents). After several amendments and reinstatements of the joint agreement between the City and the County that was first established in 1981, that agreement ended in 2004, ultimately leaving the City with ownership and control of the water system. Again, it seems the parties soon after resorted to the legislature and the courts. *See* Act of June 29, 2005 (Sullivan II), ch. 140, 2005 N.C. Sess. Laws 244 (captioned "An Act Regarding Water Rates in Buncombe County"); Act of June 29, 2005 (Sullivan III), ch. 130, 2005 N.C. Sess. Laws 243 (captioned "An Act Regarding the Operation of Public Enterprises by the City of Asheville"); *City of Asheville v. State*, 192 N.C. App. 1, 36-37, 665 S.E.2d 103, 128 (2008) (finding that a local act addressing equitable rates "principally contemplate[d]" and "relate[d] only to matters which are purely economic in nature . . . rather than prioritizing the system's health or sanitary conditions"), *appeal dismissed and disc. rev. denied*, 363 N.C. 123, 672 S.E.2d 685 (2009). The plenary power of the General allows it, not the courts, to craft a resolution of this matter.

As acknowledged in the first clause of Article VII, Section 1, the General Assembly has plenary authority to establish new subdivisions of local government. The General Assembly alone can consider the local competing interests and craft a solution. Such legislative action is not conditioned upon first providing a majority of this Court with satisfactory justification. *Johnson*, 226 N.C. at 8, 36 S.E.2d at 809 ("We have no power to review a statute with respect to its political propriety as long as it is within the legislative discretion and has a reasonable relation to the end sought to be accomplished."). The majority's holding that a new political subdivision addressing regional problems with the water system violates Article II, Section 24 simply because the legislation involves a water system erases the General Assembly's historic authority to establish convenient local governmental units acknowledged by the first clause of Article VII, Section 1. The General Assembly's creating a new local governmental subdivision does not offend the state constitution. This Court should not weigh the wisdom or expediency of a legislative act. Accordingly, I respectfully dissent.

Chief Justice MARTIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
DAVID MARTIN BEASLEY YOUNG

No. 80A14

Filed 21 December 2016

Constitutional Law—cruel and unusual punishment—life without parole—defendant younger than 18

A seventeen-year-old's sentence of life without parole for first-degree murder was prohibited by the Eighth Amendment to the United States Constitution as interpreted in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012). Although N.C.G.S. § 15A-1380.5 might have increased the chance that defendant's sentence would be altered or commuted, it did not provide a sufficiently meaningful opportunity to reduce the severity of the sentence to constitute something less that life imprisonment without the possibility of parole.

On writ of certiorari to review an order on a motion for appropriate relief entered on 1 February 2013 by Judge Mark E. Powell in Superior Court, Buncombe County. On 5 April 2013, the Court of Appeals allowed the State's petition for writ of certiorari to review the order pursuant to N.C.G.S. § 7A-32(c). On 11 March 2014, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Following oral argument on 6 May 2014, the Court on 28 January 2016 ordered supplemental briefing. Heard in the Supreme Court on 12 October 2016.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Senior Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Barbara S. Blackman and Kathryn L. VandenBerg*, *Assistant Appellate Defenders*, *for defendant-appellee.*

JACKSON, Justice.

In this case we consider whether the Superior Court, Buncombe County correctly ordered that defendant, who was sentenced to life imprisonment without the possibility of parole for a murder he committed at age seventeen, must be resentenced as a result of the decision

in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012). Because we conclude that defendant's sentence is prohibited by *Miller*, we affirm.

On 3 May 1999, following a capital trial, a jury found defendant guilty of first-degree murder pursuant to the felony murder rule based on attempted armed robbery and "sale of a counterfeit controlled substance with a deadly weapon." The jury also found defendant guilty of one count each of possession with intent to sell or deliver, sale of, and conspiracy to sell a counterfeit controlled substance. Defendant's convictions resulted from his involvement in a disputed drug-related transaction that escalated into a fatal shooting on 8 January 1997. *State v. Young*, 151 N.C. App. 601, 2002 WL 1543672, at *1 (2002) (unpublished). Defendant was seventeen years old on the date of the offenses. After considering whether defendant should receive a sentence of death or life imprisonment without the possibility of parole, the jury recommended life, and the trial court entered judgment accordingly.

In the wake of the Supreme Court's *Miller* decision, defendant filed a motion for appropriate relief in Superior Court, Buncombe County on 4 October 2012. The court conducted a hearing on 18 January 2013 and in an order filed on 1 February 2013, found that defendant "was under the age of 18 at the time of the commission of the crime" and that when "the crime was committed, North Carolina law required the mandatory imposition of life imprisonment without parole for all offenders convicted of first-degree murder." The court further explained that pursuant to *Miller*, "mandatory imposition of life without parole upon defendants who were under the age of 18 at the time of commission of their crimes constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution." Therefore, the court concluded that the 2012 *Miller* decision retroactively applied to defendant's 1999 sentence, vacated the sentence, and ordered a new sentencing hearing.

On 13 March 2013, the State filed a petition for writ of certiorari, petition for writ of supersedeas, and motion for temporary stay with the North Carolina Court of Appeals. The Court of Appeals allowed the petition for writ of certiorari and stayed the superior court's order pending disposition of the appeal. On 12 March 2014, this Court entered an order on its own initiative certifying the appeal for discretionary review prior to a determination by the Court of Appeals.

In a brief filed with the Court of Appeals, the State argued that the superior court erred by giving *Miller* retroactive effect and vacating defendant's sentence; however, on 25 January 2016, before this

appeal was decided, the United States Supreme Court filed an opinion in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016). In pertinent part, the Supreme Court concluded that "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at ___, 136 S. Ct. at 731-32. The Supreme Court then held that "*Miller* announced a substantive rule of constitutional law." *Id.* at ___, 136 S. Ct. at 736. On 29 January 2016, shortly after *Montgomery* was decided, we ordered the parties to submit supplemental briefs.

In its supplemental brief the State acknowledges that "[t]he United States Supreme Court has now made clear [in *Montgomery*] that its holding in *Miller* applies retroactively to already final cases." Nevertheless, the State contends that defendant is not entitled to resentencing based upon *Miller* and *Montgomery*. The State asserts that "[e]ven though the General Assembly chose to call the sentence defendant received in this case 'life imprisonment without parole,' " defendant's sentence "is not really life imprisonment without parole but instead a sentence of life imprisonment with 'a meaningful opportunity to obtain release.' " Specifically, the State argues that N.C.G.S. § 15A-1380.5—which was enacted effective 1 May 1994 and repealed effective 1 December 1998—applies to the offenses that defendant committed on 8 January 1997. The State contends that section 15A-1380.5 thus provides a meaningful opportunity for release and therefore, defendant's sentence is not of the type addressed by the *Miller* decision. We disagree.[1]

In several recent cases, the United States Supreme Court has considered how the two gravest punishments imposed in the United States criminal justice system should apply to persons who committed crimes as minors. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 69 (2010) (noting that life imprisonment without the possibility of parole is the second greatest punishment permitted by law); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." (citing *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Conner, J., concurring))). In this context, the Supreme Court has explained that "less culpability should attach to a crime committed by a juvenile than to a comparable crime

1. The State acknowledges that it did not raise this issue at the hearing on defendant's motion for appropriate relief. We conclude that the State has not preserved this issue for appellate review. N.C. R. App. P. 10(a)(1). Nevertheless, we now consider the State's argument in order "to expedite decision in the public interest." *Id.* at R. 2.

committed by an adult." *Thompson*, 487 U.S. at 835 (plurality opinion). "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* The Supreme Court has stated that relative to adults, minors may lack maturity, may have a lessened sense of responsibility, and may be more vulnerable to peer pressure and other outside influences. *Roper*, 543 U.S. at 569. Because of these differences, minors' "irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* at 570 (quoting *Thompson*, 487 U.S. at 835).

Another consideration emphasized by the Supreme Court in its recent decisions is a minor offender's "capacity for change." *Graham*, 560 U.S. at 74. The Supreme Court has stated that minors "still struggle to define their identity" and are less likely than adults to be "irretrievably depraved." *Roper*, 543 U.S. at 570. Citing both its precedents and literature from the social sciences, the Supreme Court concluded that minors' personality traits "are more transitory, less fixed"; that specific traits such as "impetuousness and recklessness that may dominate in younger years can subside"; and that "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993), and Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003), and citing Erik H. Erikson, *Identity: Youth and Crisis* (1968)).

Most relevant to our analysis here are the decisions in *Graham* and *Miller*, which set limits on the power of the States to impose a sentence of life imprisonment without the possibility of parole on defendants who committed crimes before the age of eighteen. *Miller*, ___ U.S. at ___, 132 S. Ct. at 2469; *Graham*, 560 U.S. at 82. In *Graham* the Supreme Court held that the Eighth Amendment to the United States Constitution "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. In pertinent part, the Supreme Court reasoned that removing the possibility of parole makes a life sentence "far more severe." *Id.* at 70 (quoting *Solem v. Helm*, 463 U.S. 277, 297 (1983), *abrogated by Harmelin v. Michigan*, 501 U.S. 957 (1991)). Life imprisonment without the possibility of parole "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."

Id. at 69-70 (citing *Solem*, 463 U.S. at 300-01). In concluding that such a harsh sentence is never proportionate for a nonhomicide offense committed by a minor, the Supreme Court determined that establishing "a categorical rule [against life without the possibility of parole] gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Id.* at 79. The Supreme Court stated:

> A State is not required to *guarantee* eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some *meaningful opportunity* to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders *never* will be fit to reenter society.

Id. at 75 (emphases added).

In *Miller* the Court addressed these same considerations with respect to two defendants who were both convicted of a murder committed at the age of fourteen. ___ U.S. at ___, 132 S. Ct. at 2460. Relying upon *Graham*, the Court stated:

> [N]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . .
>
> Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. . . .
>
> But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole

> sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s . . . foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

Id. at ___, 132 S. Ct. at 2465-66. The Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at ___, 132 S. Ct. at 2469. Although a sentencing court may find that a specific homicide justifies life imprisonment without the possibility of parole, the judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at ___, 132 S. Ct. at 2469.

Although *Miller* was decided in 2012, it must be given retroactive effect during certain state collateral review procedures. *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 731-32. "Giving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.* at ___, 136 S. Ct. at 736.

In this case, after a hearing on defendant's motion for appropriate relief, the superior court found that defendant was convicted of first-degree murder and that at the time of conviction, North Carolina law required that all sentences of life imprisonment be imposed without the possibility of parole. *See* N.C.G.S. § 14-17 (1997) (providing in part that "any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole"). Nevertheless, the State argues that defendant's sentence "is not really life imprisonment without parole" because defendant may be able to obtain release pursuant to N.C.G.S. § 15A-1380.5, which at the time of defendant's conviction stated:

> (a) For purposes of this Article the term "life imprisonment without parole" shall include a sentence imposed for "the remainder of the prisoner's natural life."
>
> (b) A defendant sentenced to life imprisonment without parole is entitled to review of that sentence by a resident superior court judge for the county in which the

> defendant was convicted after the defendant has served 25 years of imprisonment. The defendant's sentence shall be reviewed again every two years as provided by this section, unless the sentence is altered or commuted before that time.
>
> (c) In reviewing the sentence the judge shall consider the trial record and may review the defendant's record from the Department of Correction, the position of any members of the victim's immediate family, the health condition of the defendant, the degree of risk to society posed by the defendant, and any other information that the judge, in his or her discretion, deems appropriate.
>
> (d) After completing the review required by this section, the judge shall recommend to the Governor or to any executive agency or board designated by the Governor whether or not the sentence of the defendant should be altered or commuted. The decision of what to recommend is in the judge's discretion.
>
> (e) The Governor or an executive agency designated under this section shall consider the recommendation made by the judge.
>
> (f) The recommendation of a judge made in accordance with this section may be reviewed on appeal only for an abuse of discretion.

Id. § 15A-1380.5 (1995) (repealed 1998).

Although this section might increase the chance for a sentence to be "altered or commuted," *id.* § 15A-1380.5(d), after careful consideration of *Graham*, *Miller*, and *Montgomery*, we conclude that section 15A-1380.5 does not support the State's contention that defendant's sentence "is not really life imprisonment without parole." Section 15A-1380.5 states that a defendant "is entitled to review of [his or her] sentence by a resident superior court judge," but it guarantees no hearing, no notice, and no procedural rights. In addition, the statute provides minimal guidance as to what types of circumstances would support alteration or commutation of the sentence. The section requires only that the judge "consider the trial record" and notes that the judge "may" review other information "in his or her discretion." *Id.* § 15A-1380.5(c). Ultimately, "[t]he decision of what to recommend is in the judge's discretion," and the only effect of the judge's recommendation is that "[t]he Governor or

an executive agency designated under this section" must "consider" it. *Id.* § 15A-1380.5(e). Because of these provisions, the possibility of alteration or commutation pursuant to section 15A-1380.5 is deeply uncertain and is rooted in essentially unguided discretion. Accordingly, this section does not reduce to any meaningful degree the severity of a sentence of life imprisonment without the possibility of parole. *See Graham*, 560 U.S. at 69-70 (stating that life imprisonment without the possibility of parole "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence").

Moreover, section 15A-1380.5 does not address the central concern of *Miller*—that a sentencing court cannot treat minors like adults when imposing a sentence of life imprisonment without the possibility of parole. ___ U.S. at ___, 132 S. Ct. at 2466. As the Supreme Court stated in *Montgomery*:

> A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, *e.g.*, Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). *Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.*

___ U.S. at ___, 136 S. Ct. at 736 (emphasis added). This statement reflects the Supreme Court's foundational concern that at some point during the minor offender's term of imprisonment, a reviewing body will consider the possibility that he or she has matured. Nothing in section 15A-1380.5 requires consideration of this factor. In fact, after the judge's recommendation is submitted to "[t]he Governor or an executive agency designated under this section," N.C.G.S. § 15A-1380.5(e), nothing in section 15A-1380.5 gives any guidance to the final decision maker because this framework simply was not developed to address the concerns the Supreme Court raised in *Miller* and *Montgomery*.

Based upon his conviction for a crime that occurred when he was seventeen years old, defendant was sentenced to "imprisonment in the State's prison for life without parole" pursuant to a North Carolina statute that did not permit the sentencing court to consider a lesser punishment. *Id.* § 14-17 (1997). Although section 15A-1380.5 might increase the chance that this sentence will be altered or commuted, it does not

provide a sufficiently meaningful opportunity to reduce the severity of the sentence to constitute something less than life imprisonment without the possibility of parole. We hold that defendant's sentence is prohibited by the Eighth Amendment to the United States Constitution as interpreted in *Miller*. As a result, the trial court correctly vacated that sentence and ordered a new sentencing hearing. The court's order is affirmed and the case is remanded for resentencing.

AFFIRMED; REMANDED FOR RESENTENCING.

TOWN OF BOONE, PLAINTIFF
v.
STATE OF NORTH CAROLINA, DEFENDANT

COUNTY OF WATAUGA, INTERVENOR-DEFENDANT

No. 93A15-2

Filed 21 December 2016

Zoning—extraterritorial jurisdiction—withdrawal by legislature

An act by the legislature withdrawing extraterritorial jurisdiction from the Town of Boone was squarely within the legislature's general power as described in the first clause of Article VII, Section 1 of the state constitution. Local jurisdictional reorganization is precisely the type of "organization and government and fixing of boundaries" contemplated by the first clause of Article VII, Section 1 and historically approved by the Supreme Court of North Carolina.

Justice ERVIN concurring in the result.

Justice HUDSON joins in this concurring opinion.

Justice BEASLEY dissenting.

Appeal pursuant to N.C.G.S. § 7A-27(a1) from an order entered on 29 July 2015 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 22 March 2016.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, Jim W. Phillips, Jr., and Julia C. Ambrose, for plaintiff-appellee.

Roy Cooper, Attorney General, by Lauren M. Clemmons, Special Deputy Attorney General, for defendant-appellant.

Eggers, Eggers, Eggers & Eggers, by Stacy C. Eggers, IV, for intervenor-defendant-appellant.

NEWBY, Justice.

In this case we consider whether the General Assembly may withdraw the previous extension of a town's jurisdiction beyond its corporate limits and return governance to the county. The first clause of Article VII, Section 1 of our state constitution recognizes the historic plenary authority of the General Assembly to provide for the "organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions." This language acknowledges the legislative power to organize local government and fix the jurisdictional boundaries. Extraterritorial jurisdiction affects the organization of local governmental subdivisions by extending a town's jurisdiction into the county, thus shifting the political authority over certain subjects from one local government to another. Here, by withdrawing the Town of Boone's extraterritorial jurisdiction, the legislature restored the local jurisdictional boundaries as originally fixed, returning the governance of territory located outside of the Town limits to Watauga County. The limitations imposed by Article II, Section 24 do not apply to an action by the General Assembly establishing or modifying the jurisdictional boundaries of local governmental units. Because the legislative act withdrawing the Town's extraterritorial jurisdiction falls squarely within this plenary power, we hold that the act is constitutional, and we reverse the decision of the trial court.

Historically, the General Assembly established the governmental jurisdiction of a municipality by fixing the municipality's corporate limits. *See State v. Eason*, 114 N.C. 787, 795, 19 S.E. 88, 90 (1894) ("[T]he jurisdiction of a municipality does not extend beyond [its boundary], in the absence of some other language in the charter . . . ."). Beginning in the late 1800s, the General Assembly began to extend the jurisdiction of select municipalities beyond their corporate limits with regard to designated governmental functions. *See id.* at 792, 19 S.E. at 89 ("[T]he

legislature unquestionably ha[s] the power to extend the jurisdiction of the town, for police purposes . . . ."); *see also*, *e.g.*, Act of Jan. 17, 1911, ch. 2, sec. 27, 1911 N.C. Priv. [Sess.] Laws 3, 17 (extending the City of Greensboro's jurisdiction for sanitation and the protection of city property for one mile "outside of said city limits"). Each grant of extraterritorial authority was by local act on a city-by-city basis. Despite the growing usage of extraterritorial jurisdiction, the General Assembly precluded municipalities in Watauga County from governing extraterritorially. *E.g.*, Act of May 26, 1955, ch. 1334, 1955 N.C. Sess. Laws 1387 (authorizing municipalities to regulate the subdivision of land within one mile of the corporate limits but excluding Watauga County and fifty-two other counties); *see also* Act of June 19, 1959, ch. 1204, sec. 1, 1959 N.C. Sess. Laws 1354, 1354 (expressly precluding towns located within Watauga County from governing extraterritorially). In 1961 the General Assembly granted extraterritorial jurisdictional authority to certain municipalities located within Watauga County, including the Town of Boone, over territory not more than one mile beyond their corporate limits. Act of May 30, 1961, ch. 548, sec. 1¾, 1961 N.C. Sess. Laws 748, 748. Article 19 of Chapter 160A of the General Statutes includes the current codification of extraterritorial jurisdiction.

For twenty years, the Town did not attempt to govern within the extraterritorial area. In 1981 the Town "initiate[d] the steps necessary to extend extraterritorial [jurisdiction] to [the] one mile perimeter" surrounding the Town and also sought "permission from the Watauga County Board of Commissioners to extend this radius to two miles." *See* N.C.G.S. § 160A-360(a) (2015) (requiring approval from the county to extend jurisdiction beyond the one-mile perimeter).[1] When the County denied the Town's request to exercise jurisdiction beyond the one-mile extraterritorial area, the Town adopted Ordinance 82-11 to exercise "[e]xtraterritorial zoning jurisdiction pursuant to [N.C.G.S. §] 160A-360" for five specified areas located within the permitted one-mile perimeter outside the Town limits. Boone, N.C., Ordinance 82-11 (Aug. 26, 1982).[2]

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1. Even when a municipality wishes to exercise extraterritorial jurisdiction in an area within one mile of its corporate limits, county approval is required if the county is already enforcing zoning ordinances, subdivision regulations, and the State Building Code in that area. N.C.G.S. § 160A-360(e) (2015).

2. A municipality that wishes to exercise extraterritorial jurisdiction must specify by ordinance the areas to be included, defining the boundaries "to the extent feasible, in terms of geographical features identifiable on the ground." N.C.G.S. § 160A-360(b) (2015). These boundaries must "at all times be drawn on a map, set forth in a written description, or shown by a combination of these techniques." *Id.* A copy of this delineation must be

In 2014 the General Assembly withdrew extraterritorial jurisdiction from the Town and returned governance of the areas to the County. Act of June 26, 2014, ch. 33, sec. 1, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 139, 140 (the Boone Act) ("Notwithstanding any other provision of law, the Town of Boone shall not exercise any powers of extraterritorial jurisdiction as provided in Article 19 of Chapter 160A of the General Statutes."). The Boone Act effectively reorganized the specified local governmental jurisdictions within Watauga County by confining the Town's jurisdictional reach to its corporate limits and restoring governance of the extraterritorial area to the County. *See* N.C.G.S. §§ 160A-360(a)-(b) (2015).

The Town filed its complaint, challenging the Boone Act as a facially unconstitutional local act prohibited by Article II, Section 24 of the North Carolina Constitution. The State unsuccessfully moved to dismiss the complaint and, in its answer, denied the Town's allegations regarding the applicability of Article II, Section 24.[3] The County intervened, asserting its "special interest" in the action as a "property owner" and "the duly elected governing body for the citizens and residents residing within the former extraterritorial jurisdiction."[4]

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filed with the Register of Deeds and, as is true of the delineation of the municipality's corporate boundaries, maintained in the office of the municipality's clerk. *Id.* §§ 160A-22 (2015), 360(b).

To establish its extraterritorial boundary, the Town adopted Ordinance 83-2, describing the extraterritorial area by metes and bounds and topographical features, Boone, N.C. Ordinance 83-2, § 1 (Mar. 31, 1983), and amended the zoning map to include the extraterritorial area, *id.* § 4. The Town later expanded its reach of extraterritorial jurisdiction into other specified areas located within the one-mile perimeter. *E.g.*, *id.* 83-5 (Apr. 7, 1983); *id.* 87-12 (Dec. 22, 1987); *id.* 92-03 (Sept. 3, 1992); *id.* 98-04 (Nov. 19, 1998); *id.* 99-02 (May 27, 1999). With each additional area, the Town amended its zoning map to reflect and describe the new boundaries. *E.g.*, *id.* 83-2, § 4; *id.* 83-5; *id.* 87-12, § 4; *id.* 92-03, § 4; *id.* 98-04, § 4; *id.* 99-02, § 4. County residents living within the added territory were then notified that the political body governing zoning and development had changed. *See* N.C.G.S. § 160A-360(a1) (2015).

3. The State contends that plaintiff's claims are barred by the doctrine of sovereign immunity, that "[p]laintiff lacks standing, as well as the capacity to sue, for the withdrawal of its extraterritorial jurisdictional powers," that reallocation of authority over planning and development within the extraterritorial jurisdiction "constitutes a legitimate exercise of legislative authority over [the legislature's] political subdivisions" and a non-justiciable . . . political question[ ] within the purview of the legislative branch of government," and that plaintiff fails to state a claim for relief under the state constitution. Because we resolve this case based on the General Assembly's plenary power acknowledged in the first clause of Article VII, Section 1, we do not address the other arguments.

4. Residents of extraterritorial jurisdiction areas are not allowed to vote in local government municipal elections; they remain county residents for voting purposes. *See* Ordinance 82-11; N.C.G.S. §§ 160A-360(a1), -362 (2015).

A three-judge panel heard oral arguments and granted summary judgment in favor of the Town, concluding "that the revocation of the Town of Boone's power of extraterritorial jurisdiction by [the Boone Act] is unconstitutional pursuant to the prohibition on local acts contained in Article II, Section 24" and enjoining its implementation. The State and the County appealed that decision under N.C.G.S. § 7A-27(a1).

The State and the County argue that, under Article VII, Section 1 of the constitution, the legislature delegates to municipalities the authority to govern a particular territory and retains plenary power to modify the governance of that geographic territory. To hold otherwise would allow Article II, Section 24 to impermissibly restrict the General Assembly's broad authority over municipalities as acknowledged by Article VII, Section 1. The Town responds that the Boone Act is a prohibited local act because it removes the authority of the Town to enforce its ordinances, some of which may "[r]elat[e] to health, sanitation, and the abatement of nuisances," N.C. Const. art. II, § 24(1)(a), or "[r]egulat[e] labor, trade, mining, or manufacturing," *id.* art. II, § 24(1)(j), and that the Act otherwise partially repeals N.C.G.S. § 160A-360, a general law, *see id.* art II, § 24(2).

The analytical framework for reviewing a facial constitutional challenge is well-established. Our "State Constitution is in no matter a grant of power," *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959), and as such, "[a]ll power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it," *id.* at 112, 102 S.E.2d at 861 (citation omitted). *See also State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895) ("[P]ower resides with the people and is exercised by their representatives in the General Assembly."). "We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (citation omitted). An act of the General Assembly will be declared unconstitutional only when "it [is] plainly and clearly the case," *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)), and its unconstitutionality must be demonstrated beyond reasonable doubt, *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991) (citations omitted).

Though not expressly stated in our first constitution, the General Assembly has long enjoyed plenary power to create political subdivisions of local government, establish their jurisdictional boundaries, and invest them with certain powers, *see Quality Built Homes Inc. v. Town of Carthage*, ___ N.C. ___, ___, 789 S.E.2d 454, 457 (2016), which "may be enlarged, abridged or modified at the will of the legislature," *id.* at ___, 789 S.E.2d at 457 (quoting *White v. Comm'rs of Chowan Cty.*, 90 N.C. 437, 438 (1884)). Our Constitution of 1868 affirmed "the duty of the Legislature to provide for the organization of cities, towns, and incorporated villages." N.C. Const. of 1868, art. VIII, § 4. By 1876, following a brief suspension of "provisions relating to municipal[ities]" during Reconstruction, *see id.*, art. VII, § 12, the constitution reaffirmed that "[t]he General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions" pertaining to municipalities, *id.*, Amends. of 1875, art. VII, § 14. *See Journal of the Constitutional Convention of the State of North Carolina* 162-63 (Raleigh, Josiah Turner 1875) (dismissing concerns that the 1875 amendment to Article VII would provide "unlimited control of the Legislature" over "the municipal government of cities, towns, &c.").

Local political subdivisions are "mere instrumentalities of the State for the more convenient administration of local government," *Holmes v. City of Fayetteville*, 197 N.C. 740, 746, 150 S.E. 624, 627 (1929), *appeal dismissed per curiam*, 281 U.S. 700, 50 S. Ct. 353, 74 L. Ed. 1126 (1930), whose territory and functions rest "in the absolute discretion of the state," *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 50, 165 S.E.2d 201, 207 (1969) (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, 28 S. Ct. 40, 46, 52 L. Ed. 151, 159 (1907)); *accord Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 9-10, 36 S.E.2d 803, 809 (1946). Under its plenary power, the General Assembly may create, organize, and abolish these local governmental units, arranging and rearranging local government to best meet the specific local needs of the people. *See People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 222 (1875) (Political subdivisions "are parts and parcels of the State, organized for the convenience of local self-government."); *accord White*, 90 N.C. at 438. Each locality presents different challenges and needs for the arrangement of local governmental units. The General Assembly is the only branch of government equipped to organize local government and, through oversight, craft responses to the changing needs of local communities.

As acknowledged by the case law, this broad power of the General Assembly has remained unchanged throughout our history and is recognized in Article VII, Section 1 of our current constitution, adopted in 1971:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1. As such, Article VII, Section 1 "is not a delegation of power to the General Assembly" but "a general description" and "merely a recognition" of "the General Assembly's power to provide for the organization and powers of local government," *Report of the North Carolina State Constitution Study Commission* 85 (1968) [hereinafter *1968 Constitution Commission Report*], as affirmed in the 1875 amendment, which "gave the General Assembly full power to revise or abolish the form and powers of county and township governments," *id.* at 143.[5]

The text of the first clause of Article VII, Section 1, "[t]he General Assembly shall provide for the organization and government and the fixing of boundaries" of local governmental entities, mandates the statutory creation, structuring, restructuring, and defining of local governmental subdivisions and their jurisdictional boundaries. We look to the plain meaning of the phrase to ascertain its intent. *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510-11 (2004) (The constitution is construed for its plain meaning.); *see also Dunn v. Pac. Emp'rs Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (Ordinary rules of grammar apply.). Each word informs a proper understanding of the whole. "Organization" means something "put together into an orderly, functional, [and] structured whole." *Organize*, *The American Heritage Dictionary* 926 (new coll. ed. 1979). "Government" is defined as "[t]he act or process of governing; especially, the administration of public policy in a political unit;

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5. Significantly, the text of Article VII, Section 1, recognizing the General Assembly's historic duty to provide for local government, was adopted against the backdrop of Article II, Section 24 and the various court decisions describing its application. *See 1968 Constitution Commission Report* 85; *see also N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 286 S.E.2d 89, 94 (1982) (relying on the *1968 Constitution Commission Report* to "ascertain[ ] the intent of the framers and adopters, [and] the object and purpose of the revision"). Following well-established principles of construction, one amendment cannot be read to eliminate the other, and the one more recent in time is given its full application. *In re Peoples*, 296 N.C. 109, 159, 250 S.E.2d 890, 919 (1978) (considering constitutional amendments "*in pari materia* with the other sections of our Constitution which it was intended to supplement" (citations omitted)), *cert. denied*, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979); *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) ("Constitutional provisions should be construed in consonance with the objects and purposes in contemplation *at the time of their adoption*." (emphasis added)).

political jurisdiction." *Government*, *id.* at 570. The "fixing of boundaries" means establishing borders or limits. *See Fix* and *Boundary*, *id.* at 497, 156. Thus, the plain meaning of the phrase "organization and government and fixing of boundaries" includes the designation and realignment of the political jurisdictions of local governmental units.

The General Assembly alone has the oversight responsibility and authority to define, limit, and expand the otherwise competing jurisdictions of local political subdivisions. *See Hailey v. City of Winston-Salem*, 196 N.C. 17, 22-23, 144 S.E. 377, 380 (1928) ("When a new governmental agency is established by the Legislature, such as a municipal corporation, it takes control of all the affairs over which it is given authority, to the exclusion of other governmental agencies.").[6] Setting the jurisdictional boundaries of political subdivisions is left to legislative discretion.[7] Since the needs of each community differ, this Court has repeatedly acknowledged the practical reality that the General Assembly may exercise that discretion by local act.[8]

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6. Instances of creating, organizing, and reorganizing political subdivisions have met this Court's approval, both before and after the 1917 amendments that created the predecessor to Article II, Section 24. *See*, *e.g.*, *Bethania Town Lot Comm. v. City of Winston-Salem*, 348 N.C. 664, 668, 502 S.E.2d 360, 362 (1998) ("The General Assembly may, by special or local act, create municipalities and change the boundaries of municipalities." (citations omitted)); *Lilly v. Taylor*, 88 N.C. 489, 490-91, 494-95 (1883) (affirming the legislature's creation and subsequent repeal of the charter of the Town of Fayetteville); *Mills v. Williams*, 33 N.C. (11 Ired.) 558, 560, 563-64 (1850) (upholding the legislature's "power to create and abolish" Polk County); *see also In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 16-17, 249 S.E.2d 698, 707 (1978) (Municipalities have no inherent constitutional right to their boundaries and derive authority only from the powers delegated by the legislature. (citations omitted)).

7. *See Piedmont Ford Truck Sale, Inc. v. City of Greensboro*, 324 N.C. 499, 502, 380 S.E.2d 107, 109 (1989) ("The extension of boundaries of cities has been held to be a political decision . . . ." (citations omitted)); *see also Texfi Indus., Inc. v. City of Fayetteville*, 44 N.C. App. 268, 273, 261 S.E.2d 21, 25 (1979) (recognizing the General Assembly's authority to create, destroy, or change the boundaries of any political subdivision), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980); *Jones v. Jeanette*, 34 N.C. App. 526, 532, 239 S.E.2d 293, 296 (1977) (stating that setting boundaries under Article VII, Section 1 is a "permissible legislative function" "left to legislative discretion" (citing, *inter alia*, *Hunter*, 207 U.S. at 178-79, 28 S. Ct. at 46, 52 L. Ed. at 159)).

8. *See Bethania Town Lot Comm.*, 348 N.C. at 668, 502 S.E.2d at 362; *Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206-07 (1972) (The legislature may create a municipality by special act and may provide procedures for annexation by special act.); *Town of Highlands v. City of Hickory*, 202 N.C. 167, 168, 162 S.E. 471, 471 (1932) (upholding a local act that extended the municipal limits of one town and repealed statutes under which adjacent towns were organized); *Holmes*, 197 N.C. at 748, 150 S.E. at 628 (The legislature may extend by special act extraterritorial jurisdiction and the authority of a municipality to provide services outside its corporate limits.); *State v. Rice*, 158 N.C. 635, 636, 74 S.E. 582, 582 (1912) (recognizing the legislature's authority to allow the exercise

The second clause of Article VII, Section 1 concerns the authority of the General Assembly to confer specific "powers and duties" on local governmental units. Unlike the first clause in Article VII, Section 1, the second clause includes an express limitation; namely, it prohibits any legislative delegation of "powers and duties" to local governmental units that is "otherwise prohibited by this Constitution." Only under the second clause, then, is the General Assembly's authority over local governments expressly subject to limitations imposed by other constitutional provisions, including the constraints on local acts in Article II, Section 24 first adopted in 1917. For example, under the Article II, Section 24 prohibition on certain local acts, the General Assembly cannot grant to one county the power to enact local employment legislation, *see Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 191, 581 S.E.2d 415, 430 (2003), or remove a city's power to enforce certain ordinances regarding specific properties within its municipal limits, *see City of New Bern v. New Bern–Craven Cty. Bd. of Educ.*, 338 N.C. 430, 442, 450 S.E.2d 735, 742 (1994).[9]

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of extraterritorial jurisdiction outside municipal limits by local act); *Lutterloh v. City of Fayetteville*, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908) (recognizing validity of extension of corporate boundaries through annexation by local act); *see also In re City of Durham Annexation Ordinance*, 69 N.C. App. 77, 84, 316 S.E.2d 649, 654 ("Article VII, Section 1 is not a power of the General Assembly which must be carried out or enacted by general laws as defined in Article XIV, Section 3."), *appeal dismissed and disc. rev. denied*, 312 N.C. 493, 322 S.E.2d 553 (1984).

9. This approach of conducting an Article II, Section 24 analysis only when the challenged statute specifies a specific "power" or "duty" is consistent with our prior decisions. In *Piedmont Ford Truck Sale, Inc. v. City of Greensboro*, the plaintiffs challenged a local act annexing certain land to the City of Greensboro. 324 N.C. 499, 501, 380 S.E.2d 107, 108 (1989). While the annexation clearly arose under the authority to "fix the boundaries of cities" acknowledged in Article VII, Section 1, *id.* at 503, 380 S.E.2d at 110, because the act also contained a specific "provision regarding solid waste collection," the plaintiffs argued the statute violated Article II, Section 24, *id.* at 504, 380 S.E.2d at 110. Because the statute specified a particular "power," this Court conducted an analysis under Article II. *Id.* at 504-06, 380 S.E.2d at 110-11. When viewed as a whole, the explicit grant of power was a "small part" of the legislation, *id.* at 506, 380 S.E.2d at 111, and this Court concluded that "[t]he provision . . . regarding solid waste collection" did not violate Article II, Section 24, *id.* at 506, 380 S.E.2d at 111. *See also, e.g.*, *Lamb v. Bd. of Educ.*, 235 N.C. 377, 379-80, 70 S.E.2d 201, 203 (1952) (concluding that an act expressly restricting certain express powers of the Randolph County Board of Education violated the Article II limitations on local acts); *Idol v. Street*, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951) (concluding that an act that "confer[red] power upon the Board of Aldermen of the City of Winston-Salem and the Board of Commissioners of Forsyth County" to, *inter alia*, "name a joint city-county board of health," which varied from general law, "[wa]s a local act relating to health" in violation of the Article II limitations on local acts); *Bd. of Health v. Bd. of Comm'rs*, 220 N.C. 140, 143-44, 16 S.E.2d 677, 678-79 (1941) (concluding that an act removing from the Nash County Board of Health the power to appoint a county health officer was a local act relating to health in violation of the Article II limitations on local acts).

Acting under its plenary authority, the General Assembly creates municipalities. Historically, the municipality's governmental authority ended at its corporate limits. The General Assembly first granted municipalities the authority to govern extraterritorially by amending municipal charters.[10] Even after the adoption of the restrictions on local acts, the legislature continued to delegate to select cities on an individual basis the authority to enforce more comprehensive zoning regulations within their one-mile perimeters.[11] Over time extraterritorial jurisdiction has become more common and the governmental authority expanded.[12]

At its essence, jurisdiction is "[a] government's general power to exercise authority over all persons and things within its territory" or the "geographic area within which political . . . authority may be exercised." *Jurisdiction*, *Black's Law Dictionary* (10th ed. 2014). Extraterritorial jurisdiction extends the Town's jurisdictional boundary, allowing the Town to impose certain ordinances—already applicable within its corporate limits—one mile into County territory without the County's approval, thus superseding any County regulations on those same subjects. *See* N.C.G.S. § 160A-360 (2015); *see also* Trey Allen, Univ. of N.C. Sch. of Gov't, *General Ordinance Authority*, *in County and Municipal Government in North Carolina* 77, 84 (Frayda S. Bluestein ed., 2d ed. 2014) ("A city may enforce zoning and other development ordinances inside its corporate limits and within its extraterritorial jurisdiction (ETJ). . . . When a city chooses to enforce development ordinances in its

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10. *See Rice*, 158 N.C. at 636, 640, 74 S.E. at 582, 584 (upholding a City of Greensboro ordinance regulating hog farming within one-fourth mile of the corporate limits, adopted pursuant to the 1911 statutory delegation of authority by charter amendment).

11. *E.g.*, Act of Apr. 23, 1949, ch. 1192, sec. 1, 1949 N.C. Sess. Laws 1521, 1521 (authorizing Town of Tarboro to exercise zoning powers within one mile beyond the Town's corporate limits); Act of Mar. 31, 1949, ch. 700, sec. 3, 1949 N.C. Sess. Laws 732, 733 (same for City of Gastonia); Act of Mar. 28, 1949, ch. 629, secs. 1, 2, 1949 N.C. Sess. Laws 640, 640-41 (same for Town of Chapel Hill); Act of Mar. 25, 1949, ch. 540, secs. 1, 4, 1949 N.C. Sess. Laws 541, 541-42, 543 (same for City of Raleigh); *see also Report of the Municipal Government Study Commission* 18 (1958) [hereinafter *Municipal Report*] ("A total of 19 cities have, by special act, been given authority to zone for one mile or more beyond their limits.").

12. Whether enforcing its ordinances inside its municipal limits or extraterritorially, a town receives the authority to govern territory from the legislature. *See Holme*s, 197 N.C. at 744, 150 S.E. at 626 ("The general rule is that a municipal corporation has no extraterritorial powers . . . ."); *Town of Lake Waccamaw v. Savage*, 86 N.C. App. 211, 213, 356 S.E.2d 810, 811 (recognizing that the General Assembly may by local act permit a town to exercise extraterritorial jurisdiction), *disc. rev. denied*, 320 N.C. 797, 361 S.E.2d 89 (1987).

ETJ, the county's development ordinances no longer apply there . . . ."). Extraterritorial jurisdiction remains extraordinary because it broadens a municipality's jurisdictional reach beyond its corporate limits. This extension of extraterritorial jurisdictional authority deprives the residents of the extraterritorial area of meaningful representation and the right to vote for local government representatives who shape policies affecting their property interests.[13] *See Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481, 492 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.").

The pivotal question before this Court is whether the Boone Act, which withdraws the Town's extraterritorial jurisdiction, is an exercise of the General Assembly's plenary authority to "provide for the organization and government and fixing of boundaries" of local government under the first clause of Article VII, Section 1. If so, our analysis ends, and there is no need to address the application of the second clause of Article VII, Section 1 and any restrictions imposed by Article II, Section 24.

Extraterritorial jurisdiction is inextricably tied to a municipality's authority to enforce its zoning and development ordinances within certain geographic boundaries. By retracting the Town's jurisdictional reach to its corporate limits, the Boone Act restores the local government boundaries within Watauga County as originally fixed. This local jurisdictional reorganization is precisely the type of "organization and government and fixing of boundaries" contemplated by the first clause of Article VII, Section 1 and historically approved by this Court. The Boone Act withdraws from the Town its extraterritorial jurisdiction and its governing authority to enforce certain ordinances within the one-mile perimeter and returns governance of that territory to the County and its residents. The General Assembly is the only body politic uniquely qualified to oversee local government and set the jurisdictional lines that divide the Town and the County.

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13. County citizens residing within the affected territory cannot vote for Town officials. Ordinance 82-11; *see* N.C.G.S. §§ 160A-360(a1), 362. While County residents subject to the Town's extraterritorial jurisdiction are represented on the Town's planning board and board of adjustment, Ordinance 82-11, these extraterritorial-jurisdiction appointees may only vote on matters involving the extraterritorial area, *see* N.C.G.S. §§ 160A-360(a1), 362; *see also Municipal Report* 18 ("[G]overnmental action affecting the use of property should originate in a governing board elected by persons subject to such action . . . [and] residents of the area affected should be given a voice . . . through the naming of outside residents to local planning boards and boards of adjustment.").

Because the state constitution authorizes the General Assembly to reduce the Town's jurisdictional reach, the removal of extraterritorial jurisdiction falls squarely within the legislature's general power as described in the first clause of Article VII, Section 1. For the reasons stated above, the decision of the three-judge panel finding the Act unconstitutional is reversed.

REVERSED.

Justice ERVIN concurring in the result.

Although I concur in the Court's determination that the Boone Act is not facially unconstitutional, I am unable to agree with the Court's determination to uphold the Boone Act pursuant to the first portion of the first paragraph of Article VII, Section 1 of the North Carolina Constitution, which recognizes the General Assembly's authority to provide for the "organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions" on the theory that the Boone Act effectuates a "reorganization" of the authority granted to Boone and Watauga County. N.C. Const. art. VII, § 1. Instead, I believe that a determination of the constitutionality of the Boone Act hinges upon the second part of the first paragraph of Article VII, Section 1, which recognizes the General Assembly's authority to "give such powers and duties to counties, cities and towns, and other governmental subdivisions as [the General Assembly] may deem advisable" so long as any legislation that is enacted pursuant to this provision is not "otherwise prohibited by [the North Carolina] Constitution." *Id.* For the reasons set forth below, while I believe that the General Assembly's decision to alter the Town's regulatory authority is subject to constitutional limitations, such as those contained in Article II, Section 24, I also believe that the Boone Act is not impermissibly connected to the subjects about which the General Assembly lacks the authority to enact local legislation. Moreover, even if the Boone Act does implicate "the organization and government and the fixing of boundaries" provision, that determination does not obviate the necessity for the Court to consider "any restrictions imposed by Article II, Section 24" given our decision in *Piedmont Ford Truck Sale, Inc. v. City of Greensboro*, 324 N.C. 499, 380 S.E.2d 111 (1989). As a result, while I concur in the result reached by the Court, I am unable to join its decision.

Although the Court believes that its decision to uphold the constitutionality of the Boone Act obviates the need to address the State's

sovereign immunity and standing arguments, I do not find that assertion convincing. Since both sovereign immunity and standing are threshold issues, they must be addressed in order for the Court to reach the merits of the constitutional claims that have been advanced for our consideration. For that reason, I will begin by addressing the sovereign immunity and standing arguments that the State has advanced in opposition to the Town's claims.

In seeking relief from the order of the three-judge panel of the Superior Court, Wake County, before this Court, the State argues that the panel erred by granting summary judgment in the Town's favor because (1) the Town's challenge to the Boone Act is barred by the doctrine of sovereign immunity; (2) the Town lacks standing to challenge the constitutionality of the Boone Act; and (3) the Town's challenge to the Boone Act in reliance upon Article II, Section 24 fails given that the Boone Act falls squarely within the General Assembly's authority regarding the "fixing of boundaries" pursuant to Article VII, Section 1 of the North Carolina Constitution.[1] With respect to the sovereign immunity issue, the State contends that the Town failed to specifically allege a waiver of sovereign immunity in its complaint; that nothing in the relevant statutory provisions authorizes a municipality to file suit against the State; and that the Town does not have a valid constitutional claim sufficient to support a direct action against the State. In response, the Town asserts that it was not required to do anything other than allege a reasonable basis for determining that its claim is not barred by sovereign immunity. Moreover, the State's argument directed to the substance of the Town's claim does not serve the purpose for which sovereign immunity exists, which is to obviate the necessity for the State to defend itself in litigation in the absence of consent. The lack of any valid basis for the State's sovereign immunity argument is bolstered by the substantial number of decisions stemming from challenges to legislation asserted in reliance upon Article II, Section 24, none of which has suggested that such claims are barred by sovereign immunity. I do not find the State's sovereign immunity argument to be persuasive.

"Sovereign immunity stands for the proposition that . . . 'the State cannot be sued except with its consent or upon its waiver of immunity.' " *Dawes v. Nash County*, 357 N.C. 442, 445, 584 S.E.2d 760, 762 (2003) (quoting *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998), and citing *Guthrie v. N.C. State Ports Auth.*, 307 N.C.

1. The County echoes the State's substantive argument.

522, 534, 299 S.E.2d 618, 625 (1983)). "[S]overeign immunity . . . 'is an *immunity from suit* rather than a mere defense to liability . . . .' " *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 425 (1985)). "[T]he doctrine of sovereign immunity . . . is a common law theory or defense established by this Court," so that, "when there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum v. Univ. of N.C.*, 330 N.C. 761, 786, 413 S.E.2d 276, 292, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

The State's argument in reliance upon the Town's failure to specifically plead a waiver of sovereign immunity relies exclusively upon *Vest v. Easley*, in which the Court of Appeals noted that "[i]t is well-established law that with no allegation of waiver [of sovereign immunity] in a plaintiff's complaint, the plaintiff is absolutely barred from suing the state and its public officials in their official capacities in an action for negligence." 145 N.C. App. 70, 74, 549 S.E.2d 568, 573 (2001) (citations omitted). Instead of asserting a negligence-based claim for monetary damages such as the claim at issue in Vest, however, the Town has sought a declaration concerning the constitutionality of the Boone Act. "A declaratory judgment may be used to determine the construction and validity of a statute," *Town of Emerald Isle v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987) (citing *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 168 S.E.2d 389 (1969)), with "a municipality [being entitled to] have its rights and obligations determined in a declaratory judgment action," *id.* at 646, 360 S.E.2d at 760 (citing *Bd. of Managers v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953)). In light of that fact, this Court has regularly entertained declaratory judgment actions against the State and its political subdivisions involving challenges to the constitutionality of legislation as violative of Article II, Section 24. *E.g.*, *id.* at 645-52, 360 S.E.2d at 759-63; *Bd. of Managers*, 237 N.C. at 186-90, 74 S.E.2d at 754-57. On the other hand, the State has failed to identify a single decision of this Court holding that the Town was required to plead a waiver of sovereign immunity as a prerequisite for challenging the constitutionality of the Boone Act under Article II, Section 24 or that the doctrine of sovereign immunity presents any obstacle to our consideration of the merits of the Town's constitutional challenge.[2]

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2. Even if the Town was required to plead a waiver of sovereign immunity, I believe that it. complaint satisfies this requirement given that a waiver of sovereign immunity is inherent in the very constitutional challenge that the Town asserted in its complaint.

As previously noted, the State asserts that this Court's decisions under Article II, Section 24 have no bearing upon the sovereign immunity claim that it has advanced in this case because the constitutionality of the Boone Act is controlled by the boundary fixing provision of Article VII, Section 1, rather than Article II, Section 24. However, even when this Court has rejected constitutional claims predicated upon Article II, Section 24, those decisions rest upon substantive considerations rather than upon the doctrine of sovereign immunity, *see*, *e.g.*, *Town of Emerald Isle*, 320 N.C. at 648-52, 360 S.E.2d at 761-63; *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557-60, 359 S.E.2d 792, 797-99 (1987), with such results obtaining even in cases involving challenges to legislation related to annexation and the creation or alteration of municipal boundaries, *see*, *e.g.*, *Piedmont Ford Truck Sale*, 324 N.C. at 505, 380 S.E.2d at 111 (holding that a local act obligating the City of Greensboro to provide solid waste collection in newly annexed areas did not relate to health and sanitation for purposes of Article II, Section 24(1)(a), because it had the "effect" of making a general law of statewide application applicable to an annexation being effectuated by means of a local act and because the challenged legislation did not "subject the annexed area to a different treatment than" would have been the case if Greensboro "had annexed the area under the general annexation law"). As a result, our precedent indicates that the mere fact that a constitutional challenge to legislation advanced in reliance upon Article II, Section 24 proves unsuccessful does not establish that the underlying claim should have been dismissed on sovereign immunity grounds.

Aside from the fact that the Town was not required to allege or prove that a traditional cause of action exists under Article II, Section 24 in order to seek and obtain a declaration concerning the constitutionality of the Boone Act, *see Town of Emerald Isle*, 320 N.C. at 646, 360 S.E.2d at 760 (stating that a plaintiff seeking a judicial declaration "is not required to allege or prove that a traditional 'cause of action' exists against [a] defendant" (citing *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 588, 347 S.E.2d 25, 31-32 (1986))), this Court has "clearly establish[ed] the principle that sovereign immunity [cannot] operate to bar direct constitutional claims," particularly if the plaintiff is left with "no adequate remedy at state law," *Craig*, 363 N.C. at 340, 678 S.E.2d at 356 (citing *Corum*, 330 N.C. at 782-86, 413 S.E.2d at 289-92). Although this Court's decisions in *Corum*, 330 N.C. at 782-86, 413 S.E.2d at 289-92, and *Craig*, 363 N.C. at 338-42, 678 S.E.2d at 354-57, specifically mention the constitutional protections contained in the Declaration of Rights, no decision of this Court limits the applicability of the principle enunciated in those cases to the constitutional principles

enunciated in Article I of the North Carolina Constitution. On the contrary, this Court held in *Craig* that the plaintiff was entitled to obtain a decision on the merits with respect to a claim advanced in reliance upon Article IX, Section 1 of the North Carolina Constitution, which provides that "schools, libraries, and the means of education shall forever be encouraged," in addition to the claims that he asserted pursuant to Article I, Sections 15 and 19 of the North Carolina Constitution. *Craig*, 363 N.C. at 335, 342, 678 S.E.2d at 352, 357. The prohibition against local legislation addressing certain subjects contained in Article II, Section 24 is an integral part of our State's fundamental law and should not be treated as of lesser importance. As a result, the doctrine of sovereign immunity does not bar the Town from asserting a claim against the State pursuant to Article II, Section 24.

In support of its contention that the Town lacks standing to challenge the constitutionality of the Boone Act, the State places principal reliance upon *Wood v. City of Fayetteville*, 43 N.C. App. 410, 259 S.E.2d 581 (1979), *appeal dismissed and disc. rev. denied*, 299 N.C. 125, 261 S.E.2d 926-27 (1980), in which the Court of Appeals held that the City of Fayetteville lacked standing to challenge certain limitations that the General Assembly had imposed upon Fayetteville's annexation authority. According to the State, *Wood* and our decision in *In re Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974), establish that a municipality, as a creature of the State, is only entitled to exercise those powers granted to it by the General Assembly and lacks the right to challenge the constitutionality of legislation enacted by the body that created it. Moreover, given that the ability of a municipality to exercise certain powers outside its corporate limits stems from a discretionary decision made by the General Assembly rather than from any vested right possessed by the municipality, any decision by the General Assembly to eliminate that municipality's authority to exercise extraterritorial jurisdiction cannot result in any injury to that municipality sufficient to give it standing to bring suit against the State. Finally, the State contends that there is no statutory support for the proposition that the Town has the authority to bring suit against the State on any basis.

After acknowledging that this Court has allowed municipalities to assert claims against it in the past, the State claims that these cases are distinguishable. For example, the State argues that, since this case is governed by the boundary fixing provision of Article VII, Section 1 rather than the limitations upon the enactment of local legislation contained in Article II, Section 24, it is clearly distinguishable from the cases in which municipalities have been allowed to challenge the constitutionality of

legislation, such as *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 488 S.E.2d 144 (1997), and *Town of Emerald Isle*, each of which involved the imposition of a new obligation on a local government. Similarly, this case is deemed to be distinguishable from *City of New Bern v. New Bern–Craven County Board of Education*, 328 N.C. 557, 402 S.E.2d 623 (1991) (*New Bern I*), given that *New Bern I* did not stem from an action brought by a municipality against the State and given that the challenged legislation involved the removal of the city's authority to enforce the State Building Code within, rather than outside, its own municipal boundaries, coupled with a grant of authority to the county to enforce the building code within the municipal boundary contained in a local, rather than a general, law, *see* N.C.G.S. § 153A-320 (2015); *id.* § 160A-360(d) (2015). Finally, the State argues that, since there is no earlier decision of this Court arising from a challenge to the withdrawal of a municipality's extraterritorial jurisdiction, nothing forecloses the State's ability to challenge the Town's standing to prosecute the present litigation.

In response, the Town argues that *Wood* and *In re Martin* do not establish a standing rule of the breadth for which the State contends. Moreover, the Town contends that a series of decisions after *In re Martin*, including *Town of Emerald Isle*, *New Bern I*, and *Town of Spruce Pine*, fatally undermine the State's position. In the Town's view, these more recent decisions, especially *New Bern I*, demonstrate that a municipality has standing to challenge the constitutionality of legislation depriving it of the ability to exercise regulatory authority, that the General Assembly's authority to regulate municipal corporations is not without limit, and that allowing municipalities to challenge the constitutionality of legislation pursuant to Article II, Section 24 is of critical importance given that "they are the best positioned—indeed, they are often the only parties positioned—to do so." Finally, the Town contends that the Boone Act is primarily concerned with powers rather than with boundaries and that the Court has rejected similar boundary-related arguments in the past, as is evidenced by our decision to invalidate the legislation at issue in *City of New Bern v. New Bern–Craven County Board of Education*, 338 N.C. 430, 450 S.E.2d 735 (1994) (*New Bern II*).

As this Court has previously stated, "[t]he 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[ ] of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20

L. Ed. 2d 947, 961 (1968) (citation omitted)). According to N.C.G.S. § 1-254, "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder," N.C.G.S. § 1-254 (2015), in order "to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations," *Walker v. Phelps*, 202 N.C. 344, 349, 162 S.E. 727, 729 (1932).

"An action may not be maintained under the Declaratory Judgment Act . . . unless the action involves a present actual controversy between the parties." *Town of Emerald Isle*, 320 N.C. at 645-46, 360 S.E.2d at 760 (citing *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958)); *see New Bern I*, 328 N.C. at 559, 402 S.E.2d at 624-25 (stating that, "in order to invoke the provisions of the Declaratory Judgment Act[,] there must be a justiciable controversy between the parties" (citations omitted)). "Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable." *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (citation omitted). Litigation is unavoidable for declaratory judgment purposes in instances in which a "[c]ounty contends it has the right to enforce certain laws," and a "[c]ity says the [c]ounty does not have the right." *New Bern I*, 328 N.C at 561, 402 S.E.2d at 626. Thus, a municipality's challenge to the constitutionality of legislation affecting its legal position involves an actual or justiciable controversy cognizable under the Declaratory Judgment Act. *See, e.g.*, *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 198-99, 675 S.E.2d 641, 647-48 (2009) (concluding that a justiciable controversy existed between two governmental entities and sufficed to confer standing to seek and obtain a declaration concerning the nature and extent of their disputed powers and duties); *see also Town of Spruce Pine*, 346 N.C. at 790, 488 S.E.2d at 146 (concluding that Avery County had standing to seek a declaration concerning the constitutionality of the Water Supply Watershed Protection Act in light of this Court's decisions in *New Bern I* and *Town of Emerald Isle*);[3] *Town of Emerald Isle*,

3. Although *Town of Spruce Pine* does not specifically state that the County's challenge to the constitutionality of the Water Supply Watershed Protection Act took the form of a declaratory judgment action, the Court of Appeals' decision clearly establishes that it did. 123 N.C. App. 704, 711, 475 S.E.2d 233, 237 (1996) (stating that, "[f]or standing in a declaratory judgment action, there must be a present, actual controversy at the time the pleading requesting declaratory relief is filed" (citing *Sharpe*, 317 N.C. at 584, 347 S.E.2d at 29)), *rev'd on other grounds*, 346 N.C. 787, 488 S.E.2d 144 (1997).

320 N.C. at 646, 360 S.E.2d at 760 (concluding that the Town had standing to seek a declaration concerning the constitutionality of legislation requiring the Town to maintain facilities providing pedestrian beach access because the action involved a present actual controversy between the parties (citation omitted)). As a result, the Town clearly has standing to seek a declaration concerning the constitutionality of the Boone Act.

The State's reliance upon *Wood* and *In re Martin* for standing-related purposes is misplaced. In *In re Martin*, this Court held, in the context of an administrative appeal, that a county lacked standing to challenge the constitutionality of a statute granting tax exemptions as violative of the uniform taxation provisions of Article V, Section 2 of the North Carolina Constitution. 286 N.C. at 71, 75-76, 209 S.E.2d at 770, 773. In the aftermath of *In re Martin*, this Court has allowed a municipality to challenge the constitutionality of a statute affecting its rights or status in a declaratory judgment action on multiple occasions. *E.g.*, *Town of Spruce Pine*, 346 N.C. at 790, 488 S.E.2d at 146; *New Bern I*, 328 N.C. at 558-61, 402 S.E.2d at 624-26; *Town of Emerald Isle*, 320 N.C. at 646, 360 S.E.2d at 760. *In re Martin* does not articulate a broad standing rule of the nature posited by the State. Instead, the Court's standing decision in *In re Martin* stemmed from the fact that, given that counties lack inherent taxing authority, they do not have a right to complain that the enabling legislation authorizing counties to tax personal property "is lacking in breadth," 286 N.C. at 74, 209 S.E.2d at 772; that the county, which was seeking to avail itself of the authority to tax personal property pursuant to the same legislation that it alleged to be unconstitutional, could "not accept the benefits of the taxing power conferred upon it by the statute and at the same time reject on constitutional grounds the statutory classification of property which 'shall not be assessed for taxation,' " *id.* at 75, 209 S.E.2d at 772 (citation omitted); and that the county was precluded from challenging the constitutionality of the statute in question because the "uniformity in taxation" requirement contained in Article V, Section 2 "relates to equality in the burden on the State's taxpayers" rather than the county's interest in collecting tax revenues, *id.* at 76, 209 S.E.2d at 773 (citation omitted). Thus, our decision in *In re Martin* rested on a number of factors, most of which provide no support for the State's position with respect to the standing issue.

Although the Court of Appeals focused its attention in *Wood* on the first of the three factors mentioned in *In re Martin*, 43 N.C. App. at 419, 259 S.E.2d at 586 (stating that, as was the case with Mecklenburg County in *In re Martin*, "the City of Fayetteville . . . is a creature of the legislature and an agency of the state" that "has no inherent power to annex"

and that, "[i]n light of *Martin*, . . . the City cannot question the limitations placed by the legislature on its power to annex" (internal citations omitted)), this Court is not bound by that decision.[4] Contrary to the approach adopted in *Wood*, we have interpreted *In re Martin* as holding that a local government lacks standing to challenge the constitutionality of a statute in the event that it has accepted benefits arising from the same statute that it seeks to challenge. *See*, *e.g.*, *Town of Spruce Pine*, 346 N.C. at 790, 488 S.E.2d at 146.[5] Consistent with that interpretation of *In re Martin*, in *New Bern I*, 328 N.C. at 559, 402 S.E.2d at 625, this Court rejected the argument that a unit of local government lacks standing to seek a declaration concerning the constitutionality of a statute divesting it of existing regulatory authority on the theory that the local government has no inherent or "vested right" to exercise that authority.

In my opinion, the standing issue before the Court in this case is remarkably similar to the one that we resolved in favor of the municipality in *New Bern I*. Like the powers at issue in this case, the inspection power at issue in *New Bern I* and *II* was a component of a bundle of regulatory powers that had been granted to municipalities by the General Assembly in Article 19 of Chapter 160A. *See* N.C.G.S. §§ 160A-360(a), -411 to -439 (2015). Prior to the enactment of the legislation at issue in *New Bern I* and *II*, the city had the authority to conduct inspections pursuant to N.C.G.S. § 160A-411 and had, in fact, performed them. *New Bern II*, 338 N.C. at 434, 450 S.E.2d at 738. Although this Court recognized that the General Assembly had the authority to confer building and fire and safety code enforcement responsibility upon municipal governments and that the municipality had no inherent or vested right to exercise that authority, we held that the City had the right to seek a declaration of the extent, if any, to which the challenged legislation violated Article II, Section 24 on the grounds that the city "had the right to enforce the codes prior to the action by the General Assembly" and that this "change in" an enforcement responsibility that had "previously belonged to" the city could be challenged "under the Declaratory Judgment Act." *New Bern I*, 328 N.C. at 559, 402 S.E.2d at 625 (citing *Bd. of Health v. Bd. of Comm'rs*, 220 N.C. 140, 142-44, 16 S.E.2d 677, 678-79 (1941) (holding that legislation allowing the Nash County Board

4. The Court of Appeals has never cited *Wood* in any subsequent decision.

5. Although *Wood* does not mention the "acceptance of a benefit" theory, Fayetteville was challenging the constitutionality of certain limitations that the General Assembly had placed upon the exercise of authority contained in the same statute upon which Fayetteville predicated its claim to have a right to annex the affected area. As a result, the outcome reached in *Wood* is consistent with that compelled by the "acceptance of benefits" theory.

of Commissioners to veto the appointment of the county health officer by the county board of health and requiring that the appointment of the health officer be confirmed by the county commissioners was subject to constitutional challenge in a declaratory judgment action)). In addition, we rejected an argument that the city lacked standing to bring a declaratory judgment action for the purpose of challenging the constitutionality of the legislation in question on the grounds that no duty was being imposed on the city by the challenged legislation, stating "[t]hat is not the test," that the city's "status was changed by the acts of the General Assembly," and that the city "may challenge this change of status by an action for a declaratory judgment." *Id.* at 560, 402 S.E.2d at 625. Finally, this Court concluded in *New Bern I* that the parties' disagreement over the county's right to enforce the laws in question had no effect on the city's ability to maintain the present litigation. *Id.* at 561, 402 S.E.2d at 626. Thus, the fact that both the Town and the County claim the right to regulate land use in the Town's extraterritorial jurisdiction and the fact that the County has taken steps to resume exercising regulatory authority in the affected area establish that the Town and the County have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[ ] of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650 (quoting *Flast* 392 U.S. at 99, 20 L. Ed. 2d at 961 (citation omitted)).

The State correctly notes that the facts at issue in *New Bern I* and *II* and the facts at issue here are different in that this case involves the removal of an entire bundle of powers, rather than a single power, from the authority that the General Assembly has delegated to the Town; that the enforcement authority at issue in this case, unlike the authority at issue in the *New Bern* cases, involves the exercise of regulatory authority in an area located outside of the municipality's corporate limits rather than inside those limits; that the legislation at issue in *New Bern I* and *II*, unlike the Boone Act, explicitly transferred enforcement authority from the municipality to the county; and that the Town, unlike the municipality in *New Bern I* and *II*, was required to and did enact ordinances defining the area in which it intended to exercise extraterritorial jurisdiction as a prerequisite for exerting regulatory authority there. However, while these distinctions implicate facts that are relevant to a determination of the merits of the Town's challenge to the constitutionality of the Boone Act, I am unable to see how they have any bearing on the proper resolution of the standing issue in this case. Thus, for all these reasons, I believe that the State's challenge to the Town's standing to maintain the present action lacks merit.

The ultimate issue before us in this case is whether the constitutionality of the Boone Act should be evaluated on the basis of the General Assembly's authority to "provide for the organization and government and the fixing of boundaries," N.C. Const. art. VII, § 1, or the General Assembly's authority to "give such powers and duties" to local governments "except as otherwise prohibited by this Constitution." As a result of the fact that Article II, Section 24 was enacted for the purpose of placing certain limits on the authority retained by the General Assembly, including at least a portion of the authority recognized in Article VII, Section 1, I believe that a proper resolution of the issue before us requires a consideration of Article VII, Section 1, Article II, Section 24, and the decisions of this Court discussing the reach of the limitations on the legislative power to enact local legislation worked by Article II, Section 24. After conducting what I believe to be the required analysis, I am unable to escape the conclusion that the logic adopted by the Court in upholding the Boone Act unduly enlarges the scope of the first portion of the first paragraph of Article VII, Section 1 and unduly narrows both the second part of the first paragraph of Article VII, Section 1 and the reach of the limitations on the scope of the legislative power set out in Article II, Section 24 in a manner that is not "in consonance with the objects and purposes in contemplation at the time of their adoption." *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953).

Since the adoption of our first constitution in 1776, the General Assembly has enjoyed considerable authority over units of local government. *See generally* John L. Sanders, *The Proposed Constitution of North Carolina: An Analysis*, 23 Popular Gov't 1, 9 (Feb. 1959) (noting that "North Carolina has a strong tradition of state legislative control and supervision of local government, both county and municipal," and that, "[f]rom 1776 until 1868, the Constitution left provision for and control of local government almost entirely in the hands of the General Assembly"). Although the delegates at the 1835 convention elected to propose constitutional amendments to prohibit "private laws" addressing a number of subjects, including the granting of requests for divorce, alimony, name changes, legitimation of individuals born out of wedlock, and restoration of citizenship rights of convicted felons, N.C. Const. of 1776, Amends. of 1835, art. I, §§ 3, 4, paras. 3-5, which were subsequently ratified by the voters, the delegates rejected a proposal that "[t]he General Assembly shall have no power to pass any private law to effect any object, that could be effected by a general law on the same subject." *Proceedings and Debates of the Convention of North-Carolina [1835]* 379, 382 (Raleigh, Joseph Gales & Son 1836).

The 1868 Constitution provided that "[i]t shall be the duty of the Legislature to provide for the organization of cities, towns, and incorporated villages," N.C. Const. of 1868, art. VIII, § 4, without requiring the adoption of uniform legislation addressing that subject. Although the framers of the 1868 Constitution limited the enactment of such legislation with respect to private businesses, those limitations did not apply to municipal and public corporations. *Id.*, art. VIII, § 1 (providing that "[c]orporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of the corporations cannot be attained under general laws," with "[a]ll general laws and special acts passed pursuant to this Section" being subject to "alter[ation] from time to time or repeal[ ]"). In 1875, the General Assembly's authority over local governments was expanded, with the changes by which this policy was effectuated including the adoption of an amendment to Article VII of the Constitution of 1868 adding new language providing that "[t]he General Assembly shall have full power by statute to modify, change or abrogate any and all of the provisions of this article and substitute others in their place, except sections seven, nine and thirteen." *Id.*, Amends. of 1875, art. VII, § 14; *see generally* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 25-26 (2d ed. 2013) (stating that "[t]he principal aim" of these amendments "was to restore to the General Assembly more of the power it had lost" in 1868 and that "the General Assembly regained its former power over local government" by means of Article VII, § 14). The 1875 amendments to the constitutional provisions governing the relationship between the General Assembly and local government were adopted despite concerns that they would "abridg[e] the rights of the citizens by placing the government and organization of cities, towns, and &c., under the unlimited control of the Legislature." *Journal of the Constitutional Convention of the State of North Carolina* 162-63, 252 (Raleigh, Josiah Turner 1875).

The present version of the first paragraph of Article VII, Section 1 was recommended in the report of the North Carolina State Constitution Study Commission. *Report of the North Carolina State Constitution Study Commission* 33, 90 (1968). In support of this recommendation, the Commission noted that, given the version of Article VII adopted in 1875, the constitutional provisions governing the General Assembly's authority over local government, except for those relating to financial matters and providing for the office of Sheriff, were subject to modification by the General Assembly, which "ha[d] often exercised that power." *Id.* at 33. "In view of this fact," the Commission recommended eliminating the provisions contained in Article VII that prescribed the General

Assembly's authority over the organization and powers of local government to the extent that they were subject to modification by statute and inserting in their stead what is now the first paragraph of Article VII, Section 1, which the Commission depicted as "a general description of the General Assembly's power to provide for the organization and powers of local government" that, instead of constituting "a delegation of power to the General Assembly," "merely [recognizes] . . . the [General Assembly's] power in this regard." *Id.* The Commission's recommended modifications to the constitutional provisions relating to the General Assembly's authority over local governments were not "calculated . . . to bring about any fundamental change in the power of state and local government or the distribution of that power." *Id.* at 4. Those amendments were submitted for ratification by the voters, approved at the 1970 general election, and became effective on 1 July 1971, Act of July 2, 1969, ch. 1258, secs. 1, 2, 4, 1969 N.C. Sess. Laws 1461, 1479, 1484. As a result, the General Assembly's well-established and long-standing authority over the organization and powers of local government currently appears in, while antedating, Article VII, Section 1, which provides, in pertinent part, that:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1.

Article II, Section 24 expressly precludes the General Assembly from "enact[ing] any local, private, or special act or resolution" concerning fourteen "[p]rohibited subjects." Among other things, Article II, Section 24 provides that:

> (1) Prohibited subjects. – The General Assembly shall not enact any local, private, or special act or resolution:
>
> (a) Relating to health, sanitation, and the abatement of nuisances;
>
> . . . .
>
> (e) Relating to non-navigable steams;
>
> . . . .

> (j) Regulating labor, trade, mining, or manufacturing;
>
> . . . .
>
> (3) Prohibited acts void. – Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

N.C. Const. art. II, § 24(1)(a), (3). Although the General Assembly is prohibited from "enact[ing] any local, private, or special act" regarding any of the fourteen subjects listed in Article II, Section 24(1) "by the partial repeal of a general law," *id.* § 24(2), the General Assembly "may . . . repeal local, private, or special laws enacted by it," *id.*, and "enact general laws regulating the matters set out" in the relevant constitutional provision, *id.* art. II, § 24(4).

Article II, Section 24, which was Article II, Section 29 at the time of its original adoption, was one of three constitutional amendments seeking to curtail local, private, and special legislation that were submitted for ratification by the General Assembly in 1915, were ratified by the people on 7 November 1916, and became effective on 10 January 1917. *See* Act of Mar. 9, 1915, ch. 99, secs. 1, 8, 1915 N.C. Pub. [Sess.] Laws 148, 148-49, 151; *see also Kornegay v. City of Goldsboro*, 180 N.C. 441, 449, 105 S.E. 187, 191 (1920) (describing the adoption of former Article II, Section 29; Article VIII, Section 1; and former Article VIII, Section 4 as "a complete and comprehensive scheme" intended to "remedy" the "fully realized . . . evils of special, local, and private acts" and "to get rid of special legislation as far as practicable").[6] As the history of Article II, Section 24 demonstrates:

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6. Article VIII, Sections 1 and 4 provided, after the adoption of the 1916 amendments, that:

> Section 1. No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations, for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations, and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation.
>
> . . .
>
> [Section 4.] It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money,

> The organic law of the State was originally drafted and promulgated by a convention which met at Halifax in December, 1776. During the ensuing 140 years, the Legislature of North Carolina possessed virtually unlimited constitutional power to enact local, private, and special statutes. This legislative power was exercised with much liberality, and produced a plethora of local, private, and special enactments. As an inevitable consequence, the law of the State was frequently one thing in one locality, and quite different things in other localities. To minimize the resultant confusion, the people of North Carolina amended their Constitution at the general election of 1916 so as to deprive their Legislature of the power to enact local, private, or special acts or resolutions relating to many of the most common subjects of legislation.
>
> . . . .
>
> In thus amending their organic law, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this section shall be void[.]"

Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 185-86, 581 S.E.2d 415, 426-27 (2003) (first alteration in original) (quoting *Idol v. Street*, 233 N.C. 730, 732-33, 65 S.E.2d 313, 314-15 (1951) (quoting N.C. Const. of 1868, art. II, § 29 (1917) (now art. II, § 24(3)))).

> contracting debts, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations.

Ch. 99, sec. 1, 1915 N.C. Pub. [Sess.] Laws at 149. This Court held, in a sharply divided opinion, that Article VIII, Section 1 only applied to "private or business corporations, and does not refer to public or *quasi*-public corporations acting as governmental agencies," *Kornegay*, 180 N.C. at 446, 105 S.E. at 189 (quoting *Mills v. Bd. of Comm'rs*, 175 N.C. 215, 219, 95 S.E. 481, 482 (1918)), and that, since the general law provision contained in Article VIII, Section 4 was directory, rather than mandatory, *id.* at 448, 105 S.E. at 190, it did not prevent the enactment of local or special legislation governing the organization and operation of municipal governments, *id.* at 448-50, 105 S.E. at 190-91. Article VIII, Section 4 was deleted from the North Carolina Constitution when Article VII, Section 1 was adopted. Ch. 1258, sec. 1, 1969 N.C. Sess. Laws at 1479.

> It was the purpose of the amendment to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by *general laws* to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State.

High Point Surplus Co. v. Pleasants, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965).

Although the majority posits that Article VII, Section 1 is more recent in time than Article II, Section 24 and, consequently, that the provisions in Article VII, Section 1 are to be given their "full application" to the extent there is any conflict between these two constitutional provisions, I am unable to agree with this logic. As was noted above, the modifications to Article VII that led to the enactment of the first paragraph of Article VII, Section 1 were not "calculated . . . to bring about any fundamental change in the power of state and local government or the distribution of that power." *Report of the North Carolina State Constitution Study Commission* 4. In other words, Article VII, Section 1 was not designed to effectuate any substantive change to the General Assembly's authority over units of local government and did nothing more than reflect the same legislative authority that existed when Article II, Section 24 was adopted, effectively making Article II, Section 24, rather than Article VII, Section 1, more recent in time. As a result, given that the enactment of Article VII, Section 1 did not have the effect of changing existing North Carolina law, Article II, Section 24 and this Court's decisions construing it remain critical to a proper resolution of this case.

As noted earlier, the State and County argue that the exercise of extraterritorial jurisdiction constitutes the "fixing of boundaries" for purposes of Article VII, Section 1, rendering the limitations on local legislation imposed by Article II, Section 24 inapplicable to the Boone Act, a proposition with which the Court appears to agree. Although the Town acknowledges that Article VII, Section 1 gives the General Assembly plenary authority over municipal boundaries, it contends that the "boundaries" referenced in the relevant constitutional provision are the municipal boundaries that are fixed at the time of initial incorporation or by means of subsequent charter amendments or annexations rather than the area within which a municipality is authorized to exercise extraterritorial jurisdiction; that extraterritorial jurisdiction relates to regulatory power

or authority rather than the establishment of municipal boundaries; that the establishment and exercise of extraterritorial jurisdiction is materially different from the initial establishment or subsequent alteration of municipal boundaries; and that any alteration in the regulatory authority that the Town is entitled to exercise is subject to constitutional limitations, such as those contained in Article II, Section 24, on the General Assembly's authority to "give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable," N.C. Const. art. VII, § 1. I find this interpretation of Article VII, Section 1 persuasive.

Neither the State, the County, nor the Court point to any cases holding that the exercise of extraterritorial land use regulatory authority constitutes the "fixing of boundaries" for purposes of Article VII, Section 1. The only reason that a municipality is required to define the area in which it is entitled to exercise extraterritorial jurisdiction is to specify the location or locations within which the municipality can take a limited number of actions that could not otherwise be taken there with respect to regulation of the planning, development, and use of land, including (1) the subdivision of land, N.C.G.S. §§ 160A-371 to -377 (2015); (2) zoning, *id.* §§ 160A-381 to -393 (2015); (3) historic districts and landmarks, *id.* §§ 160A-400.1 to -400.15 (2015); (4) private development agreements, *id.* §§ 160A-400.20 to -400.32 (2015); (5) wireless telecommunications facilities, *id.* §§ 160A-400.50 to -400.53 (2015); (6) the acquisition of open space, *id.* §§ 160A-401 to -407 (2015); (7) building inspections, *id.* § 160A-411 to -439 (2015); (8) minimum housing standards, *id.* §§ 160A-441 to -450 (2015); and (9) community appearance standards, *id.* §§ 160A-451 to -455 (2015), as well as certain other "[m]iscellaneous [p]owers" delineated in Part 8 of Article 19 of Chapter 160A, such as community development programs and activities, the acquisition and disposition of property for redevelopment, urban development action grants, and urban homesteading programs, *id.* §§ 160A-456 to -457.2 (2015); erosion and sedimentation control, *id.* § 160-458 (2015); floodway regulation, *id.* § 160A-458.1 (2015); mountain ridge protection, *id.* § 160A-458.2 (2015); downtown development projects, *id.* § 160A-458.3 (2015); designation of transportation corridor official maps, *id.* § 160A-458.4 (2015); stormwater control, *id.* § 160A-459 (2015); and programs to finance energy improvements, *id.* § 160A-459.1 (2015). *See* David W. Owens, Univ. of N.C. Sch. of Gov't, *Land Use Law in North Carolina* 31 & n.47 (2d ed. 2011) (stating that, "[w]hen a city adopts an extraterritorial boundary ordinance, the city acquires jurisdiction for all of its ordinances adopted under Article 19 of Chapter 160A of the General Statutes" (citing N.C.G.S. § 160A-360(a)); *see also id.* at 30 (discussing how concerns

about "chaotic" development "along the urban fringe, often in unregulated areas just outside of city corporate limits," resulted in the General Assembly's decision to authorize cities to implement " 'perimeter zoning,' which is now known as municipal extraterritorial jurisdiction"). On the other hand, the initial creation of municipal boundaries and the process of extending those boundaries through boundary extension legislation or annexation results in the identification of those individuals entitled to vote in municipal elections and receive municipal services and required to pay municipal taxes and to be subject to the full panoply of the municipality's authority. *See*, *e.g.*, N.C.G.S. § 160A-31 (2015) (annexation by petition); Frayda S. Bluestein, *Incorporation*, *Annexation*, *and City–County Consolidation*, *in County and Municipal Government in North Carolina* 15, 17-24 (Frayda S. Bluestein ed., 2d ed. 2014) [hereinafter *County and Municipal Government*] (discussing the various forms of statutorily authorized annexation, required provision of governmental services, and taxation of newly annexed property); Trey Allen, *General Ordinance Authority*, *in County and Municipal Government*, 77, 84 (stating that, "[f]or the most part, a city's police power ordinances apply only within the corporate limits and to any city-owned property or right-of-way outside the city," although "[a] city may enforce zoning and other development ordinances inside its corporate limits and within its extraterritorial jurisdiction" (citing N.C.G.S. § 160A-176 (2013)). Thus, even though a municipality must define the boundary within which it intends to exercise extraterritorial regulatory authority, the enforcement of those powers, rather than the establishment of a territorial boundary, is the defining characteristic of extraterritorial jurisdiction, rendering legislative decisions relating to the exercise of extraterritorial jurisdiction subject to constitutional limitations not applicable to legislation prescribing and governing the establishment of municipal boundaries. *New Bern II*, 338 N.C. at 438, 450 S.E.2d at 740 (rejecting the county's argument that local legislation removing the city's authority to conduct building code inspections relating to certain properties located within the city's corporate limits and shifting that authority to the county was within the General Assembly's "plenary powers to enact local laws pursuant to Article VII, Section 1" (citing *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989))).

In addition, the Court holds that the Boone Act is not subject to the limitations upon the enactment of local legislation contained in Article II, Section 24 because extraterritorial jurisdiction implicates the "organization and government" of units of local government as authorized

by Article VII, Section 1,[7] and that the Boone Act "is an exercise of the General Assembly's plenary authority to 'provide for the organization and government and fixing of boundaries' of local government under the first clause of Article VII, Section 1." However, the Court has not cited any prior decisions of this Court holding that the limitations imposed by Article II, Section 24 do not apply to legislation, such as the Boone Act, effectuating what amounts to the reassignment of local government jurisdiction over particular subjects of regulation, or that the "powers and duties" which the General Assembly is authorized to delegate to local governments pursuant to Article VII, Section 1 are not subject to the limitations upon legislative authority imposed by Article II, Section 24, and I know of none. On the contrary, this Court has repeatedly invalidated local acts changing the existing assignment of regulatory authority among units of local government as violative of Article II, Section 24.

A careful review of this Court's decisions concerning Article II, Section 24 demonstrates that we have repeatedly held that the enactment of local legislation which had the effect of shifting, reassigning, or re-delegating the authority to regulate certain activities from one unit of local government to another violated Article II, Section 24 without ever stating that the analysis required by Article II, Section 24 is limited to instances involving the exercise of "power" separate and apart from the reassignment of regulatory jurisdiction. For example, we have held that local legislation transferring the authority to enforce health and safety regulations from one local government entity to another was invalid pursuant to Article II, Section 24. *See*, *e.g.*, *New Bern II*, 338 N.C. at 440, 450 S.E.2d at 741 (invalidating legislation that shifted responsibility for enforcing the State Building Code by expanding Craven County's jurisdiction to include certain properties located within New Bern's municipal corporate boundaries as impermissible local legislation relating to health and sanitation); *see also Idol*, 233 N.C. at 733, 65 S.E.2d at 315 (finding it "clear beyond peradventure" that legislation authorizing the consolidation of the Winston-Salem and Forsyth County health departments and providing for the appointment of a joint city-county board to administer the public health laws in the affected jurisdictions constituted a prohibited "local act relating to health"); *Bd. of Health v. Bd. of Comm'rs*, 220 N.C. at 143, 16 S.E.2d at 679 (emphasizing our "commit[ment] to the proposition that a law affecting the selection of officers to whom is given the duty of administering the health laws is a

7. Neither the State nor the Town argued that the Boone Act involves the "organization and government" of local governments as provided for in Article VII, Section 1.

law 'relating to health' " while invalidating a local law requiring that the county health officer appointed by the county board of health be confirmed by the Nash County Board of Commissioners (citing *Sams v. Bd. of Cty. Comm'rs*, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940))); *Sams*, 217 N.C. at 285-86, 7 S.E.2d at 541 (concluding that a local act "undertak[ing] to create for Madison County, alone, a county board of health and to name its members" "conflict[ed] with the constitutional restrictions upon the power of the General Assembly imposed by" Article II, Section 24). The Court's decision that the Boone Act is not subject to the limitations upon the enactment of local legislation spelled out in Article II, Section 24 conflicts with the clear import of these decisions.

As support for its broad interpretation of "organization and government" as used in the first part of the first paragraph of Article VII, Section 1, the Court conducts a plain language analysis focusing upon dictionary definitions of the relevant words. However, the plain language in which the provision in question is couched suggests to me that the phrase "organization and government" refers to the creation of units of local government and the manner in which those units of local government are governed rather than the powers that those units are entitled to exercise. My interpretation is fully consistent with the numerous decisions upon which the Court relies, almost all of which relate to the establishment of municipal boundaries or the creation or abolition of units of local government, rather than to the authority that units of local government are entitled to exercise. Unlike the majority's interpretation, this interpretation of "organization and government" also avoids overly narrowing or eviscerating the "powers and duties" language contained in the second part of the first paragraph of Article VII, Section 1, *see Bd. of Educ. v. Bd. of Comm'rs*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904) (stating that, "[i]f different portions [of the state constitution] seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory" (quoting Thomas M. Cooley, *Cooley's Constitutional Limitations* 92 (7th ed. 1903))); *see also Lacy v. Fid. Bank of Durham*, 183 N.C. 374, 380, 111 S.E. 612, 615 (1922) (stating that the constitution should be "construed so as to allow significance to each and every part of it if this can be done by any fair and reasonable intendment" (citation omitted)), and does not conflict with the numerous decisions invalidating local government reorganizations cited in the preceding paragraph. As a result, for all these reasons, I cannot agree that the Boone Act constitutes a valid exercise of the General Assembly's authority to provide for the "organization and government" of local governmental bodies.

Even if the enactment of local legislation eliminating the Town's authority to exercise extraterritorial jurisdiction constitutes the alteration of municipal corporate boundaries and the exercise of the General Assembly's authority over the "organization and government" of units of local government, our opinion in *Piedmont Ford Truck Sale* indicates that the limitations on the enactment of local legislation imposed by Article II, Section 24 remain relevant. In that case, the owners of recently annexed property challenged the validity of a local act authorizing the City of Greensboro to annex certain land contiguous to Greensboro's existing corporate limits, contending, among other things, that the challenged legislation constituted an impermissible local law relating to health and sanitation in violation of Article II, Section 24(1)(a).[8] 324 N.C. at 500, 380 S.E.2d at 108. In rejecting the property owners' challenge to the validity of the legislation in question, which, like the challenge advanced by the Town in this case, rested upon the powers or duties that the Greensboro would be required to exercise (or precluded from exercising) in the relevant area, we acknowledged that the alteration and extension of Greensboro's municipal corporate boundaries fell within the ambit of Article VII, Section 1. *Id.* at 501-02, 380 S.E.2d at 109. In spite of the fact that the legislation at issue in that case constituted "the fixing of boundaries" for purposes of Article VII, Section 1 and effectuated what the Court has labeled in this case as a restructuring of the regulatory jurisdiction made available to the City of Greensboro by subjecting the annexed territory and those persons living within it to the full panoply of rights, obligations, and regulations available to and imposed upon City residents, this Court did not refrain from conducting an Article II, Section 24 analysis, as consistency with the Court's decision in this case would seem to require. Instead, we proceeded to analyze the substance of the property owners' contention that the legislation in question, which required the City to provide solid waste collection service in the newly annexed territory, constituted impermissible local legislation relating to health and sanitation in violation of Article II, Section 24(1)(a). *Id.* at 504-05, 380 S.E.2d at 110-11. Although we ultimately held that the legislation in question did not violate Article II, Section 24(1)(a),

8. The language quoted by the Court from *Piedmont Ford Truck Sale* does not appear in that portion of our opinion addressing the property owners' claim in reliance upon Article II, Section 24. 324 N.C. at 502, 380 S.E.2d at 109 (stating that "[t]he extension of boundaries of cities has been held to be a political decision which is not protected by the United States Constitution or the Constitution of North Carolina" in addressing the property owners' argument in reliance on the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution (citations omitted)).

id. at 505-06, 380 S.E.2d at 110-11, the fact that we reached the merits of the property owners' claim under Article II, Section 24 suggests that a local act that alters local government jurisdictional boundaries and reorganizes units of local government is not immune from challenge under Article II, Section 24. Thus, even if the Boone Act amounted to a revision of municipal boundaries or the organization of local government, *Piedmont Ford Truck Sale* suggests that the limitations upon the enactment of local legislation enunciated in Article II, Section 24 remain applicable in the event that the legislation in question has the effect of altering the local government's powers or duties relating to prohibited subjects such as health, sanitation, and the abatement of nuisances. As a result, for all these reasons, I believe that we are required to address the merits of the Town's challenge to the Boone Act under Article II, Section 24.

The first step in determining whether the Boone Act violates Article II, Section 24 would ordinarily be for us to decide whether the Boone Act "is a *local act* prohibited by Article II, section 24 of the Constitution" or "a *general law* which the General Assembly has the power to enact." *Adams*, 295 N.C. at 690, 249 S.E.2d at 406. In this case, however, the State and the County have conceded that the Boone Act is a local act.[9] As a result, we need only determine whether the Boone Act "[r]elat[es] to health, sanitation, and the abatement of nuisances," N.C. Const. art. II, § 24(1)(a), "[r]elat[es] to non-navigable streams," *id.* § 24(1)(e), or "[r]egulat[es] labor, trade, mining, or manufacturing," *id.* § 24(1)(j).

Although the stated purpose of a local act and its substantive provisions are undoubtedly relevant to the determination of whether a local

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9. The parties have made conflicting assertions about the origin of the Town's authority to exercise extraterritorial jurisdiction. In 1959, the General Assembly authorized municipalities with populations of "2,500 or more" in eighty-one counties to "adopt[ ] zoning regulations" "extending for a distance of one mile beyond [their corporate] limits in all directions." Act of June 19, 1959, ch. 1204, sec. 1, 1959 N.C. Sess. Laws 1354, 1354-55 (codified at N.C.G.S. § 160-181.2 (1959)). However, municipalities located in eighteen counties, including Watauga, were specifically excluded from the coverage of this legislation. *Id.*, sec. 1, at 1355. In 1961, the General Assembly authorized municipalities with a population of 1,250 or more to exercise extraterritorial jurisdiction and eliminated the exclusion for municipalities located in Watauga County. Act of May 30, 1961, ch. 548, secs. 1, 1¾, 1961 N.C. Sess. Laws 748 (amending N.C.G.S. § 160A-181.2 (1959)). In view of the fact that an act "eliminating a county from a list of [counties] excepted" and "making the provisions of" a general law applicable to that county is "tantamount to a re-enactment of the general law making it applicable" to the county in question rather than a local law, *State v. Ballenger*, 247 N.C. 216, 217-18, 100 S.E.2d 351, 353 (1957), the 1961 Act appears to have been a general, rather than a local, law.

law violates Article II, Section 24(1), *City of Asheville v. State*, ___N.C. ___, ___, ___ S.E.2d ___, ___ (Dec. 21, 2016) (93A15-2), our recent precedent clearly indicates that the practical effect of the challenged legislation is pertinent to, and perhaps determinative of, the required constitutional inquiry, *e.g.*, *Williams*, 357 N.C. at 189, 581 S.E.2d at 429 (concluding that, while "the record demonstrates that . . . the intent of the enabling legislation and the Ordinance [enacted pursuant to the challenged legislation] is to prohibit discrimination in the workplace, the effect of these enactments is to govern the labor practices of [certain businesses] in Orange County"); *New Bern II*, 338 N.C. at 433-42, 450 S.E.2d at 737-42 (concluding that legislation shifting the responsibility for enforcing the State Building Code with respect to certain buildings from the City of New Bern to Craven County constituted unconstitutional local acts related to health and sanitation). Thus, we must determine the extent to which the Boone Act impermissibly impinges upon one of the subjects about which the General Assembly lacks the authority to enact local legislation by examining the stated purpose of the challenged legislation, the content of its substantive provisions, and the practical effect that the challenged legislation will have if it is allowed to go into effect.

As we noted in *City of Asheville*, this Court has not, to date, clearly indicated when a local act does and does not "relate" to a prohibited subject for purposes of Article II, Section 24. For the reasons set forth in that decision, the issue of whether a local law relates to one of the prohibited subjects enumerated in Article II, Section 24 requires us to consider whether, in light of its stated purpose and practical effect, the Boone Act has a material, but not exclusive or predominant, connection to one of those purposes. In undertaking the required analysis in a case, such as this one, which involves legislation implicating a broad range of issues rather than a single subject that has been subject to a facial, rather than an as-applied challenge, I believe that we are required to evaluate the challenged legislation as a whole and to ascertain the materiality of the relationship between the challenged legislation and the prohibited subjects delineated in Article II, Section 24 by determining whether the challenged legislation, considered in its entirety, has a material relationship to one or more of those prohibited subjects.[10] Any

10. The applicability of the analytical approach that I deem appropriate in this case hinges upon the fact that the General Assembly has treated the range of issues about which a municipality would ordinarily be entitled to exercise regulatory authority as a unified whole. In other words, the applicable legislation authorizes a municipality, in the exercise of its discretion, to do a number of different things in regulating land use in its extraterritorial jurisdiction without in any way indicating that the availability of these different types of regulatory authority should be treated as severable. A subject-by-subject

other approach will fail to honor the presumption of constitutionality to which legislation enacted by the General Assembly is entitled and result in a mistaken understanding of the genuine purpose for and practical effect of the challenged legislation.

Unlike the situation with respect to the legislation at issue in *City of Asheville*, the Boone Act lacks a statement of the purpose that motivated the General Assembly's decision to eliminate the Town's ability to exercise extraterritorial jurisdiction. However, the clear effect of the General Assembly's decision to enact the Boone Act is to prevent the Town from regulating certain activities in the existing extraterritorial area and to preclude the Town from exercising such authority in additional areas in the future. Although the Boone Act does not explicitly "undo" the designation of the extraterritorial areas in which the Town was entitled to exercise regulatory jurisdiction, *see* Act of June 26, 2014, ch. 33, sec. 1, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 139, 140 (stating that "the Town of Boone shall not exercise any powers of extraterritorial jurisdiction as provided in Article 19 of Chapter 160A of the General Statutes"), I am not convinced that the General Assembly intended to create a zone in which no local governmental entity has the ability to exercise regulatory authority. For that reason, I see no basis for believing that the General Assembly intended to do anything other than to transfer regulatory authority with respect to the affected area from the Town to the County. *See* N.C.G.S. § 153A-320 (stating that "[e]ach of the powers granted to counties by this Article and by Article 19 of Chapter 160A of the General Statutes may be exercised throughout the county except as otherwise provided in G.S. 160A-360); *id.* § 160A-360(f1) (2015) (stating that, "[w]hen a city relinquishes jurisdiction over an area that it is regulating under this Article to a county, the city regulations and powers of enforcement shall remain in effect until (i) the county has adopted this regulation or (ii) a period of 60 days has elapsed following the action by which the city relinquished jurisdiction"); *cf. id.* § 160A-360(d) (stating that, in the event that "a city fails to adopt an ordinance specifying the boundaries of its extraterritorial jurisdiction, the county of which it is a part shall be authorized to exercise the powers granted by [Article 19] in any area beyond the city's corporate limits"). As a result, this Court must evaluate the extent to which the entire bundle of powers removed from the Town and transferred to the County has a material connection to one of the prohibited purposes set out in Article II, Section 24, rather than

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approach would, of course, be perfectly permissible in the event that the challenged legislation addressed a number of discrete issues that the General Assembly has not linked together.

the extent to which any isolated power which the Town is prevented from exercising by the Boone Act relates to a prohibited purpose.

In seeking to persuade this Court that the Boone Act relates to health, sanitation, and the abatement of nuisances, the Town relies upon a number of statutory provisions, including N.C.G.S. § 160A-381 (granting zoning authority to municipalities "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community" and authorizing municipalities to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lots that may be occupied; the size of yards, courts, and other open spaces; population densities; and the location and use of buildings, structures and land); *id.* § 160A-383 (providing that "[z]oning regulations shall be designed to promote the public health, safety, and general welfare" and may address issues such as the provision of "adequate light and air"; the prevention of "overcrowding of land"; avoiding undue population concentration; lessening street congestion; securing "safety from fire, panic, and dangers"; and facilitating the "provision of transportation, water, sewerage, schools, parks, and other public requirements"); *id.* § 160A-383.4 (authorizing regulations seeking to reduce the amount of energy consumption through the use of measures like density bonuses and similar incentives); *id.* § 160A-412(a) (providing for the enforcement of state laws and local ordinances relating to the "construction of buildings and other structures"; the installation of facilities such as plumbing, electrical, and air-conditioning systems; the "safe, sanitary, and healthful" "maintenance of buildings and other structures"; and other issues specified by the city council); *id.* § 160A-424(a) (providing that "[t]he inspection department may make periodic inspections, subject to the council's directions, for unsafe, unsanitary, or otherwise hazardous and unlawful conditions in buildings or structures within its territorial jurisdiction"); *id.* § 160A-426(b) (providing that "an inspector may declare a nonresidential building or structure within a community development target area to be unsafe if" it "appears . . . to be vacant or abandoned" and "appears . . . to be in such dilapidated condition as to cause or contribute to blight, disease, vagrancy, fire or safety hazard, to be a danger to children, or to tend to attract persons intent on criminal activities or other activities that would constitute a public nuisance"); *id.* § 160A-432(c) (stating that "[n]othing in this section shall be construed to impair or limit the power of the city to define and declare nuisances and to cause their removal or abatement by summary proceedings, or otherwise"); *id.* § 160A-439(a) (authorizing the adoption of ordinances providing for the repair, closing, and demolition of nonresidential buildings or structures "that fail to meet minimum standards of

maintenance, sanitation, and safety established by the governing body"); and *id.* § 160A-441 (finding "that the existence and occupation of dwellings in this State that are unfit for human habitation are inimical to the welfare and dangerous and injurious to the health, safety and morals of the people" and "that a public necessity exists for the repair, closing or demolition of such dwellings"). Although the statutory provisions upon which the Town relies clearly implicate issues relating to health, sanitation, and the abatement of nuisances, I do not believe the Boone Act, when considered as an integrated whole, has a material relation to health, sanitation, and the abatement of nuisances.

As an initial matter, many of the statutory provisions to which the Town has directed our attention essentially amount to assertions that the statute in question has been enacted pursuant to the State's police power. *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. at 460-61, 168 S.E.2d at 394 (stating that "[t]he General Assembly may delegate to a municipality, as an agency of the State, authority to enact ordinances in the exercise of the police power" (citation omitted)); *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734-35 (1949) (stating that the "police power" authorizes the "enact[ment of] laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society" and that, for "a statute . . . to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare" (citations omitted)). Although the presence of language invoking the police power is certainly relevant to the inquiry that must be conducted pursuant to Article II, Section 24(1)(a), *New Bern II*, 338 N.C. at 439-40, 450 S.E.2d at 740-41, the ubiquity with which such language appears in the General Statutes makes it difficult for me to treat its presence as determinative for the purpose of ascertaining whether a particular piece of legislation relates to any prohibited subjects listed. As noted by a leading scholar cited with regularity by this Court, *see, e.g.*, *Adams*, 295 N.C. at 690-91, 249 S.E.2d at 407, using "[t]he recital of legislative intent in" a statute that simply reflects "standard boiler plate language used to invoke the exercise of the police power of the state in the protection of the public health, safety and morals" to bring an act within the coverage of Article II, Section 24 "would cast doubt on the validity of any exercise of the police power in less than all the counties should the General Assembly employ" words such as " 'health' in the usual descriptive formula." Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev. 340, 396 (1967) (noting this Court's reliance upon such language in *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 207, 118 S.E.2d 408, 410 (1961), to support a

determination that legislation allowing municipalities with a population of 500 or more in fourteen named counties to create a housing authority related to health and sanitation for purposes of what is now Article II, Section 24(1)(a) and stating that "[a]n extension of *Carringer* would cast doubt on the validity of any exercise of the police power in less than all the counties should the General Assembly employ the word 'health' in the usual descriptive formula").[11] Thus, the fact that the statutory provisions that a municipality is entitled to enforce while exercising extraterritorial jurisdiction were enacted pursuant to the police power should not obscure our obligation to examine the Boone Act in its entirety.

Upon examining the practical effect of the Boone Act in its entirety, one cannot escape the conclusion that, while portions of the zoning, building code, housing quality, and urban development regulations that the Town enforces in its extraterritorial jurisdiction clearly implicate health, sanitation, and the abatement of nuisances, the other powers that the Town is entitled to exercise on an extraterritorial basis do not have such a clear relationship to those subjects. For example, it is not clear to me that extraterritorial regulation of subdivisions, N.C.G.S. §§ 160A-371 to -377; historic districts and landmarks, *id.* §§ 160A-400.1 to -400.15; private development agreements, *id.* §§ 160A-400.20 to -400.32; wireless communications facilities, *id.* §§ 160A-400.50 to -400.53; open spaces, *id.* §§ 160A-401 to -407; community appearance commissions, *id.* §§ 160A-451 to -455; mountain ridges, *id.* § 160A-458.2; transportation corridor maps, *id.* § 160A-458.4; downtown development, *id.* § 160A-458.3; and energy improvements, *id.* § 160A-459.1 have much, if anything, to do with health, sanitation, and the abatement of nuisances. In addition, municipalities exercise zoning, building code enforcement, and housing quality regulations for a number of different purposes, including, but not limited to, the avoidance of unsightly, but not necessarily unsanitary, conditions; the protection of property values; and the development of needed infrastructure. Consistent with my understanding of the reasoning underlying the regulatory authority that the Town exercises in its extraterritorial jurisdiction, the Town's Unified Development Ordinance sets out twenty-five "goals" that the Town seeks to achieve through its land use policies, the vast majority of which do not appear to have any substantial bearing on health, sanitation, and the abatement of nuisances. Boone, N.C., Unified Dev. Ordinance, art. I, § 1.04.01 (Jan.

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11. The statement from *State ex rel. Carringe*r discussed in the text constituted mere dicta given our holding that the trial court should have dismissed the plaintiff's action based upon his failure to establish standing to challenge the constitutionality of the legislation in question. 254 N.C. at 208, 118 S.E.2d at 410-11.

1, 2014).[12] As a result, when the challenged legislation is considered as a whole, I am not satisfied that the General Assembly's decision to eliminate the Town's ability to exercise extraterritorial jurisdiction has a material relation to health, sanitation, and the abatement of nuisances.

Although the Town has not made any effort to define a "non-navigable stream" for purposes of Article II, Section 24(1)(e), the obverse of the term in question is well established for purposes of our State's common law regarding riparian rights, in which it is typically understood to refer to streams that are passable by watercraft. *Gwathmey v. State*, 342 N.C. 287, 300-01, 464 S.E.2d 674, 682 (1995) (stating that "all watercourses are regarded as navigable in law that are navigable in fact" (quoting *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901)), and that, "if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose"). For that reason, I believe that a non-navigable stream for purposes of Article II, Section 24(1)(e) is a body of water over which watercraft cannot ordinarily travel. Unlike the prohibition against the adoption of local legislation relating to health, sanitation, and the abatement of nuisances set out in Article II, Section 24(1)(a), this Court has never had the occasion to construe the prohibition against the enactment of local legislation relating to non-navigable streams contained in Article II, Section 24(1)(e). However, given the fact that both of these constitutional provisions utilize identical "[r]elating

12. More specifically, the Town's goals of "[p]rotect[ing] water quality," "[p]rotect[ing] designated water supply watersheds," and "[s]upport[ing] public health through provision of convenient exercise opportunities" appear to have a material relationship to health, sanitation, and the abatement of nuisances, while "preserv[ing] and protect[ing] areas and landmarks of historic significance," "[p]reventing degradation of natural drainage areas," "[m]inimiz[ing] public and private losses due to flood conditions," "[m]inimiz[ing] public and private losses due to slope failure caused by land disturbance of steep and very steep slopes," "[p]reserv[ing] and protect[ing] the scenic beauty and natural environment of the Town's hillside areas," "[p]reserv[ing] and protect[ing] the overall quality of life for residents and visitors," "[p]reserv[ing] and protect[ing] the character of established residential neighborhoods," "[m]aintain[ing] economically vibrant as well as attractive business and commercial areas," "[e]ncourag[ing] signage that maintains, enhances, and is compatible with the beauty and unique character of the Town," "[f]acilitat[ing] the creation of an attractive environment," "[r]etain[ing] and expand[ing] the Town's employment base," "[f]acilitat[ing] safe and efficient movement of motorists, pedestrians and cyclists," "[e]ncourag[ing] public transit," "[e]ncourag[ing] walkability and bikeability," "[m]aintain[ing] orderly and compatible land-use and development patterns," "[e]ncourag[ing] environmentally responsible development practices," "[p]romot[ing] rehabilitation and reuse of older buildings," "[m]aintain[ing] a range of housing choices and options," "[e]stablishing clear and efficient development review and approval procedures," "[p]rotect[ing] community property values," "[p]rotect[ing] and balanc[ing] private property rights," and "[b]ring[ing] about [the] eventual improvement or elimination of non-conformities" do not. *Id.*

to" language, I believe that the same "materiality" test that this Court adopted in *City of Asheville*, ___ N.C. at ___, ___ S.E.2d at ___, for purposes of determining whether a particular local law relates to health, sanitation, and the abatement of nuisances should be deemed applicable to the prohibition against the enactment of local legislation relating to non-navigable streams.

In seeking to persuade this Court that the Boone Act constitutes an impermissible local law relating to non-navigable streams, the Town points to N.C.G.S. §§ 160A-458, 160A-458.1, and 160A-459(a). Section 160A-458 provides that "[a]ny city may enact and enforce erosion and sedimentation control ordinances as authorized by Article 4 of Chapter 113A of the General Statutes, and in such enactment and enforcement shall comply with all applicable provisions of Article 4." N.C.G.S. § 160A-458. In addition, we note that N.C.G.S. § 113A-51, which serves as the "Preamble" to Article 4 of Chapter 113A, provides that "[t]he sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem," that "[c]ontrol of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare," and that "the purpose of" Article 4 is "to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation." *Id.* § 113A-51 (2015). Similarly, section 160A-458.1 provides that "[a]ny city may enact and enforce floodway regulation ordinances as authorized" and in compliance with "Part 6 of Article 21 of Chapter 143 of the General Statutes," *id.* § 160A-458.1, with the purposes of floodplain regulation being to "[m]inimize the extent of floods by preventing obstructions that inhibit water flow and increase flood height and damage," "[p]revent and minimize loss of life, injuries, property damage, and other losses in flood hazard areas," and "[p]romote the public health, safety, and welfare of citizens of North Carolina in flood hazard areas," *id.* § 143-215.51 (2015). Finally, section 160A-459 provides that "[a] city may adopt and enforce a stormwater control ordinance to protect water quality and control water quantity." *Id.* § 160A-459. Once again, while the bundle of powers that a municipality has the authority to exercise in its extraterritorial jurisdiction includes authority that is relevant to issues relating to non-navigable streams, along with other water-related subjects, I am unable to say, when the Boone Act is considered in its entirety, that the apparent purpose or practical effect of the withdrawal of the Town's authority to exercise extraterritorial jurisdiction upon non-navigable streams is a material one.

Finally, the Town has failed to make a detailed argument to the effect that the Boone Act impermissibly regulates trade. As we have previously held, "trade," for purposes of Article II, Section 24(1)(j), consists of "a business venture for profit and includes any employment or business embarked in for gain or profit." *Cheape*, 320 N.C. at 558-59, 359 S.E.2d at 798 (quoting *Smith v. County of Mecklenburg*, 280 N.C. 497, 508, 187 S.E.2d 67, 74 (1972), and citing *Pleasants*, 264 N.C. at 655-56, 142 S.E.2d at 702)). In other words, "*[p]rivate profit*" is "an inherent element of the concept of trade as used in" Article II, Section 24(1)(j). *Smith*, 280 N.C. at 510, 187 S.E.2d at 75 (citing *Gardner v. City of Reidsville*, 269 N.C. 581, 591-92, 153 S.E.2d 139, 148 (1967)). "[R]egulate" for purposes of Article II, Section 24(1)(j), means "to govern or direct according to rule[,] . . . to bring under [ ] control of law or constituted authority." *Williams*, 357 N.C. at 189, 581 S.E.2d at 429 (quoting *State v. Gulledge*, 208 N.C. 204, 208, 179 S.E. 883, 886 (1935) (ellipsis in original), *quoted in Cheape*, 320 N.C. at 559, 359 S.E.2d at 798 (using the stated definition of "regulate" in applying Article II, Section 24(1)(j)). In instances where the aim or practical effect of the challenged legislation is the complete prohibition of a certain type of activity "without regard to whether profit or other compensation [is] involved," this Court has concluded that the legislation does not regulate trade or labor. *Smith*, 280 N.C. at 510, 187 S.E.2d at 76 (citing *State v. Chestnutt*, 241 N.C. 401, 403-04, 85 S.E.2d 297, 299 (1955)); *see Williams*, 357 N.C. at 189-90, 581 S.E.2d at 429 (concluding that the legislation in question and the related ordinance "regulate[d] labor" because "the effect of these enactments [was] to govern labor practices of 'person[s] engaged in an industry affecting commerce who has 15 or more employees' " and "regulate[d] trade" because "[m]ost of the employers affected by the [o]rdinance [were] businesses operated for gain or profit," such that "[r]egulation of these employers ha[d] the practical effect of regulating trade" (citations omitted)). Although the withdrawal of the Town's extraterritorial jurisdiction would have an impact on the business of exchanging real property for a profit, that fact does not justify a decision to invalidate the Boone Act as an impermissible attempt to regulate trade in violation of Article II, Section 24(1)(j) given that the relevant regulations affect all land use-related activities instead of being limited to those founded upon a desire for profit. Thus, I am not persuaded by this aspect of the Town's challenge to the Boone Act as well.

As a result, for all these reasons, while I believe that the Town has standing to challenge the constitutionality of the Boone Act as violative of Article II, Section 24, and that the Town's claim is not barred by sovereign immunity considerations, I am unable, in light of the presumption

of constitutionality and the breadth of the issues addressed in the Boone Act, to conclude that the challenged legislation constitutes local legislation relating to one of the prohibited subjects listed in Article II, Section 24. Although I agree with the result that the Court deems appropriate, I am unable to agree that the Boone Act implicates the General Assembly's powers over the organization, government, and boundaries of local governments and that the limitations on the enactment of local legislation set out in Article II, Section 24 have no bearing on the proper resolution of this case. As a result, I concur in the result reached by the Court without concurring in its opinion.

Justice HUDSON joins in this concurring opinion.

Justice BEASLEY dissenting.

Because I disagree with the majority's holding that the Boone Act does not violate Article II, Section 24, I would affirm the decision of the three-judge panel of the Superior Court, Wake County, that the revocation of the extraterritorial jurisdiction powers of the Town of Boone (Town) violated "the prohibition on local acts contained in Article II, Section 24 of the North Carolina Constitution." Therefore, I respectfully dissent.

The first issue before us is to determine whether the facial challenge passes constitutional muster. The party bringing forth a facial challenge "must show that there are no circumstances under which the statute might be constitutional." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (citation omitted). This Court "seldom uphold[s] facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Id.* at 502, 681 S.E.2d at 280. This Court has consistently stated that a facial challenge is "the most difficult challenge to mount successfully." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987)). However, this Court's analysis does not end there. This Court must also "measure the balance struck by the legislature against the minimum standards of the constitution." *Id.* at 565, 614 S.E.2d at 486 (quoting *Henry v. Edmisten*, 315 N.C. 474, 491, 349 S.E.2d 720, 731 (1986)). "The best way for the Court to discharge this function is for it to enunciate a workable principle as to what process the law of the land minimally requires." *Henry*, 315 N.C. at 491, 340 S.E.2d at 731. Here those minimum standards require that the General Assembly not enact local

laws that relate to the prohibited subjects enumerated within Article II, Section 24. The Boone Act grants the General Assembly the authority to withdraw certain powers from the Town that relate to the constitutionally prohibited subjects listed in Article II, Section 24; therefore, the act cannot survive a facial challenge.

The General Assembly has broad powers; however, it was never the intent of the drafters of the constitution that the General Assembly be granted unbridled powers. Hence, Article II, Section 24 of the North Carolina Constitution (the Local Act Prohibition) provides instances in which the General Assembly is prohibited from enacting statutes that directly impact the welfare and services of local governments. Under the Local Act Prohibition, the North Carolina Constitution bars the General Assembly from enacting local laws, rather than general laws, affecting fourteen enumerated subjects. N.C. Const. art. II, § 24. In relevant part, the Local Act Prohibition provides that:

> (1) Prohibited subjects. – The General Assembly shall not enact any local, private, or special act or resolution:
>
> (a) Relating to health, sanitation, and the abatement of nuisances;
>
> . . . .
>
> (e) Relating to non-navigable streams;
>
> . . . .
>
> (j) Regulating labor, trade, mining, or manufacturing.

Id. art. II, § 24(1). The Local Act Prohibition further provides that "[a]ny local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void." *Id.* art. II, § 24(3).

This Court has acknowledged that in enacting the Local Act Prohibition "the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities." *Idol v. Street*, 233 N.C. 730, 732-33, 65 S.E.2d 313, 315 (1951). Further, this Court has stated that the purpose behind adopting the Local Act Prohibition was to

> free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen

> local self-government by providing for the delegation of local matters by *general laws* to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State.

Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 188, 581 S.E.2d 415, 428 (2003) (emphasis in original) (quoting *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965)). Therefore, if the General Assembly aims to address one of the subjects in the Local Act Prohibition, it must do so by enacting statewide laws of general applicability rather than local acts. *See Williams*, 357 N.C. at 188-89, 581 S.E.2d at 428 (concluding that if the General Assembly decided "to address employment discrimination by means of a state statute, Article II, Section 24 requires that it enact either a statewide law applicable to employers and their employees . . . or a general law that makes reasonable classifications based upon rational differences of circumstances").

The Local Act Prohibition provides express restrictions on the General Assembly's authority in order to safeguard against an abuse of legislative power. *See* N.C. Const. art. II, § 24 (limiting certain local, private, or special acts). As previously stated, the General Assembly is prohibited from enacting local, private, or special acts relating to one of the enumerated subjects. *Id.* art. II, § 24(1). Additionally, the Local Act Prohibition prevents the General Assembly from circumventing the prohibitions in subsection (1) by also preventing the "enact[ment] [of] any such local, private, or special act by the partial repeal of a general law." *Id.* art. II, § 24(2). As a disincentive for the General Assembly to overstep its powers, the Local Act Prohibition states that "[a]ny local, private, or special act or resolution enacted in violation of the provisions of this Section *shall be void*." *Id.* art. II, § 24(3) (emphasis added).

In addition to the constitutional limitations, this Court must determine through judicial review, whether the General Assembly has abused or overstepped its legislative power or authority, thereby assessing the constitutionality of legislative acts. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016) (citing *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787)). Thus, this Court is required to ensure that the General Assembly is acting within its powers and that its actions do not violate direct prohibitions of our constitution.

The Boone Act, which was enacted in 2014 by the General Assembly, withdrew the extraterritorial jurisdiction from the Town and returned regulatory control of the extraterritorial area to the County of Watauga.

Act of June 26, 2014, ch. 33, sec. 1, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 139, 140 (the Boone Act) ("Notwithstanding any other provision of law, the Town of Boone shall not exercise any powers of extraterritorial jurisdiction as provided in Article 19 of Chapter 160A of the General Statutes."). The issue here is whether the Boone Act violates the Local Act Prohibition of Article II, Section 24 of the state constitution.[1] It is well settled law that courts in North Carolina

> have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

Glenn v. Bd. of Educ., 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936).

The majority is convinced that because Article VII, Section 1 grants plenary power to the legislature, its analysis ends as it concludes that the General Assembly has the constitutional authority to enact the Boone Act. The majority concludes that Article II, Section 24 does not apply here. According to Article VII, Section 1:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1. The majority concludes that of the two clauses in paragraph one of Article VII, Section 1, it is only under the second clause that "the General Assembly's authority over local governments [is] expressly subject[ed] to limitations imposed by other constitutional provisions, including the constraints on local acts in Article II, Section 24." Assuming that the qualification contained within Article VII, Section 1 only applies to the second clause, I disagree with the majority's conclusion that the Boone Act falls exclusively within the first clause. As stated in the concurring opinion, the provisions in Article VII, Section 1 relate

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1. Along with the issue of whether the Boone Act violates the Local Act Prohibition, this Court is presented with issues of sovereign immunity and standing. I agree with the analysis in the concurring opinion regarding these issues, as well as the procedural history of this case.

to both municipal boundaries (clause 1) and municipal powers (clause 2). As the concurring opinion correctly states, "extraterritorial jurisdiction relates to regulatory power or authority rather than the establishment of municipal boundaries" and therefore, the Boone Act is more properly interpreted as relating to the municipal powers in the second clause. As such, the Boone Act is subject to Article VII, Section 1's limiting language, including the limitations imposed by Article II, Section 24. The concurring opinion also correctly states that determining the constitutionality of the Boone Act requires an analysis of Article II, Section 24's prohibitions; the analysis does not stop at Article VII, Section 1, as argued by the majority. Additionally, while I agree with most of the discussion set forth in the concurring opinion regarding Article II, Section 24 and the test to be applied under it, I disagree with the application of the test proffered in the concurring opinion to the facts of this case. Specifically, in regards to whether the Boone Act violates the constitutional limitations imposed by the Local Act Prohibition, I believe that this Court's decisions in *City of New Bern v. New Bern–Craven County Board of Education*, 338 N.C. 430, 450 S.E.2d 735 (1994), and *Williams*, 357 N.C. 170, 581 S.E.2d 415, guide our analysis.

To determine whether legislation violates the Local Act Prohibition we must determine whether an act is local or general. This Court follows the "reasonable classification" test to determine whether a law is general or local. *See McIntyre v. Clarkson*, 254 N.C. 510, 518-19, 119 S.E.2d 888, 894-95 (1961). An act is deemed local if it "discriminates between different localities without any real, proper, or reasonable basis or necessity–a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless or detrimental to the others." *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894 (citation omitted). Conversely, a law is general if "any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories." *Adams v. N.C. Dep't. of Nat. & Econ. Res.*, 295 N.C. 683, 691, 249 S.E.2d 402, 407 (1978) (quoting Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev. 340, 391 (1967)). Here the parties are in agreement that the Boone Act is a local act. Therefore, the Boone Act discriminates against the Town without "any real, proper, or reasonable basis." *McIntyre*, 254 N.C at 518, 119 S.E.2d at 894 (citation omitted).

In *City of New Bern*, this Court analyzed the constitutionality of legislation that withdrew the City of New Bern's inspection and

enforcement authority related to building, construction, fire, and safety codes for specific properties located within the city limits and reassigned those responsibilities to Craven County. *City of New Bern*, 338 N.C. at 433-44, 450 S.E.2d at 737-38. The City brought a challenge under Article II, Section 24. The legislation challenged in *City of New Bern* effectively shifted the responsibility of enforcing the building code, a power assigned to the city pursuant to N.C.G.S. § 160A-411, from the city to the county.[2] *Id.* at 437, 450 S.E.2d at 739-40. After concluding that the challenged acts were local acts, rather than general, this Court addressed whether the removal of the city's power to exercise inspection and enforcement authority pursuant to N.C.G.S. § 160A-411 related to "health, sanitation, or the abatement of nuisances." *Id.* at 439, 450 S.E.2d at 740. This Court reviewed the legislature's purpose for creating the building code and held that inspections pursuant to the building code affect health and sanitation. *Id.* at 439-40, 450 S.E.2d at 740-41. This Court concluded that by "alter[ing] the selection process of those who will enforce the [c]ode," the legislation affected health and sanitation and was prohibited by the Local Act Prohibition. *Id.* at 442, 450 S.E.2d at 742.

The Court's reasoning in *City of New Bern*, that a law altering who is charged with enforcing health and sanitation laws is a law related to health and sanitation, has been consistently applied to similar local legislation brought before this Court. *See Idol*, 233 N.C. at 732-33, 65 S.E.2d at 314-15 (holding unconstitutional a local act authorizing the board of aldermen and board of commissioners to create a joint city-county board of health); *Bd. of Health v. Bd. of Comm'rs*, 220 N.C. 140, 142-44, 16 S.E.2d 677, 678-79 (1941) (holding that local statutes that affected the process of appointment of a health officer were unconstitutional because they related to health); *Sams v. Bd. of Cty. Comm'rs*, 217 N.C. 284, 7 S.E.2d 540 (1940) (holding that legislation shifting the responsibility for enforcement of laws affecting the health of the public was barred by Article II, Section 29 (now Article II, Section 24)). Similarly, in the present case the Boone Act directly impacts the enforcement of laws, which themselves affect health and sanitation, by removing the Town's power to enforce the building code, fire code, and plumbing code, and other like regulations within the extraterritorial jurisdiction area. This

2. Pursuant to N.C.G.S. § 160A-411, the General Assembly authorizes cities to inspect and enforce the North Carolina Building Code within their planning jurisdictions. This statute also appears within Article 19 of Chapter 160A; thus, it is among the powers that the Boone Act withdraws from the Town of Boone.

Court in *City of New Bern* held that shifting the responsibility of enforcing the building code away from the City inescapably related to health and sanitation, because the

> Code regulates plumbing in an effort to maintain sanitary conditions in the buildings and structures of this state and thus directly involves sanitation, and consequently the protection of the health of those who use the buildings. The enforcement of the fire regulations protects lives from fire, explosion and health hazards.

City of New Bern, 338 N.C. at 440, 450 S.E.2d at 741. This same reasoning must be applied here in that the Boone Act shifts the responsibility for enforcement of laws that affect health and sanitation—mainly, the building code, fire code, and plumbing code—from the Town to the County of Watauga. The effect on the enforcement of the building, fire, and plumbing codes in the present case is similar to that in *City of New Bern*, because the Boone Act has "alter[ed] the selection process of those who will enforce" those laws. *Id.* at 442, 450 S.E.2d at 742. As noted in the concurring opinion and our recent decision in *City of Asheville v. State*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2016), our current test focuses on whether, in light of its stated purpose and practical effect, the Boone Act has a material, but not exclusive or predominant, connection to one of the prohibited subjects. Thus, I would hold that shifting the responsibility for enforcement of the building code, fire code, and plumbing code would have a material connection to health and sanitation and thus, is a violation of the Local Act Prohibition of the North Carolina Constitution.[3]

Moreover, this Court's decision in *Williams* lends further support for the conclusion that the Boone Act violates the Local Act Prohibition. In *Williams* the challenged legislation authorized Orange County to adopt an antidiscrimination ordinance that made it unlawful for an employer "[t]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to that individual's compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, disability, familial status, or veteran status." 357 N.C. at 175, 581 S.E.2d at 420. After concluding that the challenged legislation was a local act, this

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3. The concurring opinion correctly notes that the facts at issue in this case differ from the facts at issue in *City of New Bern* because *City of New Bern* involved the removal of a single power, rather than a "bundle of powers" as is the case here. However, the principles espoused in *City of New Bern*—specifically the interpretation of whether the act relates to health and sanitation—are instructive.

Court considered whether the legislation regulated any of the subjects listed in the Local Act Prohibition. Specifically, the Court in *Williams* sought to determine whether the legislation "regulate[d] labor or trade." *Id.* at 189, 581 S.E.2d at 429; *see* N.C. Const. art. II, § 24(1)(j).

In considering whether the challenged legislation regulated labor or trade, this Court rejected the argument that the legislation regulated only the acts of discrimination and did not involve labor or trade. *Williams*, 357 N.C. at 189, 581 S.E.2d at 429. Rather, this Court concluded that "while the intent of the enabling legislation and the Ordinance is to prohibit discrimination in the workplace, the *effect* of these enactments is to govern the labor practices of 'person[s] engaged in an industry affecting commerce [that] has 15 or more employees' in Orange County." *Id.* at 189, 581 S.E.2d at 429 (first alteration in original) (emphasis added). Thus, the Court focused on the practical effect of the legislation, and not its intended purpose, in determining that the legislation violated the Local Act Prohibition. As demonstrated by *Williams*, this Court's analysis is not limited to the legislative purpose or intent of an enactment. Rather, the analysis also considers the legislation's practical effect, *see id.* at 189-90, 581 S.E.2d at 429 (concluding that while the intent of the legislation was to prohibit discrimination, the legislation had the "practical effect of regulating trade"), and whether it has a material connection to the prohibited subjects of the Local Act Prohibition, as noted in the concurring opinion and our recent decision in *City of Asheville*, ___ N.C. at ___, ___ S.E.2d at ___.

Considering the practical effect of the Boone Act, I would hold that the Act violates the Local Act Prohibition. The Boone Act removes power from the Town of Boone to act within the extraterritorial jurisdiction area one mile outside of the town limits. The practical effect of removing this power is that the Town of Boone cannot enforce its ordinances within the one-mile extraterritorial jurisdiction area, including those ordinances that relate to health and sanitation, N.C. Const. art. II, § 24(1)(a), relate to non-navigable streams, *id.* art. II, § 24(1)(e), and regulate labor, trade, mining, or manufacturing, *id.* art. II, § 24(1)(j). According to the Town's Unified Development Ordinance (UDO), the purposes and goals of the UDO include "[p]romot[ing] the health, safety, and general welfare within the Town of Boone and its environs," "[p]rotect[ing] water quality," "[p]rotect[ing] designated water supply watersheds," "[p]revent[ing] degradation of natural drainage areas," and "[s]triv[ing] to minimize public and private losses due to slope failure caused by land disturbance of steep and very steep slopes." Boone, N.C., Unified Dev. Ordinance, art. 1, §§ 1.03.01, 1.04.01 (Jan. 1, 2014).

Because these ordinances themselves relate to health, sanitation, and the abatement of nuisances, as well as other prohibited subjects, legislation that shifts the responsibility of their enforcement by removing the Town's ability to enforce those ordinances also relates to health, sanitation, and the abatement of nuisances, and thereby violates the Local Act Prohibition. *See City of New Bern*, 338 N.C. at 442, 450 S.E.2d at 742 (holding that the shifting of responsibility for enforcement of the building code affects health and sanitation, and thus, is prohibited by the Local Act Prohibition); *Bd. of Health*, 220 N.C. at 143, 16 S.E.2d at 679 (concluding that two local statutes that affected the process of appointment of a health officer for Nash County were unconstitutional because "[t]his Court is . . . committed to the proposition that a law affecting the selection of officers to whom is given the duty of administering the health laws is a law 'relating to health' "). Thus, by determining that the practical effect of the Boone Act relates to health, sanitation, and the abatement of nuisances, I would conclude that there is a material connection between the Boone Act and the subjects listed in the Local Act Prohibition.

As stated above, while I agree with the general discussion in the concurring opinion, I disagree with the result that the Boone Act does not violate the Local Act Prohibition. After analyzing individually each of the subjects in the Local Act Prohibition that the Town alleged the Boone Act violated, the concurring opinion concluded that the Boone Act does not materially connect to either "health, sanitation, and the abatement of nuisances," N.C. Const. art. II, § 24(1)(a),[4] "non-navigable streams,"

4. As quoted verbatim from the concurring opinion, the following statutory provisions removed from the Town implicate issues relating to health, sanitation, and the abatement of nuisances: N.C.G.S. § 160A-381 (2015) (granting zoning authority to municipalities "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community" and authorizing municipalities to regulate and restrict the height, number of stories and size of buildings and other structures; the percentage of lots that may be occupied; the size of yards, courts and other open spaces; population densities; and the location and use of buildings, structures and land); N.C.G.S. § 160A-383 (2015) (providing that "[z]oning regulations shall be designed to promote the public health, safety, and general welfare" and may address issues such as the provision of adequate light and air; the prevention of overcrowding; avoiding undue population concentration; lessening street congestion; securing safety from fire, panic, and dangers; and facilitating the provision of transportation, water, sewerage, schools, parks, and other public requirements); N.C.G.S. § 160A-383.4 (2015) (authorizing regulations seeking to reduce the amount of energy consumption through the use of measures like density bonuses and similar incentives); N.C.G.S. § 160A-412(a) (2015) (providing for the enforcement of state laws and local ordinances relating to the construction of buildings and other structures; the installation of facilities such as plumbing, electrical, and air-conditioning systems; the safe, sanitary, and healthful maintenance of buildings and other structures; and other issues specified by the city council); N.C.G.S. § 160A-424(a) (2015) (providing that "[t]he inspection department

id. art. II, § 24(1)(e),[5] or "labor, trade, mining, or manufacturing," *id.* art. II, § 24(1)(j).[6] However, this Court should not analyze each of the enumerated subjects in isolation. In determining if the Boone Act violates the Local Act Prohibition, this Court should view the entire Local Act Prohibition. Thus, if this Court views all of the statutes within Article 19 of Chapter 160A that relate to "health, sanitation, and the abatement of

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may make periodic inspections, subject to the council's discretion, for unsafe, unsanitary, or otherwise hazardous and unlawful conditions in buildings or structures within its territorial jurisdiction"); N.C.G.S. § 160A-426(b) (2015) (providing that "an inspector may declare a nonresidential building or structure within a community development target area to be unsafe if" it "appears . . . to be vacant or abandoned" or "appears . . . to be in such dilapidated conditions as to cause or contribute to blight, disease, vagrancy, fire or safety hazard, to be a danger to children, or to tend to attract persons intent on criminal activities or other activities that would constitute a public nuisance"); N.C.G.S. § 160A-432(c) (2015) (stating that "[n]othing in this section shall be construed to impair or limit the power of the city to define and declare nuisances and to cause their removal or abatement by summary proceedings, or otherwise"); N.C.G.S. § 160A-439 (2015) (authorizing the adoption of ordinances providing for the repair, closing, and demolition of nonresidential buildings or structures "that fail to meet minimum standards of maintenance, sanitation, and safety established by the governing body"); and N.C.G.S. § 160A-441 (2015) (finding "that the existence and occupation of dwellings in this State that are unfit for human habitation are inimical to the welfare and dangerous and injurious to the health, safety and morals of the people" and "that a public necessity exists for the repair, closing or demolition of such dwellings").

5. As quoted verbatim from the concurring opinion that notes that the following statutory provisions removed from the Town implicate issues relating to non-navigable streams: N.C.G.S. § 160A-458 provides that "[a]ny city may enact and enforce erosion and sedimentation control ordinances as authorized by Article 4 of Chapter 113A of the General Statutes, and in such enactment and enforcement shall comply with all applicable provisions of Article 4." In addition, N.C.G.S. § 113A-51 provides that "[t]he sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem," that "control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare," and that "the purpose of" Article 4 is "to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation." N.C.G.S. § 113A-51 (2015); N.C.G.S. § 160A-458.1 provides that "[a]ny city may enact and enforce floodway regulation ordinances as authorized" and in compliance with "Part 6 of Article 21 of Chapter 143 of the General Statutes," N.C.G.S. § 160A-458.1, with the purposes of floodplain regulation being to "[m]inimize the extent of floods by preventing obstructions that inhibit water flow and increase flood height and damage," "[p]revent and minimize loss of life, injuries, property damage, and other losses in the flood hazard areas," and "[p]romote the public health, safety, and welfare of citizens of North Carolina in flood hazard areas," N.C.G.S. § 143-215.51 (2015). N.C.G.S. § 160A-459 provides that "[a] city may adopt and enforce a stormwater control ordinance to protect water quality and control water quantity." N.C.G.S. § 160A-459 (2015).

6. The Town fails to point to any statutory provisions in support of the argument that the Boone Act relates to "labor, trade, mining, or manufacturing."

nuisances," "non-navigable streams," and "labor, trade, mining, or manufacturing" as a whole, then the Boone Act clearly has a material connection to the prohibited subjects enumerated in the Local Act Prohibition.

Because I disagree with the majority's holding that the Boone Act does not violate Article II, Section 24, I would affirm the decision of the three-judge panel of the Superior Court, Wake County that the revocation of the Town's powers of extraterritorial jurisdiction violated "the prohibition on local acts contained in Article II, Section 24 of the North Carolina Constitution." Therefore, I respectfully dissent.

SED HOLDINGS, LLC v. 3 STAR PROPS., LLC

[369 N.C. 178 (2016)]

SED HOLDINGS, LLC	)	
	)	
v.	)	From Durham County
	)	
3 STAR PROPERTIES, LLC, ET AL.		

No. 211PA16

ORDER

The following order was entered:

Defendants' motion to appear, filed on 20 October 2016, is allowed. This case is stayed by virtue of the automatic stay arising from the bankruptcy proceeding against defendant 3 Star Properties, LLC in the United States Bankruptcy Court for the Southern District of Texas in Case 16-34815. Plaintiff's motion to be permitted to proceed now in the trial court against the remaining defendants, filed on 27 October 2016, also appears to be subject to the automatic stay.

By order of the Court in Conference, this 1st day of November, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

SOUND RIVERS AND NORTH CAROLINA COASTAL FEDERATION	)	
v.	)	From Beaufort County
N.C. DEPARTMENT OF ENVIRONMENTAL AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES	)	
MARTIN MARIETTA MATERIALS, INC., INTERVENOR	)	

No. 57P16

ORDER

Intervenor Martin Marietta Materials has filed a Petition for Writ of Certiorari to review order of N.C. Court of Appeals (29 December 2015) and a Petition for Writ of Certiorari to review order of Superior Court of Beaufort County (13 November 2015). Intervenor's petitions are allowed for the limited purpose of striking the provision of the trial court's order retaining jurisdiction for itself. Otherwise, the petitions are denied.

By Order of the Court in Conference, this 8th day of December, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of December, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
PARIS JUJUAN TODD	)	

No. 18A14-2

ORDER

In the exercise of its supervisory authority, this Court, on its own motion, allows review as follows: The Court orders the parties to brief and argue the following issues, with the State treated as the appellant and defendant treated as the appellee:

I. Did the Court of Appeals err in reversing and remanding the trial court's judgment?

II. Does this Court have jurisdiction to hear and decide an appeal taken from a decision of the Court of Appeals arising from a trial court ruling granting or denying a motion for appropriate relief pursuant to N.C.G.S. § 7A-30(2), in light of the provisions of N.C.G.S. § 7A-28(a) and N.C.G.S. § 15A-1422(f)?

By order of the Court in Conference, this 8th day of December, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of December, 2016.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme
Court of North Carolina

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

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002P13-2	State v. Jason C. Johnson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Swain County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**
015P15-2	State v. Jaired Antonio Jones	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-995)	Denied
018A14-2	State v. Paris Jujuan Todd	1. State's Motion for Temporary Stay (COA15-670) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss Appeal 5. Court's Order	1. Allowed **09/02/2016** 2. Allowed 3. --- 4. --- 5. Special Order *ex mero motu*
019P15-2	State v. Henry Ford Adkins	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-720)	Dismissed
046P16-2	In the Matter of Todd W. Short	Petitioner's *Pro Se* Motion for Extension of Time to File Petition for *Writ of Certiorari* to the Supreme Court of North Carolina	Dismissed as moot **10/21/2016**
052P16	David Easter-Rozzelle, Employee v. City of Charlotte, Employer, Self-Insured	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA15-594) 2. Plt's Motion for Leave to File PDR Out of Time 3. Plt's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied 3. Allowed
057P16	Sound Rivers and North Carolina Coastal Federation v. N.C. Department of Environmental and Natural Resources, Division of Water Resources, Martin Marietta Materials, Inc., Intervenor	1. Intervenor's Petition for *Writ of Certiorari* to Review Order of COA (COAP15-925) 2. Intervenor's Petition for *Writ of Certiorari* to Review Order of Superior Court, Beaufort County	1. Special Order 2. Special Order

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

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070PA16-2	State v. Nicolas Olivares Pineda	Def's PDR Under N.C.G.S. § 7A-31 (COA15-800-2)	Denied
081P16	In the Matter of A.B., J.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-910)	Denied
084P15-4	State v. Curtis Louis Sangster	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
086A16	In re Redmond	State's Motion for Withdrawal and Substitution of Counsel	Allowed **10/21/2016**
087A16	In re Hughes	State's Motion for Withdrawal and Substitution of Counsel	Allowed **10/21/2016**
088P15-4	State v. Mason W. Hyde	1. Def's *Pro Se* Motion for Objection 2. Def's *Pro Se* Motion for Petition for Writ of Error	1. Dismissed 2. Dismissed **Ervin, J., recused**
088A16	In re Smith	State's Motion for Withdrawal and Substitution of Counsel	Allowed **10/21/2016**
104P11-8	State v. Titus Batts	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	Dismissed **Ervin, J., recused**
107P98-5	State v. Randolph Wilson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Warren County 2. Def's *Pro Se* Motion for *De Novo* Review	1. Denied 2. Denied **Ervin, J., recused**
118P15-2	State v. Victor Adrian Gutierrez	1. Def's *Pro Se* Motion for PDR (COAP15-65) 2. Def's *Pro Se* Motion for Subpoena *Duces Tecum*	1. Dismissed 2. Dismissed as moot
121P16-2	State v. Damario Montreal Coxton	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-575-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem PDR Timely Filed 4. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Dismissed *ex mero motu* 2. Denied 3. Allowed 4. Dismissed as moot

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124A16	Jillian Murray v. University of North Carolina at Chapel Hill	1. Def's Motion for Judicial Notice (COA15-375) 2. State's Motion for Withdrawal of Counsel	1. 2. Allowed **12/08/2016**
131P16-3	Somchoi Noorsob v. Supreme Court of North Carolina	Petitioner's *Pro Se* Motion for Notice to Appeal and Request for Certificate of Appealability	Dismissed **10/17/2016**
133P16-2	State v. William Gerald Price	Def's *Pro Se* Motion for Request to Clarify (COAP15-1073)	Dismissed
138P16	Brad R. Johnson v. James R. Prevatte, Jr., Prevatte & Prevatte, PLLC	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-667) 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied 2. Denied
151P14-4	Kimberly Shreve v. North Carolina Department of Justice, Kristen Fetter, Colon Willoughby, and Tina Hoagland Byrd	1. Plt's *Pro Se* Motion for Opposition to Motion to Dismiss 2. Plt's *Pro Se* Motion for Leave to File Amended Complaint 3. Plt's *Pro Se* Motion for Opposition to Gatekeeper Order	1. Dismissed 2. Dismissed 3. Dismissed
175P16	N.C. Department of Health and Human Services, Division of Medical Assistance v. Parker Home Care, LLC --- Division of Medical Assistance, N.C. Department of Health and Human Services v. Parker Home Care, LLC	1. State's Motion for Temporary Stay (COA15-1026; COA15-1033) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Cardinal Innovations Healthcare Solutions, et al. Motion for Leave to File *Amicus* Brief	1. Allowed **05/11/2016** Dissolved **12/08/2016** 2. Denied 3. Denied 4. Dismissed as moot
187PA16	Kornegay Family Farms, LLC, et al. v. Cross Creek Seed, Inc.	Def's Motion for Leave to File Record on Appeal	Allowed **11/08/2016**
193P16	State v. Calvin Renard Carter	1. State's Motion for Temporary Stay (COA15-1234) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Deem as Timely Filed the Response to PDR	1. Allowed **05/24/2016** 2. Allowed 3. Allowed 4. Denied

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198P16	State v. Miguel Melo Nolasco	Def's PDR Under N.C.G.S. § 7A-31 (COA15-972)	Denied
211PA16	SED Holdings, LLC v. 3 Star Properties, LLC, et al.	1. Defs' Motion to Appear 2. Plt's Motion to Stay Proceedings Against 3 Star Properties, LLC, Because it is in Bankruptcy 3. Plt's Motion that Plaintiff be Permitted to Proceed Now in the Trial Court Against the Remaining Defendants	1. Allowed **11/01/2016** 2. Special Order **11/01/2016** 3. Special Order **11/01/2016**
226P16-2	In re Foreclosure of Deed of Trust from Burman Howard Maine, Betty Farmer Maine and Brandon Travis Maine, Grantor, to PBRE, Inc., Trustee, Recorded in Book 405, Page 2169, in the Ashe County Public Registry by Morrison Trustee Services, LLC, Substitute Trustee	Petitioners' *Pro Se* Motion for Request to Clarify	Dismissed
226P16-3	Betty F. Maine and Brandon Maine v. Keith B. Nichols, et al.	Petitioners' *Pro Se* Petition for *Writ of Mandamus*	Denied
228P16	State v. Derrick Dewayne Wallace	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-783) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion for Response to PDR to be Deemed Timely Filed	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
239P16	State v. Chad Braxton Bumpers	1. State's Motion for Temporary Stay (COA16-1) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/24/2016** Dissolved **12/08/2016** 2. Denied 3. Denied

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244P16	State v. Sandra Meshell Brice	1. State's Motion for Temporary Stay (COA15-904) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2016** 2. Allowed 3. Allowed
246P16-3	State v. Christopher Charles Friscia, The Trust, and Maria Adriana Friscia, The Trust	Defs' *Pro Se* Motion to Reconsider	Dismissed
248P16	Friday Investments, LLC as Successor in Interest to Tisano Realty, Inc. v. Bally Total Fitness of the Mid-Atlantic, Inc. f/k/a Bally Total Fitness of the Southeast, Inc. f/k/a Holiday Health Clubs of the Southeast, Inc. as Successor in Interest to Bally Fitness Corporation; and Bally Total Fitness Holding Corporation	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA15-680) 2. Defs' Motion to Amend PDR	1. Allowed 2. Allowed
249P16	Kevin Gerity v. North Carolina Department of Health and Human Services	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-843) 2. Petitioner's Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
256P16-2	State v. Jonathan James Newell	1. Def's *Pro Se* Motion for Appeal (COAP16-233) 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Second Petition for *Writ of Mandamus*	1. Dismissed 2. Denied 3. Denied

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257P16-2	Federal National Mortgage Association a/k/a Fannie Mae v. William Gerald Price, the Trust, and William Gerald Price	1. Petitioner's *Pro Se* Motion for Notice of Appeal 2. Respondent's Motion to Dismiss Appeal 3. Respondent's Motion for Sanctions 4. Petitioner's *Pro Se* Motion for Certified Certificate of Registration Pursuant to F.A.R.A., U.S.C. 22, § 611	1. --- 2. Allowed 3. Dismissed without prejudice 4. Dismissed
262P16	Ronald G. Keaton, Jr., Employee v. ERMC, III, Employer, New Hampshire Insurance Company, Carrier, Carl Warren & Company, Third-Party Administrator	1. Defs' Motion for Temporary Stay (COA15-1108) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Defs' Motion to Hold PDR in Abeyance 5. Defs' Motion to Withdraw PDR	1. Allowed **07/13/2016** 2. --- 3. --- 4. --- 5. Allowed
267P16	Robert V. Powell v. P2Enterprises, LLC and Robert Henry Powell	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA15-542) 2. Plt's Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied
268P16-2	Owen D. Leavitt v. Willie Hargrove	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed *ex mero motu*
269P16	State v. Shameil Dontel Smith	1. Def's *Pro Se* Motion for Adversary Preliminary Hearing 2. Def's *Pro Se* Motion for Notice of Discovery and Specific Demand for Information 3. Def's *Pro Se* Motion to Transport 4. Def's *Pro Se* Motion to Activate Indictment Information	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
270P16	Matthew Nereim v. Ryan Cummins; City Chevrolet Automotive Company; Hendrick Luxury Collision Center, LLC; National General Insurance Company; and each of them	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1253)	Denied

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271A16	Latwang Janell Reid v. State	Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-1059)	Dismissed *ex mero motu* **Ervin, J., recused**
275A16	Colleen Blondell v. Shakil Ahmed, Shabana Ahmed, Michael Fekete and Susan Elizabeth Fekete, Individually	1. Defs' (Shakil Ahmed and Shabana Ahmed) Notice of Appeal Based Upon a Dissent (COA15-796) 2. Defs' (Shakil Ahmed and Shabana Ahmed) PDR as to Additional Issues	1. --- 2. Denied
279P16	In the Matter of M.A.W.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-1153) 2. Petitioner's Motion to Deem PDR Timely Filed 3. Petitioner's Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied 3. Allowed
280P15	In re Foreclosure of Real Property Under Deed of Trust from Michael D. Gutowski and Mary Anne Gutowski, in the Original Amount of $286,000, Dated November 9, 2006 and Recorded on November 15, 2006 in Book 4367 at Page 502, Union County Registry; Trustee Services of Carolina, LLC, Substitute Trustee	1. Respondents' *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-881) 2. Respondents' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Respondents' *Pro Se* Motion for Stay of Foreclosure Sale 4. Respondents' *Pro Se* Motion to Enjoin All Other State Actions 5. Petitioner's Motion to Dismiss Appeal 6. Respondents' *Pro Se* Motion for Stay in Light of Bankruptcy Filing	1. --- 2. Denied 3. Denied **08/25/2015** 4. Dismissed as moot 5. Allowed 6. Dismissed as moot
280P16	Patricia B. Hoover v. George Barry Hoover	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1396)	Denied

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

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282P16-2	Jeremy Bruns and Jenny Bruns v. Rhonda Bryant, Dalton Bryant, Sr., Dalton Bryant, Jr., Pat McCrory, as Governor of North Carolina, Frank Perry, as Secretary of the North Carolina Department of Public Safety, Anthony Tata, as Secretary of the North Carolina Department of Transportation, Veronica McClain, USAA, and State of North Carolina	Plts' *Pro Se* Motion to Reconsider PDR Under N.C.G.S. § 7A-31(a) and *Writ of Mandamus* Under Rule 22	Denied
284P16	State v. Jaronta Raynor	Def's *Pro Se* Motion of Dismissal	Dismissed
285P16	State v. Ceasar Jones	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA (COAP13-558)	Dismissed
289P16	State v. Brian Jack Frazier	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1089)	Denied
291P16	State v. John Frede Sabbaghrabaiotti	1. State's Motion for Temporary Stay (COA15-1028) 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 **08/10/2016** Dissolved **12/08/2016** 2. Denied 3. Denied 4. Dismissed as moot
292P16	State v. Ramon A. Black	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1283)	Denied
293P16	Sammie Ray Usher, Jr. v. The Charlotte-Mecklenburg Hospital Authority	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-880)	Denied
294P16	State v. Dragan Blazevic	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1343)	Denied

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295P16	State v. Christopher Shawn Frione	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1143)	Denied
296P16	Caron Associates, Inc. v. Southside Manufacturing Corp. and Crown Financial, LLC	Def's (Crown Financial, LLC) PDR Under N.C.G.S. § 7A-31 (COA15-1376)	Denied
298P16	State v. James Stanley Daye	Def's PDR Under N.C.G.S. § 7A-31 (COA16-74)	Denied
302P16	State v. Marshall Tristan Shaw (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Moore County 2. State's Motion for Extension of Time to File Response	1. Dismissed 2. Dismissed as moot
303P16	James K. Sanderford v. Duplin Land Development, Inc.	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-1214)	Denied
304P16	State v. Michael Ray Pigford	State's PDR Under N.C.G.S. § 7A-31 (COA15-1047)	Denied
305P16	State v. Jeremy Daniel Russom	Def's *Pro Se* Motion for PDR (COAP14-359)	Dismissed
306P16	John T. Turchin and Susan Turchin v. ENBE, LLC	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-1236)	Denied
307P15-2	The Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue	1. State's Motion for Temporary Stay (COA15-896) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/25/2016** 2. Allowed 3. Dismissed *ex mero motu* 4. Allowed
307P16	State v. Dejerod Thomas Clapp	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-1079) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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308P16	State v. Robert William Ashworth	1. State's Motion for Temporary Stay (COA15-1279) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/22/2016** Dissolved **12/08/2016** 2. Denied 3. Denied 4. Dismissed as moot
309A16	State v. Rico Lamar Barnes	Def's Notice of Appeal Based Upon a Constitutional Question (COA15-1173)	Dismissed *ex mero motu*
310A16	Worley, et al. v. Moore, et al.	Defs' Motion to File Corrected Brief	Allowed **10/31/2016** **Ervin, J., recused**
310A16	Worley, et al. v. Moore, et al.	Def's Motion for Extension of Time to File Reply Brief	Allowed as to the 5 Days Extension Only **11/23/2016** **Ervin, J., recused**
311P16	Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger, Petitioners v. Lincoln County, Lincoln County Board of Commissioners, and Strata Solar, LLC, Respondents and Timothy P. Mooney, Martha McLean, and The Sailview Owners Association, Intervenor Respondents	Intervenor Respondents' PDR Under N.C.G.S. § 7A-31 (COA15-1370)	Denied
312P16	Pittsboro Matters, Inc., et al. v. Town of Pittsboro v. Chatham Park Investors, LLC	Intervenor's PDR Under N.C.G.S. § 7A-31 (COA16-28)	Denied
316P16	State v. Nathan Lorenzo Holden	Def's *Pro Se* Motion for Writ of Prohibition	Denied

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317P16-2	Ronald Thompson Corbett v. Pat McCrory, Governor	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/23/2016**
320P16	State v. Janely Higuera Cardenas	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1012)	Denied
321P16	State v. Clayton James	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-853)	Denied
322P16	State v. Tishekka Nicole Cain	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-1208) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Treat PDR as a Petition for *Writ of Certiorar*i	1. Denied 2. Denied 3. Allowed
325P16	State v. Christopher Roger Cole, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1291)	Denied
327P16	Eugene Elliott McKenzie v. Daniel M. Horne, Jr.	1. Petitioner's *Pro Se* Motion for Petition for Mandate 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
328P16	Linwood Wilson v. Barbara Wilson	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA15-1141) 2. Plt's *Pro Se* Motion for Temporary Stay 3. Plt's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied 2. Denied **09/06/2016** 3. Denied
331A16	State v. Amanda Gayle Reed	1. State's Motion for Temporary Stay (COA15-363) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **09/06/2016** 2. Allowed **10/20/2016** 3. ---

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332P16	Sandra D. Snipes and William J. Snipes v. Britthaven, Inc., Principle Long Term Care, Inc., Spruce LTC Group, LLC d/b/a Richmond Pines Healthcare and Rehabilitation Center, and Fred McQueen, Jr., M.D.	1. Defs' (Britthaven, Inc., Principle Long Term Care, Inc., and Spruce LTC Group, LLC d/b/a Richmond Pines Healthcare and Rehabilitation Center) Motion for Temporary Stay (COA16-291) 2. Defs' (Britthaven, Inc., et al.) Petition for *Writ of Supersedeas* 3. Defs' (Britthaven, Inc., et al.) Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **09/07/2016** Dissolved **12/08/2016** 2. Denied 3. Denied
333P16	State of North Carolina *ex rel.* Commissioner of Insurance v. North Carolina Rate Bureau In the Matter of the Filing Dated January 3, 2014 by the North Carolina Rate Bureau for Revised Homeowners' Insurance Rates and Homeowners' Insurance Territory Definitions	1. N.C. Rate Bureau's Notice of Appeal Based Upon a Constitutional Question (COA15-402) 2. N.C. Rate Bureau's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
336P16	WIDENI77 v. North Carolina DOT, I-77 Mobility Partners LLC and State of North Carolina	Plt's PDR Prior to Determination by COA	Denied
337P00-2	State v. Waverly Orlando Harshaw, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Catawba 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 **Edmunds, J., recused**
339P16	State v. Silvestre Alvarado Chaves	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court	Dismissed
340A95-5	State v. William Morganherring, IV (DEATH)	Def's *Pro Se* Motion for Appeal of Denial of Motion for Supplemental Post-Conviction Discovery	Dismissed
340P16	State v. Alfred Lee Cooper	Def's *Pro Se* Motion for PDR (COAP16-192)	Dismissed

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341P16	State v. Joe Terry Wright	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-589)	Dismissed
342P16	State v. Antravis Quanealious Briggs	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-767)	Denied
343P16	John M. Huff, Jr. v. William Hoyt Paramore, III	Plt's *Pro Se* Motion for Hearing	Dismissed
345P16-2	State v. Dwayne Demont Haizlip	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **09/29/2016** 2. Allowed **09/29/2016**
348A16	Kevin J. Tully v. City of Wilmington	Plt's Motion for Withdrawal of Appearance and for Substitution of Counsel	Allowed **11/09/2016**
351P16	State v. Matthew Ryan Hoover	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Iredell County	Dismissed
352P16	State v. Jeral Thomas Ore, Jr.	1. State's Motion for Temporary Stay (COA16-100) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/29/2016** 2. 3.
353P16	State v. Camellia Brown	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* Petition for *Writ of Habeas Corpus* 4. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County 5. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 6. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed without prejudice 2. Dismissed as moot 3. Denied **09/26/2016** 4. Dismissed 5. Allowed 6. Dismissed as moot

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354P16	Catrina Jarrett v. William Andrew Jarrett	1. Def's Motion for Temporary Stay (COA15-1346) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/27/2016** Dissolved **10/28/2016** 2. Denied **10/28/2016** 3. Denied **10/28/2016**
355P15	State v. Derrick Aundra Huey	1. State's Motion for Temporary Stay (COA15-100) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/26/2015** 2. Allowed 3. Allowed
358P15-2	State v. Shawn Louis Goodman	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Rowan County (COAP14-917)	Dismissed
359P16	State v. Joseph Maurice Craig	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP16-105)	Dismissed
360P16	State v. Thomas J. Valentine	Def's *Pro Se* Motion for PDR (COAP16-266)	Dismissed
362P16	Aleta Alston-Toure v. Yehudit Toure and Nkrumah Jennings	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
363P16	State v. Credrick D. Washington	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cabarrus 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
364P16	State v. Bryan Lane Lanier	Def's *Pro Se* Motion to Subpoena Defense Witnesses	Dismissed **10/21/2016**
365A16	State v. David Michael Reed	1. State's Motion for Temporary Stay (COA16-33) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **10/05/2016** 2. Allowed **11/02/2016** 3. ---
366P16	State v. Angelo Applewhite	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP16-651)	Dismissed

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367P16	State v. Rahmil Ingram	1. State's Motion for Temporary Stay (COA16-120) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/05/2016** Dissolved **12/08/2016** 2. Denied 3. Denied
368P16	Azige, et al. v. Holy Trinity Ethiopian Orthodox Tewahdo Church, et al.	Defs' Motion to Withdraw and for Substitution of Counsel	Allowed **11/22/2016** **Ervin, J., recused**
369P16	Jacqueline Clark v. North Carolina Department of Public Safety	Respondent's PDR Under N.C.G.S. § 7A-31 (COA15-624)	Denied
370P04-15	State v. Anthony Leon Hoover	1. Def's *Pro Se* Motion for Writ of Error 2. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP15-913)	1. Denied **10/07/2016** 2. Denied **10/07/2016** **Hudson, J., recused**
371P16	Linwood Wilson v. Joe Curtis	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-194) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Plt's *Pro Se* Amended PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied 3. Denied
372A16	State v. William Clifton Crabtree, Sr.	1. Def's Notice of Appeal Based Upon a Dissent (COA15-1124) 2. Def's Notice of Appeal Based Upon a Constitutional Question 3. Def's PDR as to Additional Issues 4. State's Motion to Dismiss Appeal Based Upon a Constitutional Question 5. State's Motion to Deem Motion to Dismiss Notice of Appeal Based Upon a Constitutional Question and Response to PDR Timely Filed	1. --- 2. --- 3. Denied 4. Allowed 5. Allowed
373P16	State v. Eric Alan Sanchez	Def's PDR Under N.C.G.S. § 7A-31 (COA16-249)	Denied

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374P13-7	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion for Notice of Appeal (COAP16-531; COAP16-774) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed **Ervin, J., recused**
374A16	Tatita M. Sanchez v. Cobblestone Homeowners Association of Clayton, Inc., a North Carolina non-profit corporation	1. Def's Notice of Appeal Based Upon a Dissent (COA15-1281) 2. Def's Motion to Consolidate Appeals	1. — **10/13/2016** 2. Allowed **10/13/2016**
375A16	Frank Christopher v. Cobblestone Homeowners Association of Clayton, Inc., a North Carolina non-profit corporation	1. Def's Notice of Appeal Based Upon a Dissent (COA15-1282) 2. Def's Motion to Consolidate Appeals	1. — **10/13/2016** 2. Allowed **10/13/2016**
376P02-6	State v. Robert Wayne Stanley	1. State's Motion for Temporary Stay (COA16-436) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/17/2016** 2. **Ervin, J., recused**
376A16	Vincent Franks, Jr. v. Cobblestone Homeowners Association of Clayton, Inc., a North Carolina non-profit corporation	1. Def's Notice of Appeal Based Upon a Dissent (COA15-1303) 2. Def's Motion to Consolidate Appeals	1. — **10/13/2016** 2. Allowed **10/13/2016**
377A16	Robert Sain and Jennifer Sain v. Cobblestone Homeowners Association of Clayton, Inc., a North Carolina non-profit corporation	1. Def's Notice of Appeal Based Upon a Dissent (COA15-1302) 2. Def's Motion to Consolidate Appeals	1. — **10/13/2016** 2. Allowed **10/13/2016**

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378A16	Dennis Draughon and Megan Draughon v. Cobblestone Homeowners Association of Clayton, Inc., a North Carolina non-profit corporation	1. Def's Notice of Appeal Based Upon a Dissent (COA15-1280) 2. Def's Motion to Consolidate Appeals	1. — **10/13/2016** 2. Allowed **10/13/2016**
379P16	State v. Henry Datwane Hunt	Def's PDR Under N.C.G.S. § 7A-31 (COA16-143)	Denied
380P16	State v. Jackson Cain Whisenant	Def's PDR Under N.C.G.S. § 7A-31 (COA16-82)	Denied
383P16	State v. Marvin Hakeem Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-732)	Denied
384P16	State v. Phillip Wayne Broyal	Def's PDR Under N.C.G.S. § 7A-31 (COA16-21)	Denied
386P16	State v. Quentin Lee Dick	1. State's Motion for Temporary Stay (COA15-1400) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **10/14/2016** 2.
387P16	Tony A. Hawkins v. Ernest R. Sutton, Superintendent	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
389A15-2	State v. Tae Kwon Hammonds	Def's Motion for Revision of Briefing Deadlines	Allowed **10/13/2016**
389P16	People of North Carolina, *ex rel.* Christopher Charles Friscia and Maria Andriena Friscia v. Nathan J. Taylor, et al.	Petitioners' *Pro Se* Petition for *Writ of Mandamus*	Dismissed
390P16	State v. Linda Beth Chekanow and Robert David Bishop	1. State's Motion for Temporary Stay (COA15-1294) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **10/19/2016** 2.
391A16	Next Advisor Continued, Inc. v. Lendingtree, Inc. and Lendingtree LLC	Defs' Motion to Submit Appellate Filings Under Seal	Allowed **10/19/2016**

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391A16	Next Advisor Continued, Inc. v. Lendingtree, Inc., et al.	Def's Motion to Amend Certificate of Service of Brief	Allowed **12/01/2016**
391A16	Next Advisor Continued, Inc. v. Lendingtree, Inc., et al.	1. Defs' Motion for Temporary Stay 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' Petition in the Alternative for *Writ of Certiorari* to Review Decision of N.C. Business Court 4. Defs' Motion to Amend and Supplement Record on Appeal	1. Denied 2. Denied 3. Denied 4. Dismissed as moot
392A16	The Fidelity Bank v. N.C. Department of Revenue	Petitioner's Motion to Hold Appeal in Abeyance Pending Determination of PDR in Companion Case	Allowed **10/28/2016**
393P16	The Fidelity Bank v. N.C. Department of Revenue	Petitioner's PDR Prior to a Determination of COA (COA16-1051)	Allowed
394P16	State v. Daniel Scott Best	Def's PDR Under N.C.G.S. § 7A-31 (COA16-27)	Denied
396P16	Teresa Thompson v. Evergreen Baptist Church	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1031)	Denied
397A16	State v. Adam Robert Jackson	1. Def's Motion for Removal of Current Appellate Counsel and Reappointment of the Office of the Appellate Defender 2. Def's Motion for Current Appellate Counsel to Deliver Entire File to the Office of the Appellate Defender	1. Allowed **11/07/2016** 2. Allowed **11/07/2016**
398P16	State v. Eric Lamar Lindsey	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-1188) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
400P16	State v. Clairy Kanyinda Mbaya	Def's PDR Under N.C.G.S. § 7A-31 (COA16-364)	Denied
402P16	State v. Jermuis Erell Andrews	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-253) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
403P16	Ricky Turner v. Cherry Hospital	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/31/2016**

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404P16	State v. Samson Jamarco Coleman	Petitioner's *Pro Se* Motion for PDR (COAP16-719)	Denied
405P16	State v. Antonio Freeman	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Northampton County	Denied
406P16	State v. Michael A. Sorbello	1. Def's *Pro Se* Motion for PDR (COAP16-721) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
407P16	James Cummings v. State of North Carolina	1. Def's *Pro Se* Motion for Discretionary Review (COAP16-706) 2. Def's *Pro Se* Motion for Appeal	1. Dismissed 2. Dismissed
408P16	State v. Lowell Thomas Manring	Def's PDR Under N.C.G.S. § 7A-31 (COA16-130)	Denied
410P16	State v. Joshua Sanchez	1. State's Motion for Temporary Stay (COA15-1401) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/07/2016** 2.
411P16	Union County v. Town of Marshville	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Denied **11/15/2016** 2. **Ervin, J., recused**
413P16	State v. Wesley Patterson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1145)	Denied
416P16	State v. Jeremy Rossco Bishop	Def's PDR Under N.C.G.S. § 7A-31 (COA16-276)	Denied
417P16	State v. Andrew Young	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1003) 2. State's Motion to Dismiss Def's Appeal	1. Dismissed 2. Dismissed as moot
424P16	Corey D. Greene v. Susan White	Petitioner's *Pro Se* Motion for Notice of Appeal (COAP16-828)	Denied **12/02/2016**
426P06-2	State v. Billy Thomas Pearson	Def's *Pro Se* Motion for PDR (COAP16-716)	Dismissed
430P16	Brian Reavis v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/23/2016**

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436P16	State v. Howard Franklin Eubanks	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Certiorari*	1. Allowed **12/05/2016** 2.
440P16	State v. Christopher Glenn Turner	1. State's Motion for Temporary Stay (COA16-656) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/06/2016** 2
441P16	State v. Marian Olivia Curtis	1. State's Motion for Temporary Stay (COA16-458) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/06/2016** 2.
444P08-2	State v. Rickey Nelson Spencer	Def's *Pro Se* Motion for Order to Exhaust Defendant Arguments	Dismissed
459P00-6	State v. William M. Huggins	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
510P04-3	State v. Jose Luis Macias	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **10/31/2016**
579P01-4	State v. Antorio Rice Smarr	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
618P02-2	State v. Michael Ray Trull	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cabarrus County	Dismissed
669P03-4	State v. Tony Robert Jones	1. Def's *Pro Se* Motion for Rehearing 2. Def's *Pro Se* Motion to Dismiss 3. Def's *Pro Se* Motion for Petition to Show Just Cause Under Common Law	1. Dismissed 2. Dismissed 3. Dismissed **Ervin, J., recused**

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080A14-1	State v. David Martin Beasley Young	1. Motion Requesting Court to Take Judicial Notice (COA13-646) 2. Addendum to Motion Requesting Court to Take Judicial Notice 3. State's Response to Motion Requesting Court to Take Judicial Notice 4. Addendum to Motion Requesting Court to Take Judicial Notice	1. Dismissed as moot 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed as moot
369A15	State v. John Joseph Carvalho, II	State's Motion to Amend the Record on Appeal	Dismissed as moot
374A14	Fisher, et al. v. Flue-Cured Tobacco Cooperative Stabilization Corporation	1. Plts' Memorandum of Additional Authority 2. Def's Motion for Leave to Respond to Memorandum of Additional Authority	1. --- 2. Dismissed as moot

KAYE W. FISHER, DAN LEWIS AND DANIEL H. LEWIS FARMS, INC., GEORGE ABBOT, ROBERT C. BOYETTE AND BOYETTE FARMS, INC., KYLE A. COX, C. MONROE ENZOR, JR., EXECUTOR OF THE ESTATE OF CRAWFORD MONROE ENZOR, SR., ARCHIE HILL, KENDALL HILL, WHITNEY E. KING, CRAY MILLIGAN, RICHARD RENEGAR, LINWOOD SCOTT, JR. AND SCOTT FARMS, INC., ORVILLE WIGGINS, ALFORD JAMES WORLEY, EXECUTOR OF THE ESTATE OF DENNIS ANDERSON, CHANDLER WORLEY, HAROLD WRIGHT, AND OTHERS SIMILARLY SITUATED

v.

FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION

No. 374A14

Filed 21 December 2016

1. Appeal and Error—appealability—class action certification granted—interlocutory—public interest—appeal heard

Although defendant's appeal in a class action from the certification of the class was interlocutory (denying certification affects a substantial right by not allowing certification), the subject matter of the this class action (assets held by the Flue-Cured Tobacco Cooperative Stabilization Corporation) implicated the public interest to such a degree that the Supreme Court invoked its supervisory authority.

2. Class Actions—certification—alleged derivative action

The trial court did not abuse its discretion in a class action suit against the Flue-Cured Tobacco Cooperative Stabilization Corporation by allowing a motion for class certification notwithstanding defendant's contention that plaintiffs' action was derivative in nature. Whether or not plaintiffs' claims are derivative in nature, nothing in N.C.G.S. § 55-7-42 precludes class certification in this case.

3. Class Actions—certification—class representatives—no conflict of interest

The trial court did not abuse its discretion by certifying the class where defendant argued that there was a conflict of interest between one of the class representatives and other members of the plaintiff class, a director of the organization. Because plaintiffs' claims were against defendant and not against individual directors, there was no sense in which the director was "inculpating, if not suing, himself" by participating in this case as a class representative.

4. Class Actions—certification—recovery—capable of fair determination

The trial court did not abuse its discretion when certifying a class action involving assets held by the Flue-Cured Tobacco Cooperative Stabilization Corporation by concluding that each class member's share of any recovery could be determined fairly based upon that member's patronage interests in defendant and that a class action would preserve the rights of numerous absent, unnamed class members.

5. Class Actions—certification—class members—common issues of law and fact

The trial court did not err when certifying a class in an action against the Flue-Cured Tobacco Cooperative Stabilization Corporation by finding that the class members shared numerous common issues of law and fact. The same basic questions of fact and law would determine whether defendant was liable for its actions in retaining surplus money as reserve funds and attempting to remove all the members who would not agree to enter into a current exclusive marketing agreement.

6. Class Actions—certification—class action—preferable to individual litigation

The trial court did not abuse its discretion by ruling that a class action was superior to individual litigation in a case involving assets held by the Flue-Cured Tobacco Cooperative Stabilization Corporation. Although defendant argued that the class was unmanageable simply because of its size, the trial court stated that the only pragmatically effective way to provide relief under the circumstances was through certification of a class and, given the extremely large number of similarly situated class members and the impracticality of requiring them to protect their rights through filing hundreds of thousands of individual lawsuits, it could not be concluded that the trial court abused its discretion.

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

Appeal pursuant to N.C.G.S. § 7A-27(b) from an amended order on motion for class certification entered on 24 February 2014 by Judge John R. Jolly, Jr. in Superior Court, Wake County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North

Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 20 April 2015.

Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Isley; Speights & Runyan, by C. Alan Runyan, pro hac vice; and Richardson, Patrick, Westbrook & Brickman, LLC, by James L. Ward, Jr., for plaintiff-appellees.

Quinn Emanuel Urquhart & Sullivan, LLP, by John B. Quinn, pro hac vice, and Derek L. Shaffer, pro hac vice; and Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellant n/k/a U.S. Tobacco Cooperative, Inc.

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

JACKSON, Justice.

In this case we consider whether the trial court erred by allowing plaintiffs' motion to certify a class of current and former flue-cured tobacco producers who were members of defendant Flue-Cured Tobacco Cooperative Stabilization Corporation between 1946 and 2004. Because we cannot conclude that the trial court abused its discretion, we affirm and remand.

This appeal arises from two cases that were consolidated for pretrial purposes. These two cases began with the filing of complaints on 6 January 2005 and 11 February 2005. Plaintiffs are current and former tobacco producers and members of defendant, a nonprofit cooperative that administered the federal tobacco price support program (the Price Support Program) for flue-cured tobacco from 1946 through 2004.

According to the allegations in plaintiffs' third amended and consolidated complaint, flue-cured tobacco producers participating in the Price Support Program were required to be members of defendant. To become a member, a producer paid five dollars to defendant in exchange for one share of defendant's stock. The complaint asserted that each member entered into a contract with defendant that stated:

> The undersigned grower of flue-cured tobacco (hereinafter "grower") applies for membership in the Flue-Cured Tobacco Co-operative Stabilization Corporation, a nonprofit co-operative . . . and herewith makes payment of

> $5.00 to the undersigned agent for one (1) share of common stock.
>
> The grower hereby appoints the Association as his agent to receive, handle and market all or such portion of the flue-cured tobacco . . . as the grower may elect or choose to deliver to the Association for disposition in accordance with the terms of this contract and the Association accepts such appointment . . . .
>
> The Stabilization Corporation agrees (1) to receive, handle and sell . . . such tobacco as the grower may elect to deliver to the Stabilization Corporation, and (2) that in addition to the amount of [sic] paid to the grower upon delivery of tobacco, it will distribute to him his pro rata share of any net gains remaining after payment of operating and maintenance costs and expenses and a reasonable deduction for reserves as determined by the Board of Directors.

The complaint asserts that each member "was guaranteed a lifetime membership in [defendant] that could not be cancelled without a hearing."

According to the complaint, the process of participating in the Price Support Program involved tobacco producers delivering their product to a warehouse, where defendant then graded the tobacco and attempted to sell it at auction. The auction was subject to a minimum price established annually by the United States Department of Agriculture, and the tobacco would not be sold for less than that price. If the tobacco could not be sold, then defendant would process and store it, while advancing the minimum price less an administrative fee to the tobacco producer. Defendant paid the tobacco producers using loans from the Commodity Credit Corporation (CCC), a corporation owned and operated by the federal government that helped administer the Price Support Program. The unsold tobacco served as collateral for the loans issued by the CCC.

Plaintiffs' complaint alleged that until 1982, these loans "were completely non-recourse, meaning that all losses or defaults incurred under the program were borne by the CCC and the taxpayers of the United States." At the same time, if tobacco from a given crop year eventually was sold at a price higher than necessary to pay that year's loans, then "these gains were to be allocated pro-rata among [ ] the [tobacco producers] who participated in the program that year." This system of allocating losses and gains remained in effect until 1982, when Congress enacted the No Net Cost Tobacco Program Act (the NNC Act). Pursuant

to the NNC Act, defendant began collecting an additional payment (the NNC Assessment) from tobacco producers when they delivered their tobacco to defendant. These funds served as additional collateral for the loans issued to defendant by the CCC, limiting losses borne by the federal government. If any funds remained after the loans were repaid, the surplus funds belonged to the tobacco producers who had participated in the Price Support Program. Ultimately, the Price Support Program came to an end in 2004.

Plaintiffs asserted claims related to funds accumulated by defendant throughout the lifetime of the Price Support Program and held by defendant as reserve funds. According to the allegations in the complaint, the money in defendant's reserve funds came primarily from a few specific sources. First, defendant received and stored tobacco from 1967 to 1973 and eventually sold the tobacco at a price higher than necessary to repay the loans from the CCC for those crop years. Some of this surplus money was distributed to the tobacco producers, and some was retained by defendant as reserve funds. Defendant issued certificates of interest to the tobacco producers whose tobacco had created the surplus during this time period. The certificates of interest showing that the tobacco producers had an interest in the reserve funds were issued on a pro rata basis. Second, after 1982 defendant used surplus funds collected from NNC Assessments to redeem unsold tobacco that had been held as collateral for loans from the CCC. Defendant sold that tobacco for a substantial amount and retained the money as reserve funds. Third, when the Price Support Program came to an end in 2004, defendant satisfied its remaining loans, and the CCC returned to defendant approximately eighty-three million pounds of processed tobacco that had been held as collateral. Defendant sold this tobacco and again retained the revenue.

Plaintiffs' complaint alleged that in 2004, defendant notified all its members that unless they entered into new contracts to sell tobacco exclusively to defendant in 2005, they would lose their memberships—thus "forc[ing] Plaintiffs to either enter into that contract, at reduced prices and quantities, or lose their substantial investment in [defendant], including their share of the reserves, retained earnings, and margins." Plaintiffs contended that defendant "expelled hundreds of thousands" of members and took control of the reserve funds in an "attempt[ ] to create a 'last man standing' scenario in which a few hundred remaining member[s] potentially have the benefit of hundreds of millions of dollars in assets which have been created through the efforts of all member[s], including Plaintiffs." Plaintiffs sought, *inter alia*, money damages, partial distribution of defendant's assets, and a declaratory judgment that

plaintiffs are members of defendant and are "entitled to all rights, privileges, and benefits resulting" from their membership.

Plaintiffs also filed a motion for class certification. The trial court allowed the motion, stating that the certified class shall include:

> All individuals, proprietorships, partnerships, corporations, or their heirs, representatives, executors or assigns, and other proper entities that have been members/shareholders of the Flue-Cured Tobacco Cooperative Stabilization Corporation . . . at any time from its inception through the end of crop year 2004, and any heirs, representatives, executors, successors or assigns, and;
>
> (a) had not requested cancellation of their membership and whose membership was cancelled by Stabilization without a hearing, and/or
>
> (b) were issued a certificate of interest in capital reserve by Stabilization for any of the tobacco crop years between and including 1967-1973, and/or
>
> (c) delivered, consigned for sale, or sold flue-cured tobacco and paid an assessment for deposit into the No Net Cost Tobacco Fund or No Net Cost Tobacco Account during any tobacco crop years between and including 1982-2004.

Defendant appealed to the North Carolina Court of Appeals. This Court on its own initiative certified the case for discretionary review prior to a determination by the Court of Appeals.

[1] As an initial matter, we note that defendant's appeal is interlocutory. "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment." *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 125, 225 S.E.2d 797, 802 (1976) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)). "A substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration in original) (quoting *Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805). "We consider whether a right is substantial on a case-by-case basis." *Id.* at 75, 678 S.E.2d at 605.

"The *denial* of class certification has been held to affect a substantial right because it determines the action as to the unnamed plaintiffs." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 193, 540 S.E.2d 324, 327 (2000) (citing, *inter alia*, *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984)). "[H]owever, no order *allowing* class certification has been held to similarly affect a substantial right such that interlocutory appeal would be permitted." *Id.* at 193, 540 S.E.2d at 328. In *Frost* we stated that a trial court's order allowing class certification does not affect a substantial right and is not immediately appealable. *Id.* at 194, 540 S.E.2d at 328. Nevertheless, we concluded that the underlying subject matter of *Frost* was important enough to justify invocation of our supervisory authority over the courts of this state to consider the merits of the appeal. *Id.* at 195, 540 S.E.2d at 329 (citing N.C.G.S. § 7A-32(b) (1999)).

The case *sub judice* involves "a class of producers of flue-cured tobacco who were members/shareholders of Defendant at times material and signed marketing agreements with Defendant pursuant to which the putative class members delivered tobacco to Defendant that was either sold or otherwise used in the [Price Support] program." The class includes the tobacco producers, "proprietorships, partnerships, [and] corporations," and their "heirs, representatives, executors, successors or assigns." The trial court stated that, according to defendant's records, "for each year between 1967 and 1973 certificates were issued to between 40,768 and 149,483 members," and "[t]here were 209,186 members who paid [NNC] assessments between 1982 and 2004." The parties agree that the total number of past and present members of defendant exceeds eight hundred thousand. Consequently, after careful consideration, we conclude that the subject matter of this case implicates the public interest to such a degree that invocation of our supervisory authority is appropriate. N.C.G.S. § 7A-32(b) (2015). Accordingly, we consider the merits of defendant's appeal notwithstanding that the appeal is interlocutory and ordinarily would not be immediately appealable.

[2] Rule 23 of the North Carolina Rules of Civil Procedure authorizes class action lawsuits, stating: "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) (2015). "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." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987) (footnote and citation omitted).

As an initial matter, the class representatives must demonstrate the existence of a class. *Id.* at 277, 280-81, 354 S.E.2d at 462, 464. "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. A proper 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." *Id.* at 280, 354 S.E.2d at 464. In addition to establishing the existence of a proper class, the class representatives must show: (1) that "they will fairly and adequately represent the interests of all members of the class;" (2) that they have "no conflict of interest" with the class members; (3) that they "have a genuine personal interest, not a mere technical interest, in the outcome of the case;" (4) that they "will adequately represent members outside the state;" (5) that "class members are so numerous that it is impractical to bring them all before the court;" and (6) that "adequate notice" is given to all class members. *Faulkenbury v. Teachers & State Emps.' Ret. Sys.*, 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.' " *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 337, 757 S.E.2d 466, 470 (2014) (alteration in original) (quoting *Crow*, 319 N.C. at 284, 354 S.E.2d at 466). The trial court has "broad discretion" to allow or deny class certification. *Frost*, 353 N.C. at 198, 540 S.E.2d at 331. Accordingly, we review the trial court's order allowing class certification for abuse of discretion. *See Beroth Oil*, 367 N.C. at 337, 757 S.E.2d at 470 (citing *Faulkenbury*, 345 N.C. at 699, 483 S.E.2d at 432). In *Beroth Oil* we further refined the standard of review applicable to the findings of fact and conclusions of law in the class certification order, concluding that although "the general standard of review is abuse of discretion," the trial court's conclusions of law are reviewed de novo. *Id.* at 338, 757 S.E.2d at 471 (quoting *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 300, 677 S.E.2d 1, 4 (2009), *disc. rev. denied and cert. denied*, 363 N.C. 800, 690 S.E.2d 530 (2010)). The trial court's findings of fact are binding on the appellate court if supported by competent evidence. *Id.* at 338, 757 S.E.2d at 471.

In this appeal defendant argues that class certification is improper. Defendant contends that the trial court found that the "central issue common to all Plaintiffs is whether they are entitled to share in the accumulated assets held by Defendant, which Defendant contends is held as a reasonable reserve." Defendant asserts that this issue involves a challenge to its business judgment and therefore "constitutes a prototypical

derivative claim." Defendant states that plaintiffs are barred from bringing a derivative proceeding because they failed to make a written demand upon defendant in compliance with section 55-7-42, which states:

> No shareholder may commence a derivative proceeding until:
>
> (1) A written demand has been made upon the corporation to take suitable action; and
>
> (2) 90 days have expired from the date the demand was made unless, prior to the expiration of the 90 days, the shareholder was notified that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

N.C.G.S. § 55-7-42 (2015). We disagree with defendant's assertion.

A derivative proceeding is defined in pertinent part as "a civil suit in the right of a domestic corporation." *Id.* § 55-7-40.1(1) (2015). Derivative claims belong to the corporation itself, rather than to the plaintiffs, meaning that the rights to be vindicated are those of the corporation, not those of plaintiffs suing derivatively on the corporation's behalf. *See*, *e.g.*, *Gall v. Exxon Corp.*, 418 F. Supp. 508, 514-15 (S.D.N.Y. 1976). "[A]ny damages flow back to the corporation, not to the individual shareholders bringing the [derivative] action." *Green v. Freeman*, 367 N.C. 136, 142, 749 S.E.2d 262, 268 (2013) (citing, *inter alia*, *Rivers v. Wachovia Corp.*, 665 F.3d 610, 614-15 (4th Cir. 2011)).

Defendant's appeal arises from the class certification order and seeks reversal of that order. Defendant does not argue that section 55-7-42 requires dismissal of any specific claims for relief alleged in the complaint, but contends that section 55-7-42 precludes class certification. Yet, section 55-7-42 establishes when a shareholder "may commence a derivative proceeding," but does not set forth any requirements for class certification. In addition, neither Rule 23 nor this Court's precedents require a court evaluating a motion for class certification to consider whether any claims raised by a putative class action are derivative in nature. N.C.G.S. § 1A-1, Rule 23 (2015); *see also*, *e.g.*, *Crow*, 319 N.C. at 282-84, 354 S.E.2d at 465-66 (describing the prerequisites for class certification). We conclude that whether or not plaintiffs' claims are derivative in nature, nothing in section 55-7-42 precludes class certification in the case *sub judice*. We express no opinion whether any of these claims are derivative claims and note that defendant may argue that specific

claims are barred by section 55-7-42 in a properly raised motion to dismiss. *See, e.g.*, *Allen ex rel. Allen & Brock Constr. Co. v. Ferrera*, 141 N.C. App. 284, 289, 540 S.E.2d 761, 766 (2000) (concluding that the trial court did not err by dismissing the plaintiff's derivative claims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6)). We hold only that defendant has not shown that the trial court abused its discretion by allowing the motion for class certification notwithstanding defendant's contention that plaintiffs' action is derivative in nature.

[3] Next, defendant argues that the trial court abused its discretion by certifying the class because there is a conflict of interest between one of the class representatives and other members of the plaintiff class. Specifically, defendant contends that one named plaintiff and class representative, Richard Renegar, is on defendant's Board of Directors. Defendant asserts that allowing Renegar to represent the class essentially amounts to Renegar "inculpating, if not suing, himself" because, by arguing that the Board's recent and current actions are unreasonable or improper, Renegar "effectively" contradicts Board decisions for which he "consistently voted in favor." We disagree.

We explained in *Crow* that one of the prerequisites for class certification is that the class representatives not have a conflict of interest with the other class members. "The named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465 (citing *Thompson v. Humphrey*, 179 N.C. 44, 58, 101 S.E. 738, 746 (1919)).

The trial court found that Renegar, like other class representatives, was a producer of flue-cured tobacco, was a member of defendant, had signed a marketing agreement with defendant, and had delivered tobacco to defendant. In evaluating whether there were any conflicts between the class representatives and the class members, the trial court noted that plaintiffs had not raised any claims alleging that any individual member of defendant's Board of Directors had engaged in misconduct. In addition, the trial court stated that all "claims against individual directors were voluntarily dismissed" by plaintiffs. The trial court also observed that "the named Plaintiffs have continually exhibited an interest in the outcome of this civil action and have been diligent in their involvement, such that the court is satisfied that the Class representatives will protect the interests of all Class members." The trial court concluded that plaintiffs are adequate class representatives.

Because plaintiffs' claims are against defendant and not against individual directors, there is no sense in which Renegar is "inculpating, if not suing, himself" by participating in this case as a class representative. Although a trial court might review a class representative's other activities and find that these activities create a conflict of interest with class members, here the trial court exercised its discretion and determined that Renegar is capable of representing the interests of class members. We are unable to conclude that the trial court abused its discretion by certifying the class notwithstanding this alleged conflict.

[4] Next, defendant argues that "[t]he trial court erred as a matter of law by disregarding fundamental conflicts that divide the class." Specifically, defendant identifies the following alleged conflicts of interest between the class members: (1) some class members still sell tobacco to defendant, while other class members no longer sell tobacco; (2) some class members have filed a separate action in federal district court stating that their interests are not represented by the current action; and (3) some class members who sold tobacco during years when tobacco was sold at a profit may have claims that other class members lack. Defendant asserts that the class certification order must be reversed because of these conflicts.

We did not state in *Crow* that there can be no conflicts of interest between class members. *See id.* at 282, 354 S.E.2d at 465. Nevertheless, we "caution[ed]" that the list of prerequisites identified in *Crow* should not "be viewed as all-inclusive." *Id.* at 282 n.2, 354 S.E.2d at 465 n.2. The trial court has "broad discretion" in "all matters pertaining to class certification." *Frost*, 353 N.C. at 198, 540 S.E.2d at 331. The court "is not limited to consideration of matters expressly set forth in Rule 23 or in [*Crow*]." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466. Accordingly, nothing prevents the trial court from evaluating potential conflicts of interest between class members and weighing any potential conflicts when exercising its discretion to allow or deny class certification. *See*, *e.g.*, *Harrison v. Wal-Mart Stores*, *Inc.*, 170 N.C. App. 545, 554, 613 S.E.2d 322, 329 (2005) (concluding that the trial court did not abuse its discretion when it concluded in pertinent part that it could not "certify a class in which some putative class members assert that other putative class members caused or contributed to the wrongs asserted and the latter deny the assertion"). The trial court may be in the best position to determine whether any conflicts among class members warrant denial of class certification.

In the case *sub judice* the trial court considered defendant's arguments and rejected them. The trial court concluded that "[a]ll Class

members and representatives have a common unified interest in the determination of whether Defendant is retaining more than a reasonable reserve to the detriment of the current and former members." The court noted that plaintiffs are not seeking dissolution of defendant and explained that "[v]arying interests among Class members arising from when and how much tobacco a Class member delivered do not create a conflict concerning Defendant's liability." Instead, the court stated that class members' relative interests could be determined based upon each member's patronage interests.

The court noted that class members who received certificates of interest for participation in the profitable crop years from 1967 to 1973 "would receive only that portion of the net gains for each year that is attributable to the tobacco they delivered for that year." The court stated that "[t]hese amounts have been separately accounted for and maintained in Defendant's records." The court therefore concluded that these members' interests do not conflict with those of other members.

For class members "in the 1982-2004 group," who paid the NNC Assessments that in some years helped to create the surplus money that defendant retained as reserve funds, the trial court noted that "there are no material conflicts . . . because their tobacco and [NNC] assessments are proportionally taken into consideration during the entire period that they are common contributors." Although the court acknowledged that some class members may be entitled to a larger or lesser amount of damages than others depending upon the amount of tobacco delivered and NNC Assessments paid by each individual class member, the court, quoting *Pitts v. American Security Insurance Co.*, 144 N.C. App. 1, 15, 550 S.E.2d 179, 190 (2002), stated that "[a] difference in the amount of damages does not create a material conflict of interest between [a plaintiff] and the other proposed class members."

The trial court did not find that conflicts of interest divide the members of the class. Instead, the court concluded that each class member's share of recovery could be determined fairly based upon that member's patronage interests in defendant. Moreover, the court stated that a class action "will preserve the rights of numerous absent, unnamed Class members." We are unable to conclude that the trial court abused its discretion.

[5] Next, defendant argues that the trial court erred by finding that the class members share numerous common issues of law and fact. Defendant contends that each class member's recovery will depend upon different factors, such as whether the class member still actively sells tobacco to

defendant, the communications the class member received from defendant, the crop years during which the class member produced and sold tobacco, and whether the class member has already redeemed a certificate of interest or received other payments from defendant. Defendant asserts that in *Beroth Oil*, 367 N.C. at 346, 757 S.E.2d at 476, this Court stated that certifying a class of eight hundred property owners would require a trial with "far too many individualized, fact-intensive determinations for class certification to be proper." Defendant argues that here the class is larger and requires determination of a greater number of diverse issues than those referenced in *Beroth Oil*. We disagree.

Beroth Oil involved a class of property owners raising inverse condemnation claims against the North Carolina Department of Transportation. 367 N.C. at 333, 757 S.E.2d at 468. The inverse condemnation claims arose from the deleterious effect on their properties of the Transportation Corridor Official Map Act, which imposed certain limits on obtaining a building permit or approving a subdivision plat. *Id.* at 334, 757 S.E.2d at 468. The trial court denied class certification. *Id.* at 336, 757 S.E.2d at 470. In concluding that the trial court did not abuse its discretion, we explained that different parcels of land necessarily were affected differently by the restrictions imposed by the Act. *Id.* at 343, 757 S.E.2d at 474. We observed that "[n]ot all of these 800 property owners have the same property interests and expectations. As the trial court correctly noted, the properties . . . are diverse: 'Some . . . are improved and some are not. Some are residential and others are commercial.' " *Id.* at 343, 757 S.E.2d at 474 (second ellipsis in original). Our decision was based upon the "discrete fact-specific inquiry" necessary to decide inverse condemnation claims related to the particular restrictions of the Act on numerous different properties with different uses and purposes. *Id.* at 343, 757 S.E.2d at 474.

By contrast, in the case *sub judice* the trial court identified many issues of law and fact that are common to the class. The trial court stated that "all members paid $5 for their stock," that "the material language of the stock certificates is uniform," and that "all members signed a marketing agreement," with the text of the agreements used from 1946 to 1984 being "substantially identical" and the text of the agreements used from 1985 to 2004 also being "substantially identical." The trial court explained that "Defendant's relationship with all members was governed by uniform agreements with the [CCC] and uniform agreements with the auction warehouses." The court noted that the terms of all the certificates of interest were identical. For members who participated in the 1967 to 1973 crop years, each member's "gains . . . were allocated

pro rata by year based upon each member's percentage of the consigned pounds of tobacco." For members who paid NNC Assessments, the payments were assessed, kept, transferred, and used in the same way for each member. The court stated that defendant had maintained records showing the proceeds from crop years that created a surplus, including the surplus money retained by defendant from 1967 to 1973, from 1982 to 1984, and from tobacco redeemed after the Price Support Program ended in 2004.

The trial court also identified common legal issues shared by the class, including whether defendant "was required to allocate and identify its total equity to the members on a yearly basis," "breached a fiduciary duty to Plaintiffs," or "breached Plaintiffs' contractual rights." The court stated that all plaintiffs share a common interest in determining whether defendant's reserve funds were and are reasonable. The court concluded that plaintiffs had shown sufficient commonality of interests among the class members. The trial court found that no individual inquiry is necessary to determine whether defendant may terminate the membership of members who do not agree to enter into a current marketing agreement with defendant.

Unlike *Beroth Oil*, in which even the question of whether a specific property owner could raise an inverse condemnation claim required a "discrete fact-specific inquiry," *id.* at 343, 757 S.E.2d at 474, here the same basic questions of fact and law will determine whether defendant is liable to plaintiffs for its actions in retaining surplus money as reserve funds and attempting to remove all the members who would not agree to enter into a current exclusive marketing agreement with defendant. In addition, here the trial court exercised its broad discretion to allow, rather than deny, class certification. We are unable to conclude that the trial court abused its discretion in determining that plaintiffs have demonstrated the existence of a class with a shared interest in common questions of fact and law.

[6] Finally, defendant argues that this class is unmanageable simply because of the large number of tobacco producers who were members of defendant and will be members of the class. But the large number of individuals whose interests are affected by defendant's actions is a key reason cited by the trial court in ruling that a class action is superior to individual litigation. The trial court stated that "the only pragmatically effective way to provide relief under the circumstances of this matter is through certification of a class because each individual class member's damages suffered may be relatively small while the burden and expense

of individual litigation would be very high." The trial court noted that a class action "will avoid a multiplicity of lawsuits," prevent inconsistent results, reduce plaintiffs' transaction costs in bringing the action, and "preserve the rights of numerous absent, unnamed Class members." "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. Given the extremely large number of similarly situated class members and the impracticality of requiring them to protect their rights through filing hundreds of thousands of individual lawsuits, we cannot conclude that the trial court abused its discretion by ruling that a class action is superior to individual litigation in this case. Accordingly, we affirm the trial court's order allowing the motion for class certification and remand this case to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED AND REMANDED.

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

HANESBRANDS INC.
v.
KATHLEEN FOWLER

No. 438A15

Filed 21 December 2016

Appeal and Error—appealability—Business Court designation—opposition overruled—interlocutory

In an action involving stock grant agreements and a designation of the case as a mandatory complex business case, an interlocutory order of the North Carolina Business Court overruling defendant's opposition to the designation of the case was not immediately appealable. Defendant argued that she was denied the substantial right to have the matter heard in the same manner as ordinary disputes involving ordinary citizens, but she did not explain how she was prejudiced. Although defendant contended that the Business Court's decision was akin to the denial of a motion for a change of venue, merely asserting a preference for a forum other than the Business Court absent a specific, legal entitlement to an exclusion from designation was insufficient.

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

Appeal pursuant to N.C.G.S. §§ 7A-27(a) and 7A-45.4(e) from an order entered on 5 November 2015 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice pursuant to N.C.G.S. § 7A-45.4, in Superior Court, Forsyth County. Heard in the Supreme Court on 31 August 2016.

Constangy, Brooks, Smith, & Prophete, LLP, by Robin E. Shea and Jill S. Stricklin, for plaintiff-appellee.

Law Office of David Pishko, P.A., by David Pishko, for defendant-appellant.

JACKSON, Justice.

In this case we consider whether defendant Kathleen Fowler may appeal an interlocutory order of the North Carolina Business Court overruling her opposition to designation of this case as a mandatory complex business case. We conclude that defendant has failed to show that this order affects a substantial right as required for appeal of an interlocutory order pursuant to N.C.G.S. § 7A-27(a). Accordingly, we dismiss defendant's appeal.

On 20 August 2015, plaintiff Hanesbrands Inc. filed a complaint in Superior Court, Forsyth County alleging that defendant breached five different stock grant agreements that she entered into during her employment with plaintiff. Plaintiff seeks to recover monetary damages of $462,366—the alleged value of certain of its stock units and options granted to defendant pursuant to those agreements. That same day, plaintiff filed a Notice of Designation of its case as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a) on the basis that the case involved both "the law governing corporations" and a dispute "involving securities." The designation received preliminary approval from the Chief Justice of the Supreme Court of North Carolina on 21 August 2015. *See* N.C.G.S. § 7A-45.4(f) (2015).

Defendant filed an opposition to the designation on 23 September 2015, which was overruled by order of Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, who was assigned to the case. On 12 November 2015, after filing an answer to plaintiff's original complaint, defendant appealed the Business Court's order to this Court pursuant to N.C.G.S. §§ 7A-45.4(e) and 7A-27(a). Plaintiff argues

that this Court should dismiss defendant's appeal because the Business Court's order is interlocutory and defendant failed to show that the order affects a substantial right. We agree.

When a party disagrees with a Business Court Judge's ruling on an opposition to the designation of a case as a mandatory complex business case, "the party may appeal in accordance with G.S. 7A-27(a)." N.C.G.S. § 7A-45.4(e) (2015). According to section 7A-27(a):

> Appeal lies of right directly to the Supreme Court in any of the following cases: . . .
>
> (3) From any interlocutory order of a Business Court Judge that does any of the following:
>
> a. Affects a substantial right.
>
> b. In effect determines the action and prevents a judgment from which an appeal might be taken.
>
> c. Discontinues the action.
>
> d. Grants or refuses a new trial.

Id. § 7A-27(a) (2015).

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)). To appeal from an interlocutory order, the appellant must show that the order affects a "substantial right which he might lose if the order is not reviewed before final judgment." *City of Raleigh v. Edwards*, 234 N.C. 528, 530, 67 S.E.2d 669, 671 (1951) (citations omitted). "[A]n appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)).

> "It is the appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed.

Johnson v. Lucas, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (citation omitted) (quoting *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (second and third alterations in original)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). Similarly, in appeals from interlocutory orders, the North Carolina Rules of Appellate Procedure require that the appellant's brief contain a "statement of the grounds for appellate review," which must allege "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (discussing N.C. R. App. P. 28(b)).[1]

We have determined that a "substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration in original) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)). Recognizing that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied," we have determined that it is "usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

In her appeal from the Business Court's interlocutory order in this case, defendant alleges that the designation of her case as a mandatory complex business case affects a substantial right. Specifically, defendant argues that requiring her "to defend a case filed against her by a large, public corporation in a special court established primarily for disputes between businesses" denies her the substantial right to "have this matter heard in the same manner as ordinary disputes involving ordinary citizens." Defendant also argues that the "Business Court Judge's decision in this action is akin to the denial of a motion for change of venue." Although defendant appears to suggest that she may suffer some unspecified prejudice from this case being tried in Business Court, she

1. Although opinions of the Court of Appeals are not binding on this Court, the wider scope of the Court of Appeals' jurisdiction has allowed it to develop a more robust body of case law regarding interlocutory appeals.

has not explained how she would be prejudiced. She has not identified a specific "material right" that she would lose if the order is not reviewed before final judgment nor explained how the order in question would "work injury" to her if not immediately reviewed. *See Gilbert*, 363 N.C. at 75, 678 S.E.2d at 605; *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. Furthermore, the General Statutes provide that if a case is not "designated a mandatory complex business case" it may still be designated as "a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts." N.C.G.S. § 7A-45.4(f). Rule 2.1 affords the Chief Justice wide latitude to designate a case as a complex business case. Specifically,

> [t]he Chief Justice may designate *any* case or group of cases as (a) "exceptional" or (b) "complex business." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.

Gen. R. Pract. Super. & Dist. Cts. 2.1(a), 2016 Ann. R. N.C. 3 (emphasis added). We note that in Delaware, another state having a specialized business court, the Administrative Directive establishing that state's Complex Commercial Litigation Division specifically excludes certain types of cases from designation, including "any case involving an exclusive choice of court agreement . . . where the agreement relates to an individual or collective contract of employment." James T. Vaughn, Jr., President J., Del. Super. Ct., *Administrative Directive of the President Judge of the Superior Court of the State of Delaware No. 2010-3: Complex Commercial Litigation Division* 1-2 (2010). In contrast, neither our statute nor Rule 2.1 create any such exclusions for cases involving individuals or for specific classes of cases. Merely asserting a preference for a forum other than the Business Court absent a specific, legal entitlement to an exclusion from designation is insufficient to support defendant's contention that this matter was analogous to a venue change and is therefore immediately appealable. Consequently, we conclude that defendant has not demonstrated that the Business Court's interlocutory order is immediately appealable. Accordingly, we dismiss defendant's appeal.

DISMISSED.

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

IN RE FORECLOSURE OF BEASLEY

[369 N.C. 221 (2016)]

IN THE MATTER OF FORECLOSURE BY ROGERS TOWNSEND & THOMAS, PC, SUBSTITUTE TRUSTEE, OF A DEED OF TRUST EXECUTED BY JULIA WESKETT BEASLEY DATED FEBRUARY 12, 2007 AND RECORDED ON FEBRUARY 16, 2007 IN BOOK 1211, PAGE 169 OF THE CARTERET COUNTY REGISTRY, NORTH CAROLINA

No. 276PA15

Filed 21 December 2016

Mortgages—non-judicial foreclosure hearing—trustee's withdrawal of notice

The order of the superior court clerk of court, the order of the superior court, and the opinion of the Court of Appeals in a foreclosure case all were vacated where the trustee effectively withdrew its notice of non-judicial foreclosure hearing, thus terminating the hearing.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 101 (2015), reversing an order entered on 25 September 2013 by Judge Phyllis M. Gorham in Superior Court, Carteret County. Heard in the Supreme Court on 11 October 2016.

Nelson Mullins Riley & Scarborough, L.L.P., by Donald R. Pocock and D. Martin Warf, for petitioner-appellee FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings, LLC.

Shipman & Wright, LLP, by Gregory M. Katzman, W. Cory Reiss, and Gary K. Shipman, for respondent-appellant.

PER CURIAM.

Because the trustee effectively withdrew its notice of non-judicial foreclosure hearing, thus terminating the proceeding, there was no pending case on which the clerk of court could act. *See In re Foreclosure of Lucks*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Dec. 21, 2016) (No. 162A16). As a result, we hereby vacate the clerk of court's order and that of the superior court, as well as the opinion of the Court of Appeals.

VACATED.

IN THE MATTER OF FORECLOSURE OF A DEED OF TRUST EXECUTED BY GORDON F. LUCKS DATED JULY 14, 2006 AND RECORDED IN BOOK 4254, PAGE 96 IN THE BUNCOMBE COUNTY PUBLIC REGISTRY

No. 162A16

Filed 21 December 2016

Mortgages and Deeds of Trust—foreclosure—substitute trustee—authority

The trial court properly refused to authorize a creditor to proceed with a foreclosure where the creditor failed to establish the substitute trustee's authority to foreclose under the deed of trust. However, the trial court erred by entering a "dismissal with prejudice." The refusal to authorize the creditor to proceed was not a "dismissal" and did not implicate res judicata or collateral estoppel in the traditional sense. The trial court did not abuse its discretion by refusing to admit a limited power of attorney appointing a service company, which, in turn, was relied upon to appoint a substitute trustee. The excluded limited power of attorney was not internally consistent.

Justice HUDSON concurring in result.

Justices BEASLEY and ERVIN join in this concurring opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 185 (2016), reversing an order entered on 30 December 2014 by Judge Bradley B. Letts in Superior Court, Buncombe County. Heard in the Supreme Court on 10 October 2016.

Troutman Sanders LLP, by D. Kyle Deak, for petitioner-appellee Deutsche Bank National Trust Company, Trustee.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for respondent-appellant.

NEWBY, Justice.

The contractual right of foreclosure by power of sale under a deed of trust is a non-judicial proceeding. In the comprehensive statutory framework governing non-judicial foreclosure by power of sale set forth in Chapter 45 of our General Statutes, the General Assembly

has prescribed certain minimal judicial procedures, including requiring notice and a hearing designed to protect the debtor's interest. The hearing official then authorizes the foreclosure to proceed or refuses to do so. In this informal setting, a creditor must establish, among other things, the existence of a debt, default, and its right to foreclose, and a debtor may raise evidentiary challenges. The Rules of Civil Procedure applicable to formal judicial actions do not apply. The debtor has the option to file a separate judicial action to enjoin the foreclosure.

Here, because the creditor failed to establish the substitute trustee's authority to foreclose under the deed of trust, the trial court properly refused to authorize the creditor to proceed with the foreclosure. Nonetheless, the trial court erroneously entered a "dismissal with prejudice." The refusal to authorize the creditor to proceed is not a "dismissal"; it does not implicate res judicata or collateral estoppel in the traditional sense. While the creditor may not proceed with non-judicial foreclosure on the same default, it may proceed on the same default through foreclosure by judicial action. The creditor may also proceed non-judicially under power of sale based upon a different default. Because the Court of Appeals erred by finding that the creditor established the successor trustee's authority to proceed under the deed of trust, we reverse the decision of that court, which reversed the trial court's evidentiary ruling.

In July 2006, Gordon F. Lucks (borrower) executed a promissory note with IndyMac Bank, F.S.B. (the Note) in the principal amount of $225,000 to purchase real property situated in Buncombe County. The debt is repayable through monthly installments, with each payment due on the first of the month, and matures on 1 August 2036. The Note includes default and acceleration provisions.

At the same time, borrower executed a deed of trust on the property, naming Robert P. Tucker II as trustee, which was recorded with the Buncombe County Register of Deeds. The deed of trust provides for non-judicial foreclosure by power of sale. Deutsche Bank National Trust Company (Deutsche Bank)[1] currently holds the Note and asserts that borrower "has not paid any amount due and owing under the Note since October 1, 2010."

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1. Deutsche Bank National Trust Company acts as Trustee of the Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2006-D, Home Equity Mortgage Loan Asset-Backed Certificates, Series INABS 2006-D, under the Pooling and Servicing Agreement dated September 1, 2006, the purported beneficiary under the deed of trust.

In September 2013, the Ford Firm, acting as substitute trustee under the deed of trust, initiated a hearing for non-judicial foreclosure under N.C.G.S. § 45-21.16 for borrower's failure to make payments. The Assistant Clerk of Superior Court, Buncombe County "dismissed" the case for failure to present documentation appointing the Ford Firm as substitute trustee.

In June 2014, Cornish Law, PLLC, now acting as substitute trustee, initiated a new hearing for non-judicial foreclosure based on borrower's failure to make payments.[2] The Assistant Clerk found proper documentation established that "The Ford Firm was the Trustee at the time of the [prior] dismissal," and since "Cornish Law, PLLC is in privity with The Ford Firm," the "action is barred by Res Judicata" and again "dismissed" the case. Deutsche Bank appealed the matter to superior court. *See* N.C.G.S. § 45-21.16(d1) (2015).

At the de novo hearing in superior court, Deutsche Bank tendered a series of documents to establish the substitute trustee's right to proceed with non-judicial foreclosure, which included various copies of powers of attorney. One such document, marked "Exhibit 4," is the crucial document at issue in this appeal, without which the substitute trustee lacks authority to act under the deed of trust. The document is purported to be a limited power of attorney appointing a service company to act on Deutsche Bank's behalf, which, in turn, was relied upon to appoint the substitute trustee.[3]

Deutsche Bank called a witness who testified that she was "employed by" the service company, but Deutsche Bank did not establish her position, role, or duties in the handling of records. Regarding the document marked Exhibit 4, the employee stated that a different firm "prepared the power of attorney," that "normally we record the power of attorneys," and that, "[i]n this case we try to record it to the state . . . where the headquarters would be," which she "believe[d] . . . would be Charlotte." The City of Charlotte is located in Mecklenburg County.

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2. It is unclear from the record if the new substitute trustee was proceeding under a different default.

3. Deutsche Bank tendered, *inter alia*, an exhibit appointing Cornish Law, PLLC, as substitute trustee, which was executed by a representative of the service company, acting on the Bank's behalf. *See* N.C.G.S. § 45-10(a) (2015) (allowing the noteholder to appoint a successor trustee). Because a break in any one link in the chain leading to the appointment of the substitute trustee deprives the creditor of the authority to foreclose under the deed of trust, we need not analyze the other alleged deficiencies. *See Smith v. Allen*, 112 N.C. 223, 225-26, 16 S.E. 932, 932 (1893) (citing *Hill v. Wilton*, 6 N.C. (2 Mur.) 14, 18 (1811)).

Deutsche Bank tendered Exhibit 4, which is a photocopy, fourteen pages in length, signed by a Bank officer on 21 November 2013 and notarized. The last page revealed a recording stamp from the Register of Deeds in Montgomery County, not Mecklenburg County, which states the document was recorded in 2010, three years before the purported execution, and that the document is eleven pages in length, not fourteen. Borrower objected to the Exhibit's admission into evidence, noting the "recording information appears to precede the date of signatory on that instrument." Counsel for Deutsche Bank stated that she "believe[d] that was an error in stapling the exhibit." Nonetheless, no witness testified about the discrepancy. Deutsche Bank did not request the trial court take judicial notice of any recorded version of Exhibit 4 or make other arguments for the admission of Exhibit 4.

The trial court sustained borrower's objection to the admission of Exhibit 4 for "failure to provide a proper foundation and hearsay," noting that "the document is internally inconsistent" and "has inconsistent dates." Because Exhibit 4 is essential in establishing the substitute trustee's authority to proceed with the foreclosure, the trial court "dismissed with prejudice" the case for insufficient evidence. Deutsche Bank timely appealed the matter to the Court of Appeals.

In a divided opinion, the Court of Appeals reversed the trial court's dismissal. *In re Foreclosure of Lucks*, ___ N.C. App. ___, 785 S.E.2d 185, 2016 WL 1321155 (2016) (unpublished). The majority noted that "the evidentiary rules are slightly more relaxed in the context of a foreclosure hearing than in normal litigation," *id.*, 2016 WL 1321155, at *2, and concluded that the trial court erred by sustaining borrower's objection to Exhibit 4 "on the basis of lack of 'proper foundation and hearsay,' " *id.* at *3. The dissent opined that any relaxation of the evidentiary rules "is not supported by citation or case law," *id.* at *4 (Hunter, J., dissenting), and, noting borrower failed to establish alternative means to admit Exhibit 4, concluded the trial court properly excluded the Exhibit, *id.* at *7. Borrower appeals as a matter of right.

Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding. *See In re Foreclosure of Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (A power of sale is contractual and allows the creditor to sell the mortgaged property "without any order of court in the event of a default." (quoting James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 281, at 331 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 3d ed.

1988))). Though states have adopted differing views,[4] by at least 1830, North Carolina had allowed power of sale foreclosures under deed of trust. *See Harrison v. Battle*, 16 N.C. (1 Dev. Eq.) 537, 542 (1830).

The General Assembly has crafted Chapter 45 to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale. *E.g.*, N.C.G.S. §§ 45-21.16 (2015) (notice and hearing requirements), -21.26 (2015) (reporting of sale), -21.27 (2015) (upset bid), -21.29 (2015) (orders for possession); *see also* Durant M. Glover, Comment, *Real Property—Changes in North Carolina's Foreclosure Law*, 54 N.C. L. Rev. 903, 913-15 (1976) (discussing the evolution of non-judicial foreclosure statutes). The Rules of Civil Procedure do not apply unless explicitly engrafted into the statute. *E.g.*, N.C.G.S. § 45-21.16(a) (requiring service as "provided by the Rules"); *see also In re Ernst & Young, LLP*, 363 N.C. 612, 620, 694 S.E.2d 151, 156 (2009) (holding that N.C.G.S. § 105-258(a) (2007) prescribed "its own specialized procedure that supplants the Rules"). By establishing an exclusive procedure, non-judicial foreclosure does not require the filing of an action.[5] Nonetheless, Chapter 45 does require a minimal degree of judicial oversight for the sole purpose of requiring a creditor to establish its right to proceed with the foreclosure. *See* N.C.G.S. § 45-21.16(d). The creditor must give notice of a hearing. *Id.* § 45-21.16(a). Given the fluid nature of the debtor-creditor relationship and the state and federal oversight of foreclosure proceedings,[6] there are multiple reasons why a creditor might choose not to proceed with the hearing. For example, a debtor may seek to remit late mortgage payments, or changes in law may alter foreclosure requirements, thus affecting the creditor's ability to

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4. *See* 1 Grant S. Nelson et al., *Real Estate Finance Law* § 7:20, at 944 & nn.1, 2 (6th ed. 2014) (noting that thirty-five jurisdictions allow non-judicial foreclosure by power of sale, of which North Carolina and Colorado are the only states requiring an "opportunity for a hearing before the foreclosure sale"); *compare, e.g.*, *Ex parte GMAC Mortg., LLC*, 176 So. 3d 845, 848-49 (Ala. 2013) (no judicial oversight), *with Handler Constr., Inc. v. CoreStates Bank, N.A.*, 633 A.2d 356, 362-63 (Del. 1993) (foreclosure only available by judicial action).

5. "Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding." N.C.G.S. § 45-21.16(g).

6. *See, e.g.*, Single Family Mortgage Foreclosure Act, 12 U.S.C. §§ 3751-3768 (2012) (governing non-judicial power of sale foreclosure of mortgages held by the Department of Housing and Urban Development on single-family homes, thereby preempting state law); *see also* 12 C.F.R. § 1024.41(g) (2016) (prohibiting foreclosure sale under certain circumstances "[i]f a borrower submits a complete loss mitigation application").

proceed. Such a decision to refrain from proceeding is not a "dismissal" but simply a withdrawal of the notice and has no collateral consequence.

Section 45-21.16 requires a creditor to give the debtor adequate notice of a hearing, which initially occurs before the clerk of court. *See id.* § 45-21.16(a), (d); *see also In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993) (Section 45-21.16 does not "alter the essentially contractual nature of the remedy, but rather [ ] satisf[ies] the minimum due process requirements." (quoting *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918, *appeal dismissed*, 301 N.C. 90 (1980))). The statute provides for a relaxation in the formal rules of evidence at the hearing. *See* N.C.G.S. § 45-21.16(d) ("The clerk . . . may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents."). The creditor must show the existence of (i) a valid debt, (ii) default, (iii) the right to foreclose, (iv) notice, and (v) "home loan" classification and applicable pre-foreclosure notice, and (vi) that the sale is not barred by the debtor's military service. *Id.* The evidentiary rules are the same when the trial court conducts a de novo hearing on an appeal from the clerk's decision. *See id.* § 45-21.16(d1).[7]

At the hearing the debtor is free to raise evidentiary objections "tending to negate any of the [ ] findings required under N.C.G.S. § 45-21.16," *In re Goforth Props.*, 334 N.C. at 374-75, 432 S.E.2d at 859, or the debtor may seek to enjoin the foreclosure in a separate judicial action, N.C.G.S. § 45-21.34 (2015); *see also id.* § 45-21.17A(f), (g) (2015) (setting requirements for bringing actions to set aside the sale for failure to provide notice). Once the creditor has established the various elements of N.C.G.S. § 45-21.16(d), "the clerk shall authorize the [creditor] to proceed under the instrument." *Id.* § 45-21.16(d).

If the clerk or trial court does not find the evidence presented to be adequate to "authorize" the foreclosure sale, this finding does not implicate res judicata or collateral estoppel in the traditional sense. *See* Note, *The Model Power of Sale Mortgage Foreclosure Act—An Appraisal*, 27 Va. L. Rev. 926, 929 (1941) ("[T]he principle of *res adjudicata* is therefore not applicable to" the "extra-judicial method of foreclosure."). While the creditor is prohibited from proceeding again with a non-judicial foreclosure on the *same* default, the creditor can proceed with a judicial foreclosure. *See* N.C.G.S. § 45-21.2 (2015) ("This Article does

7. "The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to" the appropriate trial court. N.C.G.S. § 45-21.16(d1).

not affect any right to foreclosure by action in court . . . ."). Likewise, the creditor may proceed non-judicially on another default.

"The competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine." *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940). We review the trial court's exclusion of documentary evidence under the hearsay rule for abuse of discretion. *See State v. Blake*, 317 N.C. 632, 637-38, 346 S.E.2d 399, 402 (1986); *accord Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 283-84 (4th Cir. 1993). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citing, *inter alia*, *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

The precise question before this Court is whether the trial court abused its discretion by finding Deutsche Bank failed to establish the appointment of the substitute trustee, a prerequisite to its right to proceed with non-judicial foreclosure, and if so, what is the effect of that decision. Exhibit 4 is essential to the substitute trustee's appointment. Though the Court of Appeals majority was correct in noting that the evidentiary rules are more relaxed in the non-judicial foreclosure setting, given the significant internal inconsistencies in the power of attorney at issue and Deutsche Bank's failure to present alternative grounds for admissibility, we conclude that the trial court did not abuse its discretion in refusing to admit Exhibit 4 into evidence.

Exhibit 4 is plainly internally inconsistent. *See* 5 John Henry Wigmore, *Evidence in Trials at Common Law* §§ 1421, 1422, at 253-54 (James H. Chabourn ed., 1974) (Trustworthiness and necessity are the hallmarks of admissibility.) Deutsche Bank tendered the Exhibit as a photocopy, fourteen pages in length, executed in 2013. The last page, which contains a recording stamp from the "Montgomery County, NC" Register of Deeds, indicates the Exhibit is only eleven pages in length and was recorded in 2010. *Cf. id.* § 1557, at 481 (explaining that "specific errors" undermine a record's trustworthiness (emphasis omitted)). While there were ways to overcome the inconsistency, none were effectuated here. *See*, *e.g.*, N.C.G.S. § 45-10(a) (2015) (allowing noteholder to appoint substitute trustee directly); *id.* § 45-21.16(d) (allowing "affidavits and certified copies"); *see also id.* § 8C-1, Rule 201(d) (2015) (judicial notice); *id.*, Rule 803(6) (2015) (business records). Deutsche Bank could have provided a photocopy of the recorded document from the proper county register of deeds, but did not do so. *See id.* § 47-28(a)

(2015) ("[P]owers of attorney affecting real property . . . shall be registered in the office of the register of deeds of the county in which the principal is domiciled or where the real property lies.").

Though the superior court correctly refused to authorize the substitute trustee to proceed, the court erroneously entered a "dismissal with prejudice." Non-judicial foreclosure is not a judicial action; the Rules of Civil Procedure and traditional doctrines of res judicata and collateral estoppel applicable to judicial actions do not apply. To the extent that prior case law implies otherwise, such cases are hereby overruled. While it is true that Deutsche Bank is barred from proceeding again with non-judicial foreclosure based on the *same default*, the Bank may nonetheless proceed with foreclosure by judicial action.[8] The Bank may also proceed with non-judicial foreclosure based upon a *different default*. The trial court's order is to be interpreted consistent with this analysis.

Though the evidentiary requirements under non-judicial foreclosure proceedings are relaxed and there were ways to overcome the Exhibit's inconsistencies, we cannot conclude the trial court had no reasonable basis to exclude Exhibit 4. Accordingly, we reverse the decision of the Court of Appeals, which reversed the evidentiary ruling of the trial court.

REVERSED.

HUDSON, J. concurring in result.

I agree that this Court should reverse the decision of the Court of Appeals and affirm the trial court's dismissal of this attempt to foreclose by power of sale. I would focus, however, on the primary argument of the parties, which addresses whether the trial court properly excluded exhibits that were necessary to establish the right to foreclose. I agree with the majority that Exhibit 4 "is the crucial document at issue in this appeal." Thus, we should review the trial court's decision to exclude Exhibit 4 "based upon a failure to provide a proper foundation and hearsay." I conclude that the trial court acted appropriately in excluding Exhibit 4.

In addition, I would explain more fully and precisely the statutory basis for the proper scope of the applicability of the Rules of Evidence and Rules of Civil Procedure in power-of-sale foreclosures. First, the

8. The Note indicates payments are due in monthly installments on the first day of the month, maturing on 1 August 2036.

majority agrees with the Court of Appeals majority's broad statement that the evidentiary rules are more relaxed in the non-judicial foreclosure setting. I would clarify that the Rules of Evidence are relaxed only in the hearing before the clerk and only to the extent specifically provided for in N.C.G.S. § 45-21.16(d). In the de novo hearing in the trial court, however, the statute does not specifically provide for any relaxation of the rules, so the Rules of Evidence apply fully, as in any court proceeding, per Rules of Evidence 101 and 1101. N.C. R. Evid. 101 (These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101."); *id.* R. 1101 ("Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.").

Second, the majority announces that the "Rules of Civil Procedure do not apply unless explicitly engrafted into the statute." I do not agree. The very first sentence of the Rules of Civil Procedure, which are themselves a statutory enactment, provides: "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in *all* actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. R. Civ. P. 1 (emphasis added) (titled "Scope of Rules"). I do not agree with the majority's assertion that the Rules of Civil Procedure do not apply "unless they are engrafted into the statute"; the Rules themselves presume they apply in all proceedings in the courts unless a different procedure is prescribed. I conclude this creates a presumption that these rules apply; the majority has turned this presumption around, citing no authority.

Additionally, the statute distinguishes between the proceeding before the clerk and the de novo hearing in the trial court, although the majority does not. I would clarify that since N.C.G.S. § 45-21.16 prescribes a different procedure for the hearing before the clerk, *see* N.C.G.S. § 45-21.16(c)-(d1) (2015), the Rules of Civil Procedure do not apply; however, because the statute does not prescribe any such alternate procedure for the de novo hearing in the trial court, *see id.* § 45-21.16(e) (2015), I would conclude that the Rules of Civil Procedure apply there, as in any court proceeding, per Rule 1. As such, I concur in the result.

"When an appellate court reviews the decision of a trial court sitting without a jury, 'findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them . . . .' " *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citations omitted)). Conclusions of law are reviewable by the

appellate court de novo. *Id.* at 467, 738 S.E.2d at 175 (citing *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)).

It does not appear that this Court has addressed the standard of review of a trial court's evidentiary determination in this particular context. The cases from the Court of Appeals are in conflict regarding whether an abuse of discretion or de novo standard of review is appropriate in the context of authentication of documentary evidence. *Compare State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (reviewing a trial court's determination as to authentication of text messages de novo), *disc. rev. denied*, 367 N.C. 791, 766 S.E.2d 644 (2014), *and State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) (reviewing a trial court's determination as to authentication of cell phone records de novo), *disc. rev. denied*, 365 N.C. 553, 722 S.E.2d 607 (2012), *with In re Foreclosure by Goddard & Peterson, PLLC*, ___ N.C. App. ___, ___, 789 S.E.2d 835, 842 (2016) (reviewing evidentiary determinations by a trial court in a power-of-sale foreclosure proceeding for abuse of discretion), *and Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (using an abuse of discretion standard to review a trial court's determination as to authentication of spreadsheets with data under Rule 901), *cert. denied*, 360 N.C. 575, 635 S.E.2d 429 (2006). In this concurring opinion, I need not make a determination about which standard of review should apply because the result would be the same under either standard.[1]

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1. The majority opinion announces an abuse of discretion standard for reviewing "the trial court's exclusion of documentary evidence under the hearsay rule" and cites this Court's decision in *State v. Blake*, 317 N.C. 632, 637-38, 346 S.E.2d 399, 402 (1986). First, *Blake* does not support this statement. *Blake* states that "[r]ulings on questions arguably leading rest in the trial court's discretion and will not be disturbed in the absence of an abuse of discretion." *Blake*, 317 N.C. at 637, 346 S.E.2d at 402. In support of this statement, *Blake* cites *State v. Young*, 312, N.C. 669, 325 S.E.2d 181 (1985), which states that "[r]ulings by the trial court on leading questions are discretionary and reversible only for abuse of discretion." *Young*, 312 N.C. at 678, 325 S.E.2d at 187. Both cases specifically address the standard of review relating to leading questions. Neither case articulates a standard of review for evidentiary determinations under the hearsay rule. In fact, when *Blake* does discuss the hearsay issue, it seems to employ, although without specifically saying, a de novo review. *See Blake*, 317 N.C. at 638, 346 S.E.2d at 402.

Additionally, there are several cases from the Court of Appeals that explicitly utilize a de novo standard for reviewing trial court determinations regarding hearsay. *See, e.g.*, *State v. Hicks*, ___ N.C. App. ___, ___, 777 S.E.2d 341, 348 (2015) ("This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection de novo." (citing *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 216 (2009))), *disc. rev. denied*, 368 N.C. 686, 781 S.E.2d 606 (2016); *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 ("The trial court's determination

Here the trial court concluded that Deutsche Bank (the Bank) "failed to offer sufficient evidence . . . to proceed with the foreclosure." The trial court found that the Bank "failed to prove [it] possessed the Right to Foreclose" after excluding several exhibits including Exhibit 4, which was essential to establishing the substitute trustee's appointment. The trial court excluded Exhibit 4 "based upon a failure to provide a proper foundation and hearsay." During the de novo hearing before the trial court, the trial court specifically noted, as to Exhibit 4, that "[t]he Court would determine this is not only a – taken no exception to hearsay rule, but also the document is internally inconsistent. I would further note this document is presented to the Court from counsel which has inconsistent dates." Thus, the precise issue before this Court is whether the trial court acted appropriately in excluding Exhibit 4.

Subsection 45-21.16(d) specifically explains that in the hearing before the clerk, "the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, *affidavits and certified copies of documents*." N.C.G.S. § 45-21.16(d) (emphasis added). This provision allows affidavits to be used in place of live testimony when "the 'necessity for expeditious procedure' substantially outweighs any concerns about the efficacy of allowing [the witness] to testify by affidavit." *In re Foreclosure of Brown*, 156 N.C. App. 477, 486, 577 S.E.2d 398, 404-05 (2003) (quoting *In re Custody of Griffin*, 6 N.C. App. 375, 378, 170 S.E.2d 84, 86 (1969)). The statute also allows clerks to consider "certified copies of documents," presumably in place of originals. N.C.G.S. § 45-21.16(d). The statute allows for these particular forms of evidence "in addition to other forms of evidence *required or permitted by law*." *Id.* (emphasis added). This means that aside from this narrow exception for affidavits and certified copies of documents, the other evidence that the "clerk shall consider," *id.*, must generally conform to the Rules of Evidence. Accordingly, I conclude that the Rules of Evidence are relaxed in power-of-sale foreclosure hearings before the clerk only to the extent specifically provided for in N.C.G.S. § 45-21.16(d).

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as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." (quoting *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 216 (2009)), *appeal dismissed and disc. rev. denied*, 365 N.C. 354, 718 S.E.2d 148 (2011).

Second, it is not clear why the majority announces a specific, possibly new standard of review relating to hearsay when it does not analyze whether Exhibit 4 is hearsay or fits within a hearsay exception here. The majority simply concludes that because Exhibit 4 is "plainly internally inconsistent," the majority "cannot conclude the trial court had no reasonable basis to exclude" it.

I further conclude that in a de novo hearing before the trial court, the Rules of Evidence apply fully, as in any court proceeding, per Rules of Evidence 101 and 1101. N.C. R. Evid. 101 (These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101."); *id.* R. 1101 ("Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State."). Subsection 45-21.16(e) does not specifically provide for any relaxation of the rules of evidence for the court proceeding, as it does in subsection 45-21.16(d), for the hearing before the clerk.

The Bank sought to introduce Exhibit 4, which is a photocopy "of a document purporting to be a Limited Power of Attorney granting certain powers to Ocwen Loan Servicing, LLC." There is no stamp on Exhibit 4 certifying the exhibit as a true and accurate copy; thus, it is an uncertified copy.

The trial court specifically noted that the document has internal inconsistencies, particularly with dates and numbers of pages. The trial court also noted the lack of a "proper foundation." I conclude that the trial court acted appropriately in excluding the document on this basis,[2] regardless of the applicable standard of review.

As noted above, I conclude that once this matter reached the superior court, the Rules of Evidence applied. Under the North Carolina Rules of Evidence, "[e]very writing sought to be admitted must be properly authenticated" in order to establish the foundation for the document's admissibility. *Inv'rs Title Ins. Co. v. Herzig*, 330 N.C. 681, 693, 413 S.E.2d 268, 274 (1992) (citations omitted). Rule 901 states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. R. Evid. 901(a). Rule 901 provides a nonexclusive list of ways evidence may be authenticated, including "Testimony of Witness with Knowledge" and "Public Records or Reports." *Id.* R. 901(b)(1), (7).[3]

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2. Because this matter can be resolved based upon the trial court's exclusion of Exhibit 4 for failure to provide a proper foundation, in my view this Court need not reach the alternate ground for inadmissibility noted by the trial court, i.e., hearsay.

3. Rule 901 reads in pertinent part:

> (b) Illustrations.– By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

Rule 902 provides for methods of self-authentication of evidence. Specifically, "[e]xtrinsic evidence of authenticity . . . is not required with respect to the following: . . . (4) Certified Copies of Public Records . . . [and] (8) Acknowledged Documents." *Id.* R. 902.[4]

The Bank's attorney here did question a live witness (Ms. Lyew) but in so doing, failed to lay enough of a foundation to establish the authenticity of Exhibit 4. Counsel did not elicit testimony regarding the witness's job responsibilities, work experience, time of employment with Ocwen, or any other details showing her personal knowledge of the documents and loan in question. This testimony failed to satisfy minimal authentication requirements. Additionally, while evidence that a public

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> (1) Testimony of Witness with Knowledge.-- Testimony that a matter is what it is claimed to be.
>
> . . . .
>
> (7) Public Records or Reports.-- Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

N.C. R. Evid. 901(b)(1), (7).

4. Rule 902 reads in pertinent part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> . . . .
>
> (4) Certified Copies of Public Records.-- A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.
>
> . . . .
>
> (8) Acknowledged Documents.-- Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

Id. R. 902.

record or report "is from the public office where items of this nature are kept" could serve to authenticate this document to the extent this document may qualify as a public record or report, *id.* R. 901(b)(7), the recording stamp included with Exhibit 4 contradicts the document itself and indicates that it was recorded in "Montgomery County, NC," and not "Charlotte" (Mecklenburg County), as the witness testified should be the case here. As such, there is no indication that this document was in fact recorded or, if so, where. Thus, Exhibit 4 does not satisfy the requirements of Rule 901. Finally, any argument under Rule 902 fails because the parties did not present that argument before the trial court.

In addition to not being authenticated, Exhibit 4 is internally inconsistent. As the majority notes, the recording stamp on Exhibit 4 indicates that the document is eleven pages in length and was recorded in 2010 in Montgomery County, North Carolina. In fact, the actual Exhibit 4 document is fourteen pages in length, was executed in 2013, and should have been recorded in Mecklenburg County, according to the witness.

Because Exhibit 4 is not a certified copy and it contained internal inconsistencies, and because no witness testified to personal knowledge about it, the trial court acted appropriately in excluding Exhibit 4, regardless of the applicable standard of review. Without Exhibit 4, the Bank failed to offer sufficient evidence of the right to proceed with a power-of-sale foreclosure. The trial court's conclusion is supported by the findings of fact and by the evidence. Accordingly, the trial court's dismissal on this basis was entirely appropriate.

In addition, I agree with the majority that the Bank "is barred from proceeding again with non-judicial foreclosure based on the same default, [and that] the Bank may nonetheless proceed with foreclosure by judicial action." To reach that conclusion, however, I do not think it necessary or consistent with applicable statutory authority to deem the Rules of Civil Procedure inapplicable.

Turning to the foreclosure procedure at issue here, it is clear to me that in N.C.G.S. § 45-21.16 (codified in "Part 2. Procedure for Sale [Under Power of Sale]"), the General Assembly has prescribed by statute a different procedure for the hearing before the clerk. The details of that procedure are explained in subsections (c) through (d1) of N.C.G.S. § 45-21.16. If and when the matter is "appealed to the judge of the district or superior court," it is to be reviewed in a de novo hearing. N.C.G.S. § 45-21.16(d1). Once the case has moved into the district or superior court for the de novo hearing before a judge "who shall be authorized to hear the appeal," no further procedure is prescribed for that stage of the

litigation. *Id.* § 45-21.16(e). Subsection (e) requires only that "[a] certified copy of any order entered as a result of the appeal shall be filed in all counties where the notice of hearing has been filed." *Id.* Because no differing procedure is prescribed in N.C.G.S. § 45-21.16(e) for the proceeding in the district or superior court, I conclude that the Rules of Civil procedure apply there, in accordance with Rule 1. *See* N.C. R. Civ. P. 1.

Upon appeal from the clerk's determination, the trial court excluded Exhibit 4 and properly concluded that the Bank failed to establish its right to foreclose by power of sale. Dismissal of the matter, under the Rules of Civil Procedure, was the proper ruling at that point. Nonetheless, as to the claim based on this default, the Bank may still proceed with foreclosure by judicial action. *See* N.C.G.S. § 45-21.2 (2015) ("This Article ["Article 2A. Sales Under Power of Sale"] does not affect any right to foreclosure by action in court, and is not applicable to any such action.").

For the reasons set forth herein, I concur in the result.

Justices BEASLEY and ERVIN join in this concurring opinion.

IN RE INQUIRY CONCERNING A JUDGE, NO. 14-126B
PETER MACK, JR., RESPONDENT

No. 250A16

Filed 21 December 2016

Judges—gross rental income not reported—hearing criminal matter involving tenant—restitution

A district court judge was publically reprimanded for not reporting gross rental income and for accepting restitution from a tenant while presiding over a criminal matter involving the tenant that the judge had initiated as the complaining witness. The Judicial Standard Commission's findings of fact, including the dispositional determinations, were supported by clear, cogent, and convincing evidence in the record. Additionally, the Commission's findings of fact supported its conclusions of law. The Commission's findings and conclusions were adopted by the Supreme Court.

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 16 June 2016 that Respondent Peter Mack, Jr., a Judge of the

General Court of Justice, District Court Division 3B, State of North Carolina, be publicly reprimanded for conduct in violation of Canons 1, 2A, and 6C of the North Carolina Code of Judicial Conduct and constituting conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 10 October 2016, 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

The issue before the Court in this case is whether Judge Peter Mack, Jr. (Respondent) should be publicly reprimanded for violations of Canons 1, 2A, and 6C of the North Carolina Code of Judicial Conduct amounting to 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 has not challenged the findings of fact made by the Judicial Standards Commission or opposed the Commission's recommendation that he be publicly reprimanded before this Court.

On 20 July 2015, the Commission counsel filed a Statement of Charges against Respondent alleging that he had failed to report certain income from extra-judicial sources as required by Canon 6 and the State Government Ethics Act. In addition, the Commission counsel alleged that Respondent had

> engaged in conduct inappropriate to his judicial office by presiding over a session of district court in which a criminal defendant appeared on the [judge's] calendar for criminal charges which the [judge] ha[d] initiated as the complaining witness, and which the [judge] agreed should be dismissed after [he] was paid restitution by the criminal defendant in the amount of $3,000 cash in the [judge's] chambers.

According to the allegations contained in the statement of charges, Respondent's failure to report his annual outside income as required by law during specified years is "in violation of Canons 1, 2A, and 6C of the North Carolina Code of Judicial Conduct," and Respondent's actions in presiding over a criminal case that he had initiated and agreeing to the dismissal of the case after receiving restitution in chambers constituted

violations of "Canons 1, 2A, and 2B of the North Carolina Code of Judicial Conduct." As a result, the Commission counsel asserted that Respondent's actions "constitute[d] 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 §[ ]7A-377."

On 1 September 2015, Respondent filed an answer in which he alleged that his failure to report outside rental income during the years in question constituted an unintentional oversight and that the handling of the case in which he received restitution was not "against normal protocol," with all the transactions in the case having been "handled through [his] de facto attorney in the proceeding and the District Attorney's Office." On 16 November 2015, Respondent and the Commission counsel filed a number of joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to publicly reprimand Respondent. On 11 May 2016, a hearing concerning this matter was held before the Commission.

On 16 June 2016, the Commission filed a Recommendation of Judicial Discipline, in which it made the following findings of fact:

> 1. Respondent has resided in Craven County, North Carolina for more than thirty years.
>
> 2. Respondent owns two residential properties in Craven County, North Carolina which he has rented to various tenants over the last ten (10) years. Specifically, from approximately May 2013 until February 2014, Respondent rented a home in New Bern, North Carolina to a tenant for approximately $800 per month (the New Bern home). Respondent began renting the New Bern home to a new tenant in 2014 for approximately $700 per month. From approximately 2007 until August of 2011, Respondent also rented a home in Havelock, North Carolina to an individual for approximately $600 per month (the Havelock home). From approximately October 2011 until the present date, Respondent rented the Havelock home to another individual for approximately $550-600 per month.
>
> 3. With respect to the Havelock home, in 2011 Respondent's former tenant vacated the home without notice, was several months behind on rent and left significant damage to the property including knocked out drywalls, missing light fixtures, soiled carpets, and more.

4. Respondent incurred significant costs as a result of the damage done to the Havelock home. Respondent contacted the former tenant seeking compensation for the damages, which the former tenant did not pay.

[5]. On 3 May 2013, Respondent sought criminal charges against the former tenant and a criminal summons was issued for injury to real property. On the criminal summons, Respondent is listed as the complainant and his address is listed as 300 Broad St., New Bern, NC 28560, the address of the Craven County Courthouse.

[6]. The former tenant's criminal charge, Craven County File No. 13CR51808, was first set for 30 May 2013. The criminal case was continued a number of times and remained pending for over a year for various reasons. The former tenant had difficulty finding a defense attorney to represent him when Respondent was the prosecuting witness. Eventually, the former tenant applied for a court-appointed attorney and an Assistant Public Defender from outside Respondent's judicial district was assigned by the Office of Indigent Defense Services.

[7]. In an effort to bring all the parties together to settle the criminal matter, the Assistant District Attorney (ADA) assigned to prosecute the former tenant's charge calendared the matter in Respondent's courtroom. Respondent did not set the case on his own calendar or exercise undue judicial authority to have the former tenant's charge heard in his court.

[8]. On 25 April 2014, Respondent presided over Criminal District Court in Craven County, and Craven County File No. 13CR51808 appeared on line number 28 of that court calendar, with Respondent's name listed as the complainant.

[9]. During the 25 April 2014 court session, Respondent provided the ADA with photographs of the damaged rental property, which were also shared with the Assistant Public Defender, who then consulted with the former tenant. The parties reached an agreement that Respondent and the ADA would not pursue the criminal charge against the former tenant if he paid Respondent restitution for the property damages. This is a common means of resolution

in similar criminal cases in Craven County. All parties agreed on the amount of restitution and the case was continued to allow the former tenant time to raise the necessary funds to pay Respondent.

[10]. On 18 July 2014, the ADA again scheduled Craven County File No. 13CR51808 on Respondent's docket, and the case appeared on line number 18 of the court calendar, with Respondent's name listed as the complainant. During this court session, Respondent recessed court and was joined in an office behind the courtroom by the ADA and the former tenant. The Assistant Public Defender representing the former tenant was not present as per an agreement with the ADA. During this meeting, Respondent left the office temporarily, and when he returned, the ADA had received $3000 in cash as restitution from the former tenant, and the ADA handed it to Respondent. After restitution was made to Respondent, the ADA filled out a form dismissing the criminal charge against the former tenant. There is no dispute that Respondent was entitled to the restitution from the former tenant.

[11]. With respect to the rental properties as a whole, while Respondent stipulates he has had little to no annual net income from the rental properties, he admits he has grossed in excess of $5,000 annually in rent as reportable extra-judicial income.

[12]. Notwithstanding Respondent's income from his rental properties, Respondent admits that he did not report this income on his annual income reports required under Canon 6 of the Code of Judicial Conduct. Specifically, Respondent did not file a Canon 6 report with the Craven County Clerk of Superior Court for 2011, 2012, or 2013. The only Canon 6 report on file for Respondent in Craven County was from the 2010 calendar year and under the column for "name of source/activity," he stated "(NONE)."

[13]. After receiving notification of the Commission's investigation into this matter, Respondent filed an "Amended" Canon 6 report on 3 November 2014, listing his two (2) rental properties (described herein), but for the calendar year for which the "Amended" report was filed, he indicated "2010 – 2014."

[14]. Respondent's failure to file the required Canon 6 reports was the result of his own negligence, but it was not an attempt to willfully conceal his extra-judicial income and neither the Respondent nor any party appearing before him benefitted from his failure to file the required reports.

[15]. In addition to the obligation to file an annual gift and income report under Canon 6, District Court judges are "covered persons" under the State Government Ethics Act, which requires all covered persons to annually file a Statement of Economic Interest (SEI form). SEI forms must be filed with the State Ethics Commission each year.

[16]. Respondent reported his rental income from the New Bern home and the Havelock home as required on his SEI forms from 2007 until 2010. However, Respondent failed to report the rental income on his 2011 SEI form. On his 2011 SEI form, Respondent affirmed "the information provided in this Statement of Economic Interest and any attachments hereto are true, complete, and accurate to the best of my knowledge and belief."

[17]. Respondent's failure to report his rental income on his SEI forms continued in 2012, 2013, and 2014, when Respondent filed No-Change SEI forms with the State Ethics Commission. These SEI forms declared that he had no changes from his 2011 SEI form to report, and thus he failed to report the income for these successive years. On each of his 2012, 2013, and 2014 SEI No-Change Forms, Respondent confirmed he had reviewed the previous year's SEI form and affirmed "my responses continue to be true, correct, and complete to the best of my knowledge and belief."

[18]. All SEI forms signed and filed by Respondent specifically instructed covered persons to list all sources of income of more than $5,000, including "rental income."

[19]. Respondent's failure to properly report his rental income to the State Ethics Commission was not a willful or intentional attempt to conceal sources of income, nor did Respondent or any party appearing before him benefit in any way from his failure to report the income. However, Respondent's affirmation, acknowledgment, and previous reporting of extra-judicial income on SEI reports from

2007-2010, show Respondent should have known to report this income.

(Citations omitted.) Based upon these findings of fact, the Commission concluded as matters of law that:

A. Failure to Report Rental Income on Canon 6 Reports, 2010-2013

1. Canon 6 of the North Carolina Code of Judicial Conduct requires judges to "report the name and nature of any source or activity from which the judge received more than $2,000 income during the calendar year for which the report is filed." N.C. Code of Judicial Conduct, Canon 6C.

2. Canon 6 further requires District Court judges to file such reports with the Clerk of Superior Court in the county in which the District Court judge resides by 15 May of the year following the year in which the income was received. N.C. Code of Judicial Conduct, Canon 6C.

3. Canon 6 serves the important purpose of ensuring transparency in a judge's financial and remunerative activities outside of the judicial office to ascertain potential conflicts of interest, avoid corruption and maintain public confidence in the impartiality, integrity and independence of the state's judiciary.

4. Where a judge acts as a landlord and personally rents real property and directly receives gross rental income exceeding $2000 in a calendar year, such activity must be reported on the annual Canon 6 report.

5. By repeatedly failing to report the rental income on his Canon 6 reports filed from 2010-2013, Respondent violated Canon 6 of the Code of Judicial Conduct.

6. By repeatedly failing to report the rental income on his Canon 6 reports filed from 2010-2013, Respondent failed to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct and failed to comply with the law and to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the

judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.

7. Respondent's failure to properly file annual Canon 6 financial disclosures was the result of his own negligence, and was not an attempt to willfully conceal his extra-judicial income. Although Respondent's failure to report did not benefit him in any way, the continuing and recurring nature of this negligence year after year, distinguishable from an isolated incident or single occurrence, aggravates this misconduct to a level warranting more than a private letter of caution.

8. Respondent's violations of Canons 1, 2A and 6 of the Code of Judicial Conduct also amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. [§ 7A-] 376(b).

B. Failure to Disclose Rental Income on Statement of Economic Interest, 2011-2014

9. The State Government Ethics Act requires all covered persons to annually file a Statement of Economic Interest (SEI form). As a judicial officer and judge of the General Court of Justice, Respondent is a "covered person" under the State Government Ethics Act. N.C. Gen. Stat. § 138A-3(10) & (19).

10. Among other things, covered persons are required to report the source of income of more than $5000 received by the covered person, his/her spouse, or members of his/her immediate family during the filing year. The State Ethics Commission has interpreted "income" to mean the covered person's gross income, not net income.

11. Pursuant to the State Government Ethics Act, income includes "salary, wages, professional fees, honoraria, interest, dividends, rental income, and business income from any source other than capital gains, federal government retirement, military retirement, or social security income." (citing N.C. Gen. Stat. § 138A-24(a)(3)). The SEI form provided by the State Ethics Commission also includes similar language.

12. By his failure to file SEI forms that accurately disclosed his extra-judicial income for the years of 2011-2014, Respondent failed to observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved, in violation of Canon 1 of the Code of Judicial Conduct.

13. By his failure to file SEI forms that accurately disclosed his extra-judicial income for the years of 2011-2014, Respondent failed to respect and comply with the law and conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the Code of Judicial Conduct.

14. Respondent's failure to properly file SEI forms that accurately disclosed his extra-judicial income for the years of 2011[ ]to 2014 was the result of his own negligence, and was not an attempt to willfully conceal his extra-judicial income or benefit any party appearing before him. Though not the result of ill motive, Respondent knew or should have known to accurately include his extra-judicial income in these reports and that his failure to do so could be considered a violation of the State Government Ethics Act, which Respondent acknowledged by his signature on the SEI forms signed each year. The potential statutory violations associated with this action aggravates this misconduct to a level warranting more than a private letter of caution. The Commission further concludes, as with Respondent's failure to properly file Canon 6 financial disclosures, that the continuing and recurring nature of Respondent's admitted negligence year after year with respect to his SEI forms, as distinguished from an isolated incident or single occurrence, aggravates this misconduct to a level warranting more than a private letter of caution.

15. Based on the foregoing, Respondent's violations of Canons 1 and 2A of the Code of Judicial Conduct with respect to his failure to file accurate SEI forms from 2011 to 2014 amounts to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C.G.S. [§ 7A-]376(b).

C. Acceptance of Restitution in a Criminal Matter While Presiding Over Court Session

16. Canon 1 of the Code of Judicial Conduct sets forth the broad principle that "[a] judge should uphold the integrity and independence of the judiciary." To do so, Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."

17. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." These principles embody the requirement that a judge should not use the prestige and benefits of the office to advance his own private and personal interests.

18. The Commission accepts Respondent's contention, as set forth in the Stipulations, that for both the April and July 2014 criminal court sessions, the ADA assigned to prosecute the former tenant calendared the matter in Respondent's courtroom for the purpose of achieving restitution or other settlement of the matter. The Commission further accepts that Respondent did not exercise undue judicial authority to have his criminal case against his former tenant heard in his court. The Commission also accepts Respondent's contention, as set forth in the Stipulations, that the State's dismissal of the charge in exchange for payment of restitution was routine practice in Craven County.

19. The touchstone of an inquiry under the Code of Judicial Conduct is not whether the conduct was motivated by malice or ill-intent, although that can be a relevant consideration, but whether the conduct in issue threatens to undermine public confidence in the independence, impartiality and integrity of the judiciary. As such, regardless of whether the restitution and dismissal practice in Craven County is routine in criminal cases, and without taking

a position on the propriety of such practice, and regardless of who calendared the matter on Respondent's criminal docket, sitting judges are not similarly situated with respect to resolving their personal legal matters as other criminal complainants or civil litigants.

20. In these circumstances, public confidence in the independence, impartiality and integrity of the judiciary depends on conduct, especially in the courtroom, that objectively and reasonably conveys a clear separation of the judge's private interests from his judicial duties. As the presiding judge in criminal district court on 25 April 2014 and 18 July 2014, it was incumbent upon Respondent to independently evaluate the propriety of his personal criminal matter being calendared before him as presiding judge, and further, to recognize the obvious conflict of interest and the potential for public concern as to his influence over the outcome of a matter in which he had a personal financial interest. As a criminal complainant, it was also incumbent upon Respondent to maintain a clear separation of his personal life from his judicial duties, including ensuring that his personal address rather than the Craven County Courthouse address was indicated as his address on the criminal summons, and settling and accepting cash restitution at a time when he was not also exercising his judicial duties as presiding judge.

21. The Commission notes that at the disciplinary recommendation hearing held on 11 May 2016, Respondent requested that the Commission reject and dismiss his stipulation that his conduct relating to the acceptance of restitution warranted discipline as set forth in the Stipulations. The Commission denies Respondent's request. In addition, as noted previously, Respondent indicated on the record that he has no objections to the facts contained in the Stipulations as they relate to this issue[, stating,] "I know I stipulated to all the facts, and I still stipulate that those are the facts[]." The facts relating to the restitution issue were also admitted in Respondent's Verified Answer.

22. The Commission concludes, therefore, that based upon the clear, cogent and convincing evidence supporting its findings of fact on this issue, Respondent (1) failed

> to personally observe standards of conduct to ensure the integrity and independence of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct; and (2) failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.
>
> 23. The Commission further concludes that the facts and circumstances relating to the restitution issue aggravate this misconduct to a level warranting more than a private letter of caution. Accordingly, Respondent's violations of Canon 1 and Canon 2A of the Code of Judicial Conduct also amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § N.C.G.S. § 7A-31[-]376(b).

(Citations omitted.) Based upon these findings of fact and conclusions of law, the Commission recommended that this Court "issue a public reprimand to Respondent" for "failing to report rental income on Canon 6 gift and income reports from 2010 to 2013," "failing to report rental income as required on annual Statements of Economic Interest filed with the State Ethics Commission from 2011 to 2014," and "settling and accepting cash restitution in a criminal matter initiated by Respondent while presiding over the court session in which the criminal matter was docketed," with this recommendation resting upon the Commission's earlier findings and conclusions and the following additional dispositional determinations:

> 1. Respondent has been fully cooperative with the Commission's investigation, voluntarily providing information about the underlying matter.
>
> 2. Respondent agreed to enter into the Stipulations to bring closure to this matter and because of his concern for protecting the integrity of the court system.
>
> 3. With respect to filing accurate Canon 6 and SEI reports, Respondent agreed to accept a recommendation of public reprimand from the Commission and acknowledges 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]).

4. Respondent has an exemplary record of public service having served honorably with the United States Army where he was awarded the Army Commendation Medal for service above and beyond the call of duty. Respondent also worked for the United States Navy as a civilian and served as a law enforcement office for over 5 years in North Carolina before beginning a career in law.

5. Respondent is also strongly dedicated to his community, volunteering his time with numerous organizations. Respondent has served as a volunteer fire fighter and EMT, President of the Judicial District 3B Bar Association, and trustee on the Board of Trustees for Craven Community College. Respondent was a Havelock Rotary Club member, has been a Master Mason in the Cherry Point Masonic Lodge for over 30 years and is a member of the Ancient and Accepted Scottish Rite.

6. Respondent has already taken remedial measures by filing an amended Canon 6 disclosure form and is taking similar steps to supplement his SEI forms from 2011-2014. Respondent now understands the necessity of reporting his extra-judicial income and will comply each year as set forth in Canon 6 of the Code of Judicial Conduct and the State Government Ethics Act.

7. Respondent also acknowledges the potential for conflicts of interest to arise in his role as a landlord. If he were to encounter another incident which would require taking out criminal charges against a current or former tenant, Respondent understands and agrees that the matter must be kept separate from any of his judicial duties and he must make reasonable efforts to ensure his role and schedule as a judge will not conflict with any criminal action where he is the prosecuting witness. Respondent has already shown initiative to comply with the Code by recusing himself when the former tenant obtained a new unrelated criminal charge which was scheduled before Respondent. When Respondent realized the matter was on his calendar, he properly recused himself.

(Citations omitted.)

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) (quoting *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008) (order)). 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.* at 428, 722 S.E.2d at 503 (alterations in original) (quoting *In re Badgett*, 362 N.C. at 206, 657 S.E.2d at 349). 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." *Id.* at 429, 722 S.E.2d at 503 (quoting *In re Badgett*, 362 N.C. at 207, 657 S.E.2d at 349).

After careful review, this Court concludes that the Commission's findings of fact, including the dispositional determinations set out above, 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. As a result, we accept the Commission's findings and conclusions and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that Respondent should be publicly reprimanded.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that Respondent Peter Mack, Jr. 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 that violates Canons 1, 2A, and 6C of the North Carolina Code of Judicial Conduct.

By order of the Court in Conference, this the 20th day of December, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of December, 2016.

Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

MIDREX TECHNOLOGIES, INC.
v.
N.C. DEPARTMENT OF REVENUE

No. 5A16

Filed 21 December 2016

Taxation—franchise and income tax—excluded corporation—building or construction contractor

The trial court did not err by concluding that Midrex Technologies, Inc. was not entitled to a franchise and income tax refund where the issue in the case was whether the corporation was entitled to utilize the single-factor tax allocation formula authorized by N.C.G.S. § 105-130.4(r) and made available to exempt corporations engaged in business as a building or construction contractor. Although the record did contain evidence tending to show that Midrex employees engaged in construction management activities and performed a limited amount of hands-on construction activity, that evidence was not enough to support a decision to classify Midrex as an "excluded corporation" on the grounds that it is a "building or construction contractor."

Appeal pursuant to N.C.G.S. §§ 7A-27(a) and 7A-45.4 from an Opinion and Order on Petition for Judicial Review entered on 21 October 2015 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice pursuant to N.C.G.S. § 7A-45.4, in Superior Court, Wake County, upholding a Final Decision and Order Granting Respondent's Motion for Summary Judgment entered by Administrative Law Judge Craig Croom on 13 October 2014. Heard in the Supreme Court on 30 August 2016.

Robinson, Bradshaw & Hinson, P.A., by Thomas Holderness, for petitioner-appellant.

Roy Cooper, Attorney General, by Tenisha S. Jacobs, Special Deputy Attorney General, for respondent-appellee North Carolina Department of Revenue.

ERVIN, Justice.

The issue in this case is whether petitioner Midrex Technologies, Inc. (Midrex) is entitled to utilize the single-factor tax allocation formula

authorized by N.C.G.S. § 105-130.4(r) and made available to exempt corporations "engaged in business as a building or construction contractor" by N.C.G.S. § 105-130.4(a)(4). For the reasons set forth below, we affirm the trial court's decision to uphold the administrative law judge's determination that Midrex was not an "excluded corporation" for purposes of N.C.G.S. § 105-130.4(a)(4) during the relevant time period.

Midrex, a Delaware corporation headquartered in Charlotte, was formed to develop and market the Midrex Direct Reduction Process. The Midrex Process, which has been patented by Midrex and is forty years old, is used in a facility known as a Midrex Plant to convert iron ore into direct reduced iron (DRI), a premium iron ore that is, in turn, used as an alternative feed in connection with the production of steel. Although Midrex engages in three primary business activities, Engineering Services and Procurement Services, Midrex Plant Sales, and After Market Sales, the ultimate focus of its business is the sale of Midrex Plants.

Engineering and Procurement Services employees design Midrex Plants, with their work including, but not limited to:

> 1. Designing refractory linings for gas based equipment, furnaces, ductwork, and heating exchange equipment;
>
> 2. Designing gas based equipment, furnaces, ductwork, and heating exchange equipment; and
>
> 3. Designing systems and equipment associated with the design and construction of DRI plants and new technology.

Engineering and Procurement Services houses employees who work in various engineering disciplines, such as mechanical, civil, process, and electrical engineering. Engineering and Procurement Services also houses employees responsible for obtaining proprietary and non-proprietary equipment needed for a Midrex Plant. Finally, Engineering and Procurement Services houses a site manager and a construction manager,[1] with the site manager being responsible for handling the relationship between Midrex and the purchaser of a Midrex Plant, including keeping the client apprised of any ongoing plant-related issues, helping coordinate activities at the plant site, recommending any necessary corrective measures, communicating with persons involved in the

1. At the time that this case was heard before the administrative law judge, Construction Manager was also its Site Manager.

construction process, and providing advice and assistance relating to any issues that might arise during the construction of a Midrex Plant and with the construction manager being responsible for all activities involved in the construction of both foreign and domestic plants.

The terms and conditions under which Midrex designs and sells a Midrex Plant are set out in certain contracts that are entered into between Midrex and the client. The plant sale contracts that Midrex enters into with its clients outline the relevant technical specifications, the terms under which the client makes payment to Midrex, and the nature and extent of the work to be performed by the client and by Midrex. The work that Midrex is required to perform under these plant sale contracts does not include the construction, erection, and installation of the systems and components utilized in a Midrex plant, with the client or some other entity being required to hire construction contractors and laborers in order to ensure the performance of those tasks. Consistent with this understanding of the contractual relationship between Midrex and its client, Midrex is required to provide engineering, equipment procurement, and advisory and field services needed in connection with the construction of a Midrex Plant, with these contractually required field services including:

> 1. Interpreting and explaining of plans, materials, and other technical data;
>
> 2. Advising the Client in developing and updating a construction schedule;
>
> 3. Inspecting material, equipment, and workmanship;
>
> 4. Providing advice related to the commissioning of a Midrex Plant.

Although Midrex field service employees do, on occasion, provide hands-on assistance to clients, the performance of this work does not change the fact that, under Midrex's plant sales contracts, the client retains ultimate responsibility for directly supervising and obtaining the performance of all on-site construction work in accordance with the relevant plans and specifications.

Finally, After Market Sales is responsible for addressing issues that arise following the construction of a Midrex Plant. For example, After Market Sales employees are involved in providing additional equipment and parts needed to permit the continued operation of an existing Midrex plant after construction has been completed.

In the years between 2005 and 2008, Midrex entered into contracts with various clients at different locations around the world for the sale of Midrex Plants. As a result, Midrex filed North Carolina C Corporation Tax Returns with the Department of Revenue that apportioned its income using the standard three-factor formula provided for in N.C.G.S. § 105-130.4(i).[2] Subsequently, Midrex filed a set of amended returns for the relevant period in which it calculated its tax liability using the single-factor formula applicable to "excluded corporations" authorized by N.C.G.S. § 150-130.4(r), with Midrex's claim to be an "excluded corporation" resting on a contention that it was "engaged in business as a building or construction contractor." N.C.G.S. §105-130.4(a)(4) (2016). In these amended returns, Midrex sought a $3,303,703 refund.

Midrex admitted that, during the relevant period, its "primary business [wa]s selling . . . plants." In all of the tax returns that it filed relating to this period, Midrex assigned itself a North American Industry Classification System (NAICS) code of 541330 based upon a review of the business services that it provides, including the field services upon which its present refund request depends. NAICS code 541330 falls within the engineering, rather than the construction, sector.

After the filing of Midrex's amended returns, respondent North Carolina Department of Revenue determined that Midrex should not be classified as an "excluded corporation" on the grounds that it "was not engaged in business as a building or construction contractor." Referencing the *Franchise Tax*, *Corporate Income Tax*, *Privilege Tax*, *Insurance Premium Tax [and] Excise Tax Rules and Bulletins for Taxable Years 2005 and 2006 and 2007 and 2008*, the Department of Revenue determined that an entity should be treated as an "excluded corporation" depending upon whether it was classified as a "building or construction contractor" on the basis of the NAICS system, which focuses upon whether an entity's primary business activity involves erecting buildings and other structures. As a result of the fact that Midrex was not primarily engaged in the business of constructing buildings or other engineering projects and was, instead, "primarily a technology company

2. Initially, Midrex filed tax returns for the 2005, 2006, and 2007 tax years that did not attempt to apportion revenue between North Carolina and other jurisdictions. In 2009 Midrex filed a return for the 2008 tax year utilizing the three-factor apportionment formula and filed amended returns seeking refunds for the 2005, 2006, and 2007 tax years. Subsequently, Midrex filed a second set of amended returns relating to the 2005, 2006, and 2007 tax years in which it sought a further refund based upon use of the single-factor formula. The present case arises from the Department's decision to reject the second set of refund requests relating to the 2005, 2006, and 2007 tax years.

that supplies technology relating to the production of DRI" that "is not responsible for the actual construction or installation of the purchased technology," the Department of Revenue determined that Midrex "was not engaged in business as a building or construction contractor" and rejected Midrex's refund request.

On 25 October 2013, Midrex filed a Petition for a Contested Tax Case Hearing with the Office of Administrative Hearings in which it sought to have the denial of its refund request by the Department of Revenue overturned. On 12 June 2014 and 27 June 2014, respectively, Midrex and the Department of Revenue filed motions seeking entry of summary judgment in their favor. On 10 October 2014, the administrative law judge entered a Final Decision and Order Granting Respondent's Motion for Summary Judgment in which he determined that there was no genuine issue of material fact, that judgment should be entered in favor of the Department of Revenue, and that Midrex's refund request should be denied.

On 23 October 2014, Midrex filed a Petition for Judicial Review in the Superior Court, Wake County. After this case was designated a mandatory complex business case as defined by N.C.G.S. § 7A-45.4 and assigned to a trial judge for decision, the Department of Revenue filed a response to Midrex's petition. On 21 October 2015, the trial court entered an Opinion and Order on Petition for Judicial Review determining that "Midrex was not an excluded corporation during the tax years at issue" and affirming "the Final Decision entered in this matter on October 10, 2014," denying Midrex's summary judgment motion, and granting the Department of Revenue's summary judgment motion.

Although Midrex acknowledged that no disputed issues of material fact existed in this case, it argued before the trial court that the administrative law judge had failed to properly apply the statutory provisions set out in N.C.G.S. § 105-130.4(a)(4) to the facts established by the present record. More specifically, Midrex asserted that the administrative law judge had erred by concluding that Midrex was not a "building or construction contractor" or "engaged in [the construction] business" and by construing the relevant statutory language to require a showing that construction-related activities constituted Midrex's "primary" business activity as a prerequisite for a finding that Midrex was an "excluded corporation." In reaching a contrary conclusion, the trial court began by attempting to determine the plain meaning of "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4) and reasoning that "only if Midrex's work qualifies as building or construction contracting will [this] Court need to address the meaning of the statutory term

'engaged in business.' " *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, No. 14 CVS 13996, slip op. at 13 (N.C. Super. Ct. Wake County Oct. 21, 2015) (unpublished). Although Midrex asserted that the field service work that it performed under its Plant sale contracts constituted construction management and that it was involved in "construction contracting" for that reason, the Department of Revenue asserted that Midrex was "not a building or construction contractor" because "Midrex's contracts do not place responsibility on Midrex to build or erect the plant" and because "Midrex is not significantly involved in the physical labor of building the plant." *Id.*

After concluding that a determination of the extent to which Midrex was properly classified as an "excluded corporation" involved an issue of statutory construction requiring an analysis of the plain meaning of the relevant statutory language and, potentially, the utilization of various principles of statutory construction, *Midrex*, slip op. at 10-13 (citing *inter alia*, *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d, 513, 517 (2001)), the trial court noted that "Merriam-Webster defines 'building' as 'the art or business of assembling materials into a structure,' " defines " 'construction' as 'the process, art, or manner or constructing something,' " and defines "contractor as 'one that contracts or is a party to a contract: as (a) one that contracts to perform work or provide supplies[; or] (b) one that contracts to erect buildings.' " *Id.* at 15 (brackets in original). In addition, the trial court sought guidance from language appearing in other relevant statutory provisions, noting that the "statutory definition [of "construction contractor" contained in N.C.G.S. § 105-273(5a)] is consistent with the dictionary definitions and emphasizes the physical work of 'building' and 'installing' as the critical elements of construction contracting, and does not suggest that it excludes subcontractors or other contractors." *Id.* According to the trial court, the dictionary and statutory definitions of the relevant terms "accurately reflect the common understanding [of the terms], as they include a broader range of activity." *Id.* at 16.

Although Midrex argued that NAICS treats construction managers providing scheduling and oversight services as contractors, the trial court pointed out that "NAICS recognizes that where an establishment's primary business is providing oversight and scheduling for construction projects it may properly be classified for purposes of the NAICS system as a 'general contractor-type establishment' " and indicated that the quoted language "does not suggest that any establishment which performs any amount of construction oversight and scheduling as some part of its services is a 'building or construction contractor.' " *Id.* As a

result, the trial court concluded that the term "building or construction contractor" as used in N.C.G.S. § 105-130.4(a)(4) did not apply to the provision of "construction management that involves only oversight or scheduling, but does not include responsibility for performance or direction of the actual building, erection, or assembly of a structure;" therefore, Midrex construction management activities "do[ ] not fit within the plain meaning of the term 'building or construction contractor' as used in [N.C.] G.S. § 105-130.4(a)(4). " *Id.* at 18.

Although the agreements between Midrex and its clients obligated Midrex to provide technical advice, including "interpreting and explaining drawings and specifications," "advising the client in development of the construction sequence," and "inspecting the material, equipment, and workmanship of the plant," and to "direct and supervise the commissioning (start-up) of the Midrex Plant once it was constructed," these contracts clearly made the client responsible for procuring the performance of the actual erection of the plant. *Id.* at 18-19. In light of these contractual provisions, the trial court determined that the fact that Midrex performed field advisory services for its clients did not render Midrex a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4). *Id.* at 19. Having made that determination, the trial court deemed it "unnecessary . . . to address the parties' arguments regarding the meaning of the term 'engaged in business,' " and affirmed the administrative law judge's order. *Id.* at 19-20. Midrex noted an appeal to this Court from the trial court's order.

As we have already noted, the issue before the trial court in this case was whether the administrative law judge properly granted summary judgment in favor of the Department of Revenue and against Midrex. Subsection 150B-51(d) of our General Statutes provides that "[i]n reviewing a final decision allowing judgment on the pleadings or summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56," with the reviewing court having the authority to "remand the case to the administrative law judge for such further proceedings as are just" in the event that "the order of the court does not fully adjudicate the case." N.C.G.S. § 150B-51(d) (2015). Similarly, in reviewing an order from a superior court acting in an appellate capacity, an appellate court must "determine whether the trial court exercised the appropriate scope of review and, if appropriate[,] . . . decide whether the court did so properly." *In re Denial of NC IDEA's Refund*, 196 N.C. App. 426, 434, 675 S.E.2d 88, 95 (2009) (quoting *County of Wake v. N.C. Dep't of Env't & Nat. Res.*, 155 N.C. App. 225, 233-34, 573 S.E. 2d 572, 579 (2002), *disc. rev. denied*, 357 N.C. 62, 579 S.E.2d 386-87 (2003)).

According to well-established North Carolina law, 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) (2015). Appeals arising from summary judgment orders are decided using a de novo standard of review. *Dallaire v. Bank of Am.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (citation omitted). "Under the *de novo* standard of review, the [Court] 'consider[s] the matter anew[ ] and freely substitute[es] its own judgment for' [that of the lower court]." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002) (second, third, and fourth alterations in original)). As a result, our task on appeal from the trial court's order is to make a de novo determination of whether the administrative law judge correctly granted summary judgment in favor of the Department of Revenue and against Midrex.

C corporations like Midrex doing business within North Carolina are subject to various forms of taxation "to raise and provide revenue" for the State. *See* N.C.G.S. § 105-1 (2015). A corporation's franchise tax obligation is computed based upon the "total amount of [the corporation's] issued and outstanding capital stock, surplus, and undivided profits," *id.* § 105-122(b) (2016), while a C corporation's income tax liability is imposed upon the corporation's "net income." *Id.* § 105-130.3 (2015). As a result of the fact that a corporation may earn income both inside and outside of North Carolina and the fact that there are limitations on the extent to which North Carolina has the constitutional authority to tax income earned outside North Carolina, a corporation that does business both inside and outside North Carolina must use the allocation and apportionment process delineated in N.C.G.S. §§ 105-122(c1)(1) and 105-130.4 in order to determine its liability for the payment of North Carolina franchise and income taxes.

According to the statutory provisions governing the allocation and apportionment process during the relevant time period, corporations other than those defined as "excluded corporations" in N.C.G.S. § 105-130.4(a)(4) are required to utilize a three-factor apportionment formula that focuses upon property, payroll, and sales in order to determine their North Carolina franchise and income tax liability, *id.* §§ 105-122(c1)(1), 130-4(i) (2015),while "excluded corporations" are entitled to utilize a single-factor formula that focuses exclusively upon sales. *Id.* § 105-130.4(r) (2015). Thus, the extent to which Midrex is

entitled to utilize the single-factor formula in lieu of the three-factor formula depends entirely upon whether it is properly categorized as an "excluded corporation."

An "excluded corporation" is defined as "any corporation *engaged in business as a building or construction contractor*, a securities dealer, or a loan company or a corporation that receives more than fifty percent (50%) of its ordinary gross income from intangible property." *Id.* § 105-130.4(a)(4) (emphasis added). In view of the fact that there is no definition of "building or construction contractor" in the relevant statutory provisions, we are required, as a first step, to determine the meaning of that statutory phrase in order to ascertain whether Midrex should be deemed an "excluded corporation" entitled to utilize the single-factor formula for the purpose of determining its franchise and income tax liability.

"Legislative intent controls the meaning of a statute." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986)).

> The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, 'the spirit of the act and what the act seeks to accomplish.' If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

Lenox, Inc. v. Tolson, 353 N.C. at 664, 548 S.E.2d at 517 (citations omitted). Courts should "give effect to the words actually used in a statute" and should neither "delete words used" nor "insert words not used" in the relevant statutory language during the statutory construction process. *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citations omitted). "[U]ndefined words are accorded their plain meaning so long as it is reasonable to do so." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098 (1999), *disavowed in part by Lenox*, 353 N.C. at 663, 548 S.E.2d at 517. In determining the plain meaning of undefined terms, "this Court has used 'standard, nonlegal dictionaries' as a guide." *C.D. Spangler Constr. Co. v. Indus. Crankshift & Eng'g Co.*, 326 N.C. 133, 152, 388 S.E.2d 557, 568 (1990) (quoting *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966)). Finally, statutes should be construed so that the resulting construction "harmonizes with the underlying reason and purpose of the statute." *Elec. Supply Co. of*

Durham v. Swain Elec. Co., 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citations omitted).

According to the *New Oxford American Dictionary*, "building" means "the process or business of constructing something," such as "the building of highways"; "construction" means "the building of something, typically a large structure"; and "contractor" means "a person or company that undertakes a contract to provide materials or labor to perform a service or do a job." *New Oxford American Dictionary* 228, 373, 377 (Angus Stevenson & Christine A. Lindberg eds. 3d ed. 2010). As the administrative law judge and the trial court reasoned, these definitions tend to focus upon the act of physically constructing or erecting a structure or improvement to real property. Thus, the validity of Midrex's claim to be a "building or construction contractor" depends upon the extent to which the work performed by Midrex employees involves the act of building or constructing a physical asset, such as a Midrex Plant.

An examination of the relevant statutory language in wider context reinforces this conclusion. As the relevant statutory provisions clearly indicate, the single-factor formula and three-factor formula are utilized to determine the affected entity's entire North Carolina tax liability. In other words, an "excluded" corporation is treated for tax allocation and apportionment purposes as if it was involved in nothing other than the activity that caused it to be classified as "excluded." In light of that fact, we have difficulty in seeing why the General Assembly would have intended for N.C.G.S. § 105-130.4(a)(4) to have been construed in such a manner as to classify an entity engaged in only a relatively small amount of construction-related activity as if it was a "building or construction contractor." Instead, it is far more likely, given that a taxpayer is treated as "excluded" or not "excluded" on a whole entity basis, that N.C.G.S. § 105-130.4(a)(4) should be understood as describing the entire entity rather than a small portion of the entity's overall business.

The interpretation of the relevant statutory language that we believe to be appropriate is further buttressed by the fact that the Department of Revenue has traditionally read N.C.G.S. § 105-130.4(a)(4) in just this way. In an attempt to provide guidance to taxpayers and others attempting to ensure compliance with North Carolina's revenue laws, the Secretary of Revenue publishes Bulletins that set out his or her interpretation of various statutory provisions.

> It is the duty of the Secretary [of Revenue] to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the

> applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation.

N.C.G.S. § 105-264(a) (2016). "The construction adopted by the administrators who execute and administer a law in question is one consideration where an issue of statutory construction arises," *Polaroid*, 349 N.C. at 301-02, 507 S.E.2d at 293 (quoting *John R. Sexton & Co. v. Justus*, 342 N.C. 374, 380, 464 S.E.2d 268, 271 (1995)), because such interpretation is " 'strongly persuasive' " and "entitled to due consideration," *id.* at 302, 507 S.E.2d at 293 (quoting and citing *Shealy v. Associated Transp., Inc.*, 252 N.C. 738, 742, 114 S.E.2d 702, 705 (1960)). *Contra Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (stating "courts consider, but are not bound by, the interpretations of administrative agencies and boards"). Thus, the manner in which the Secretary of Revenue has interpreted the relevant statutory language is important and must be given "due consideration."

The relevant Bulletin language clearly states that a "building or construction contractor," as that term is used in N.C.G.S. 105-130.4(a)(4), "is a business so classified in the [NAICS] published by the Federal Office of Management and Budget." Corp., Excise & Insur. Tax Div., N.C. Dep't of Revenue, *Franchise Tax[,] Corporate Income Tax[,] Privilege Tax[,] Insurance Premium Tax[,] Excise Tax: Rules and Bulletins: Taxable Years 2005 & 2006*, at 46; *id.*, *Years 2007 & 2008*, at 54-55. NAICS classifies establishments as belonging to particular industries based on the nature of the entity's primary business activity. According to NAICS, the construction sector is comprised of establishments that are *primarily* engaged in the construction of buildings or engineering projects, including erecting buildings and other structures, heavy construction, alterations, reconstruction, and installation. Thus, under the interpretation of N.C.G.S. § 105-130.4(a)(4) deemed appropriate by the Secretary of Revenue, an entity is not a "building or construction contractor" unless that entity is primarily engaged in the actual construction or erection of physical assets.

A careful review of the undisputed evidence contained the evidentiary record presented for the administrative law judge's consideration indicates that Midrex has only limited involvement in the actual, physical construction of a Midrex Plant. Instead, the undisputed record

evidence tends to show that the client, rather than Midrex, has ultimate responsibility for obtaining the physical construction of a Midrex Plant, with Midrex being responsible for providing scheduling, oversight, and other sorts of technical assistance and advice. For that reason, we agree with the trial court and the administrative law judge that Midrex is not a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4). Our determination to this effect is buttressed by the fact that the undisputed record evidence reflects that Midrex has classified itself as an engineering company rather than a building or construction company for purposes of the NAICS system. In view of the fact that an entity is not entitled to classify itself as a construction company utilizing NAICS unless it is primarily engaged in activities involved the building or erection of structures, the fact that Midrex concedes that it is not primarily engaged in such activities, and the fact that Midrex has assigned an engineering-related NAICS code rather than a construction-related NAICS code, it is clear that Midrex is not entitled to claim "building or construction contractor" status for purposes of N.C.G.S. § 105-130.4(a)(4) utilizing the test for identifying "excluded corporations" that the Department of Revenue has deemed appropriate either. As a result, when considering the record evidence concerning Midrex's role in the construction of a Midrex Plant on the basis of either the literal language of N.C.G.S. § 105-130.4(a)(4) or the method for identifying "excluded corporations" deemed appropriate by the Secretary, we agree that the Department of Revenue correctly rejected Midrex's refund request.

In seeking to persuade us that it should be treated as a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4), Midrex emphasizes that it provides construction management services and performs hands-on construction activities. Although the record does contain evidence tending to show that Midrex employees engage in construction management activities and perform a limited amount of hands-on construction activity, this evidence is not enough to support a decision to classify Midrex as an "excluded corporation" on the grounds that it is a "building or construction contractor."

As Midrex notes, construction management activities are included within the NAICS construction classification. In light of that fact, Midrex argues that it should be deemed a construction company for NAICS-related purposes given that it performs what amounts to construction management services for its clients and that it should be deemed to be a "building or construction contractor" for that reason. Midrex's argument to this effect fails, however, because an NAICS classification

determination is supposed to be premised upon the identification of an entity's primary business activity. Although the record does contain evidence tending to show that Midrex performs a certain amount of construction management work, the record does not provide any support for an assertion that the provision of such services constitutes Midrex's primary business activity. For that reason, Midrex could not properly be classified as a construction manager for purposes of the NAICS classification system given that construction management was not its primary line of business during the relevant time period. As a result, the fact that Midrex performs a certain amount of construction management work does not justify a decision in Midrex's favor in this case.

Similarly, while Midrex employees do, apparently, perform a very limited amount of hands-on construction, such work is not provided for in the Plant construction contracts, appears to involve an attempt on the part of Midrex's employees to demonstrate to the employees of other entities employed by the client for the purpose of physically constructing a Midrex Plant how certain jobs should be performed, and seems to represent a very small fraction of the work that Midrex performs for its clients in connection with the design, construction, and commissioning of a Midrex Plant. In other words, the hands-on construction work that is performed by Midrex's employees appears to be incidental to the obligations imposed upon it under the contracts that are intended to result in the construction of a Midrex Plant. Thus, Midrex cannot be treated as a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4) based on its hands-on construction activities either.

In an attempt to persuade us of the correctness of its position, Midrex argues that, because N.C.G.S. § 105-130.4 is a tax statute, it should be construed in favor of Midrex as the taxpayer. *See Lenox*, 353 N.C. at 664, 548 S.E.2d at 517 (2001). However, as the Department of Revenue notes, this Court has held that tax statutes providing for exceptions to otherwise-applicable general rules, such as N.C.G.S. §§ 105-130.4(a)(4) and 105-130.4(r), should be treated as statutes providing for an exemption from taxation that should be construed against the taxpayer. *See Hatteras Yacht Co. v. High*, 265 N.C. 653, 656, 144 S.E.2d 821, 824 (1965) (finding that exemptions from taxation are "to be strictly construed against the claim of such special or preferred treatment"). As the record clearly reflects, the vast majority of C Corporations subject to North Carolina taxation apportioned their income utilizing the three-factor formula specified in N.C.G.S. § 105-130.4(i) during the tax years at issue in this case. For that reason, any claim that a taxpayer has the right to utilize the single-factor formula set out in N.C.G.S. § 105-130.4(r)

should be strictly construed against, rather than in favor of, the taxpayer's contention, a proposition that further reinforces our determination that Midrex is not entitled to be treated as an "excluded corporation" as defined in N.C.G.S. § 105-130.4(a)(4).

Reduced to its essence, the argument that Midrex has advanced in support of its refund request rests on an assertion that entities seeking to be classified as "excluded corporations" based on their status as a "building or construction contractor" are entitled to be categorized in that manner as long so as they are engaged in any non-incidental amount of "building or construction" work. In other words, acceptance of Midrex's argument hinges on the proposition that the company is not required to be *primarily* "engaged in business as a building or construction contractor." Admittedly, as Midrex notes, the word "primarily" does not appear in the relevant statutory language. *See* N.C.G.S. § 105-130.4(a)(4). The absence of the word "primarily" from N.C.G.S. § 105-130.4(a)(4), while relevant, is not, however, dispositive in light of the rule of statutory construction to the effect that the fact "[t]hat a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) (citation omitted). Thus, the ultimate issue for our consideration remains what the relevant statutory language, when read in context and in its entirety, should be understood to mean.

As we have already demonstrated, the position espoused by the Department of Revenue and upheld by the administrative law judge and the trial court is fully consistent with both the literal language in which the relevant statutory provision is couched and long-standing administrative practice. Acceptance of the construction of the relevant statutory language contended for by Midrex would have the effect of allowing *any* corporation that performed *some* building or construction work to take advantage of the single-factor formula made available by N.C.G.S. § 105-130.4(r), despite the fact that the General Assembly clearly intended that the single-factor formula was only to be made available to a limited class of corporate taxpayers, with the remaining corporate taxpayers being required to use the three-factor formula.[3] Any decision

3. Admittedly, the General Assembly has amended N.C.G.S. § 105-130.4 so as to allow all corporations to utilize the single-factor formula effective for tax years beginning with 1 January 2018. However, Midrex's liability for franchise and income taxation associated with the 2005, 2006, and 2007 tax years must, of course, be determined in light of the statutory provisions in effect as of that time.

that would have the effect of vastly expanding the number of entities entitled to use the single-factor test would appear to conflict with the apparent legislative intent. *See Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 ("In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent is accomplished"). As a result, adoption of the construction of the relevant statutory language contended for by Midrex would appear to be inappropriate for this reason as well.

Thus, for the reasons set forth above, we conclude that the administrative law judge and the trial court properly determined that Midrex was not a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4). In light of that fact, we need not determine whether Midrex satisfied the "engaged in business" criterion contained in N.C.G.S. § 105-130.4(a)(4) in order to properly resolve this case. Accordingly, we hold that the trial court did not err by concluding that Midrex is not entitled to a franchise and income tax refund based upon the argument that it has advanced before this Court and we thus affirm the trial court's decision.

AFFIRMED.

THE NORTH CAROLINA STATE BAR
v.
JERRY R. TILLETT

No. 208PA15

Filed 21 December 2016

Judges—discipline—sitting judges—misconduct while in office—jurisdiction

Where a sitting judge engaged in misconduct while in office, the North Carolina State Bar Disciplinary Hearing Commission lacked the authority to investigate and discipline him. Pursuant to the state constitution and the General Statutes, jurisdiction to discipline sitting judges for their conduct while in office rests solely with the Judicial Standards Commission and the Supreme Court of North Carolina.

Chief Justice MARTIN concurring.

Justice EDMUNDS joins in this concurring opinion.

Justice ERVIN concurring in the result.

Justices HUDSON and BEASLEY join in this concurring opinion.

On writ of certiorari to review the question presented in defendant's petition for discretionary review. Heard in the Supreme Court on 30 August 2016.

Katherine Jean, Counsel, and David R. Johnson, Jennifer A. Porter, and G. Patrick Murphy, Deputy Counsels, North Carolina State Bar, for plaintiff-appellee.

Vandeventer Black LLP, by Norman W. Shearin, David P. Ferrell, and Kevin A. Rust, for defendant-appellant.

Roy Cooper, Attorney General, by Melissa L. Trippe, Special Deputy Attorney General, for North Carolina Judicial Standards Commission, amicus curiae.

JACKSON, Justice.

In this case we consider whether the North Carolina State Bar Disciplinary Hearing Commission (DHC) has the authority to investigate and discipline sitting Judge Jerry R. Tillett (defendant) for his conduct while in office. Because we conclude that the DHC lacks this authority, we reverse the DHC's denial of defendant's motion to dismiss and remand this case to the DHC to dismiss with prejudice the complaint of the North Carolina State Bar (State Bar) against defendant.

Defendant has served continuously as a judge in Judicial District One of the General Court of Justice, Superior Court Division, from the time of the circumstances giving rise to this case until the present. On 16 February 2012, the Judicial Standards Commission (JSC) commenced a formal investigation into defendant's "interactions with employees and officials of the Town of Kill Devil Hills, including his involvement in orders entered against the town, and regarding his interactions with the District Attorney's office of the 1st Prosecutorial District including pressuring that office to pursue certain legal actions." Based on its findings and conclusions, the JSC imposed a public reprimand on defendant.

According to the public reprimand, on 4 April 2010, Kill Devil Hills Police detained defendant's adult son for an unspecified reason. Eleven days later, on 15 April, defendant arranged a meeting with officials from the Town of Kill Devil Hills and its police department in defendant's chambers. Defendant complained about his son's detention "as part of a series of other complaints about incidents of misconduct involving" the police department. According to those who participated in the meeting, defendant then became agitated and confrontational in his warnings to town officials to address the complaints and engaged in "discussion of a superior court judge's ability to remove officials from office," causing some individuals to feel "threatened."

The public reprimand also states that throughout 2011 defendant received "communications from Kill Devil Hills police officers with grievances against Chief of Police Gary Britt and Assistant Town Manager Shawn Murphy related to personnel issues." During this period, defendant also received "complaints about the performance of the District Attorney of the 1st Prosecutorial District." Concluding from the complaints "that Chief Britt was guilty of professional malfeasance," defendant attempted to convince the District Attorney and members of his staff "that it was their duty to file a petition for the removal of Chief Britt." The District Attorney and his staff "ultimately concluded that there was insufficient evidence to support such a petition." On 24 June 2011, defendant then sent a letter to Chief Britt notifying him about complaints of his professional misconduct and further warning Chief Britt that "to the extent that allegations involve conduct prejudicial to the administration of justice, conduct violative of public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantial offense, this office will act appropriately in accord with statutory and/or inherent authority." This letter was printed on defendant's judicial stationery and defendant signed it "in his capacity as Senior Resident Superior Court Judge."

In addition, the public reprimand notes that on 19 September 2011 defendant drafted and executed an order for production of copies of the private personnel records of several town employees, including Chief Britt and Murphy, to be delivered to him "for an in camera review, for the protection of integrity of information, to prevent alteration, spoliation, for evidentiary purposes and or [sic] for disclosure to other appropriate persons as directed by the Court." Defendant issued this order on his own initiative without a request from any employee of the town, anyone in the District Attorney's office, or any of the complainants who previously had contacted defendant.

The public reprimand further notes that on 5 January 2012, defendant sent a letter to Murphy, also on judicial stationery "and signed in his capacity as Senior Resident Superior Court Judge," alleging receipt of "complaints of professional misconduct" against Murphy and warning Murphy that "to the extent that allegations involve conduct prejudicial to the administration of justice, conduct violative of public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantial offense, this office will act appropriately in accord with statutory and/or inherent authority." That same day defendant met with the District Attorney and a member of the District Attorney's staff "in reference to complaints lodged against the District Attorney's office and the office's failure to file a petition against Chief Britt." A sheriff's deputy was present at this meeting in defendant's chambers, which, in conjunction with defendant's "critical and aggressive comments, had the effect of intimidating the officials from the District Attorney's office."

Finally, the reprimand states that even though defendant later recused himself from matters involving complaints against the Kill Devil Hills Police Department and the District Attorney's office, he continued to involve himself in the adjudication of the complaints by communicating with judges who were involved in the matter "through suggested orders, and his appellate filings in defense of such suggested orders."

Based on these findings of fact, the JSC determined that both defendant's initial confrontation with town officials in his chambers and later in his capacity as Chief Resident Superior Court Judge "created a reasonable and objective perception of conflict that tainted his subsequent use of the powers of his judicial office in matters adversarial to these officials." The JSC also determined that defendant's attempts to address complaints against Chief Britt, Murphy, and the District Attorney were "overly aggressive," drove him to become "embroiled in a public feud with these individuals," and caused him to engage in "actions that fell outside of the legitimate exercise of the powers of his office." Furthermore, the JSC found that defendant's "communication with other judges through suggested orders, and his appellate filings in defense of such suggested orders" after he had recused himself, "created a public perception of a conflict of interest which threatens the public's faith and confidence in the integrity and impartiality of [defendant's] actions in these matters." The public reprimand of defendant concluded:

> The above-referenced actions by [defendant] constitute a significant violation of the principles of personal conduct embodied in the North Carolina Code of Judicial

> Conduct . . . . [Defendant's] overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills, and his misuse of the powers of his judicial office in connection thereto, resulted in the public perception of a conflict of interest between [defendant] and the District Attorney's office and the town of Kill Devil Hills, which brought the judiciary into disrepute and threatened public faith and confidence in the integrity and impartiality of the judiciary.

Defendant accepted the reprimand as indicated by his 6 March 2013 signature, and its official filing on 8 March 2013 constituted the JSC's final action on the matter.

On 6 March 2015, exactly two years after defendant accepted the JSC's public reprimand, the State Bar commenced a disciplinary action against defendant by filing a complaint with the DHC. The State Bar alleged that defendant's conduct constituted seventeen separate violations of North Carolina Rule of Professional Conduct 8.4(d)[1] and requested that the DHC take disciplinary action against defendant in accordance with N.C.G.S. § 84-28(a) and section B.0114 of the Discipline and Disability Rules of the North Carolina State Bar. Defendant filed a motion to dismiss the State Bar's complaint dated 16 March 2015 and an answer to the complaint on 30 March 2015. The DHC denied defendant's motion to dismiss on 30 April 2015, and defendant filed a petition for discretionary review with this Court, which was denied and certified to the North Carolina Court of Appeals by order entered on 28 January 2016. Upon reconsideration, this Court issued an order *ex mero motu* on 27 May 2016 deeming "the question presented by this case to be of such importance that the invocation of our supervisory jurisdiction is warranted." We issued a writ of certiorari to review the following question:

> Do the North Carolina State Bar Council and the Disciplinary Hearing Commission have the jurisdictional authority to discipline a judge of the General Court of Justice for conduct as a judge for which the judge has already been disciplined by the Judicial Standards Commission?

This Court stayed all proceedings before the DHC "pending full briefing by the parties in this Court and our determination of this question."

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1. Rule 8.4 states, "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice." N.C. St. B. Rev. R. Prof'l Conduct 8.4(d), 2016 Ann. R. N.C. 1261, 1261-62.

Defendant argues that Article IV, Section 17(2) of the North Carolina Constitution and Chapter 7A, Article 30 of the General Statutes convey to this Court exclusive, original jurisdiction over the discipline of members of the General Court of Justice. Consequently, defendant contends that the DHC infringes upon this Court's jurisdiction by initiating attorney disciplinary proceedings against a sitting member of the General Court of Justice for conduct while in office. Defendant therefore asserts that the DHC erred in failing to grant his motion to dismiss the State Bar's complaint against him. We agree.

The North Carolina State Bar was created by the General Assembly in 1933 "as an agency of the State of North Carolina." Act of Apr. 3, 1933, ch. 210, sec. 1, 1933 N.C. Pub. [Sess.] Laws 313, 313 (codified at N.C.G.S. § 84-15 (2015)). "Subject to the superior authority of the General Assembly to legislate thereon by general laws," the State Bar Council was "vested, as an agency of the State, with control of the discipline and disbarment of attorneys practicing law in this State." *Id.*, sec. 9, at 319 (codified at N.C.G.S. § 215(9) (Supp. 1933)). We have recognized that the "purpose of the statute creating the North Carolina State Bar was to enable the bar to render more effective service in improving the administration of justice, particularly in dealing with the problem . . . of discipling [sic] and disbarring attorneys at law." *Baker v. Varser*, 240 N.C. 260, 267, 82 S.E.2d 90, 95-96 (1954). The General Assembly enhanced the disciplinary function of the State Bar in 1975 by creating the DHC and authorizing it to "hold hearings in discipline, incapacity and disability matters, to make findings of fact and conclusions of law after such hearings, and to enter orders necessary to carry out the duties delegated to it by the council." Act of June 13, 1975, ch. 582, sec. 6, 1975 N.C. Sess. Laws 656, 658-59 (codified at N.C.G.S. § 84-28.1 (Supp. 1975)). The DHC, as a committee of the Council, *see* N.C.G.S. § 84-23(b) (2015), maintains broad jurisdiction to exercise these powers because "[a]ny attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council," *id.* § 84-28(a) (2015).

Notwithstanding the well-established statutory authority of the State Bar to discipline attorneys, in 1971 the North Carolina Courts Commission (the Commission) submitted a report to the General Assembly outlining, *inter alia*, the need for a new, formal method to address misconduct by members of the state judiciary. *See* State of N.C. Courts Comm'n, *Report of the Courts Commission to the North Carolina General Assembly* 19-30 (1971) [hereinafter *Courts Commission Report*]. The Commission noted that at that time, there was "no formal means for disciplining any judge, short of removal, and impeachment [was] the sole means for

removing an appellate or superior court judge for misconduct." *Id.* at 19. The Commission concluded that these measures were entirely inadequate to regulate the judiciary, noting the inefficiency, expense, and partisan nature of impeachment proceedings, as well as the fact that no judge had been removed by impeachment in North Carolina since 1868. *Id.* at 19-20. In addition, the Commission determined that the type of behavior potentially requiring impeachment and removal of a judge is extremely rare, thereby justifying the need for discipline proportionate to "a kind of judicial misbehavior for which removal is too severe, a kind that can usually be corrected by action within the judicial system without sacrificing the judge." *Id.* at 21. The Commission concluded that a "flexible machinery that can handle minor cases as well as major ones is an urgent and widely felt need." *Id.*

In determining the form and procedure of a potential system for judicial discipline, the Commission recognized "[t]he need for a truly effective mechanism for disciplining or removing judges" that would account for both "the tradition of [judicial] independence" and the "larger public interest in the efficient and untainted administration of justice." *Id.* at 20. The Commission noted that several other states had attempted to satisfy these interests by establishing independent judicial qualifications commissions. *Id.* at 22-25. The Commission concluded that through such disciplinary bodies:

> [t]he public is assured of an honest, able, efficient bench, while at the same time the independence of the judiciary is fully protected. And since the system permits the judiciary to police its own ranks, with any decision to censure, remove or retire coming from the supreme court, temptation of the executive or legislative branches to involve themselves in these matters is minimized.

Id. at 26. Therefore, the Commission recommended an amendment to the North Carolina Constitution "authorizing an additional procedure for discipline and removal of judges for misconduct or disability" and the creation of the JSC.[2] *Id.* at 27. Although the Commission ultimately left the procedures and composition of the JSC "to the wisdom of the General Assembly," *id.*, it recommended, *inter alia*, that JSC proceedings should be "confidential until such time as [the JSC] ma[kes] its final recommendations to the Supreme Court" so as to protect judges from

2. The Commission noted its preference for the name "Judicial Standards Commission" over "Judicial Qualifications Commission"—the moniker used in several other states. *Courts Commission Report* at 26.

groundless accusations, ensure "[p]ublic confidence in the integrity of the courts," and "protect complainants and witnesses, many of whom would be reluctant to complain or testify for fear of publicity or reprisal." *Id.* at 29-30. The Commission also recommended that the "majority of all members of the Supreme Court must concur in any censure or removal order, or in an order to take no action (dismiss) the proceedings," highlighting its intention that the Supreme Court have exclusive jurisdiction over judicial discipline. *Id.* at 30. Notably, the Commission stated that the JSC "would be analogous to the censure and disbarment machinery of the organized bar -- machinery long ago recognized as essential to protect the image of the legal profession." *Id.* at 21. This statement illustrates the Commission's view that the State Bar's disciplinary proceedings did not extend to the judiciary and that amending the Constitution and creating the JSC was intended to fill that void.

In June 1971 the General Assembly enacted the Judicial Standards Commission Act and proposed an amendment to the North Carolina Constitution authorizing the statute.[3] *In re Peoples*, 296 N.C. 109, 163, 250 S.E.2d 890, 921 (1978), *cert. denied*, 442 U.S. 929 (1979). The amendment was adopted by the voters in 1972 and became Article IV, Section 17(2), which provides:

> The General Assembly shall prescribe a procedure . . . for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

N.C. Const. art. IV, § 17(2); Thad Eure, Sec'y of State, *North Carolina Manual* 1973, at 432 (John L. Cheney, Jr. ed.) (noting date of amendment adoption).

The General Assembly fulfilled this constitutional mandate when the corresponding legislation became effective on 1 January 1973 as Article 30 of Chapter 7A of the General Statutes. Act of June 17, 1971, ch. 590, 1971 N.C. Sess. Laws 517 (codified at N.C.G.S. §§ 7A-375 to -377 (Supp.

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3. Although the statute was passed before adoption of the constitutional amendment, "[t]he General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such constitutional amendment." *In re Nowell*, 293 N.C. 235, 242, 237 S.E.2d 246, 251 (1977) (quoting *Fullam v. Brock*, 271 N.C. 145, 149, 155 S.E.2d 737, 739-40 (1967)).

1971)). The stated purpose of Article 30 "is to provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice. The procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with this Article." N.C.G.S. § 7A-374.1 (2015). Accordingly, section 7A-375 of Article 30 provides for the formation of the thirteen-member JSC, with five of those members, including the Court of Appeals judge who serves as chair of the JSC, being appointed by the Chief Justice of the Supreme Court. *Id.* § 7A-375(a) (2015). The statute then conveys authority to the JSC to adopt and amend its own procedural rules "subject to the approval of the Supreme Court." *Id.* § 7A-375(g) (2015).

Disciplinary proceedings against a judge[4] begin when a citizen of the State files "a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice," or when the JSC initiates an investigation on its own motion. *Id.* § 7A-377(a) (2015). If the JSC concludes from its investigation that disciplinary proceedings are warranted, it will issue a "notice and statement of charges." *Id.* § 7A-377(a5) (2015). An answer, additional filings, and a hearing generally will follow. *See id.* Viewing the entire framework of Article 30, we have concluded that the role of the JSC is to "serve[ ] 'as an arm of the Court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable.' " *In re Hayes*, 356 N.C. 389, 398, 584 S.E.2d 260, 266 (2002) (quoting *In re Tucker*, 348 N.C. 677, 679, 501 S.E.2d 67, 69 (1998)).

As for the actual administration of judicial discipline, presently the JSC has the exclusive authority only to issue an offending judge "a private letter of caution" for violations of the North Carolina Code of Judicial Conduct that are "not of such a nature as would warrant a recommendation of public reprimand, censure, suspension, or removal." N.C.G.S. § 7A-376(a) (2015). Imposition of those more serious forms of discipline now falls within the exclusive jurisdiction of the Supreme Court "[u]pon recommendation of the Commission." *Id.* § 7A-376(b) (2015).[5] In

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4. Article 30 states that " 'Judge' means any justice or judge of the General Court of Justice of North Carolina, including any retired justice or judge who is recalled for service as an emergency judge of any division of the General Court of Justice." N.C.G.S. § 7A-374.2(5) (2015).

5. Prior to the 2013 revisions to Article 30, section 7A-376 permitted the JSC to independently issue public reprimands. *See* Act of July 26, 2013, ch. 404, sec. 2, 2013 N.C. Sess. Laws 1681, 1682 (codified at N.C.G.S. § 7A-376(a) (2013)). Defendant was disciplined by the JSC pursuant to this earlier version of the statute.

those "proceedings authorized by G.S. 7A-376" we have determined that "this Court sits not as an appellate court but rather as a court of original jurisdiction," *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912 (citation omitted), and that "original jurisdiction to discipline judges lies solely within the Supreme Court by virtue of statutory authority," *In re Renfer*, 345 N.C. 632, 635, 482 S.E.2d 540, 542 (1997) (citing *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912). Therefore, we have concluded that the "final authority to discipline judges lies solely with the Supreme Court." *In re Hayes*, 356 N.C. at 398, 584 S.E.2d at 266 (citing *In re Peoples*, 296 N.C. at 146-47, 250 S.E.2d at 911-12).

"In obedience to" Article IV, Section 17(2), the legislature enacted Article 30, thus fulfilling "the intent of the General Assembly to provide the machinery and prescribe the procedure for the censure and removal of justices and judges for wilful misconduct in office, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978). We have upheld the General Assembly's plan, noting that "[i]t seems both appropriate and in accordance with the constitutional plan that the Supreme Court . . . should [ ] have final jurisdiction over the censure and removal of the judges and justices." *In re Martin*, 295 N.C. 291, 299-300, 245 S.E.2d 766, 771 (1978).

Aside from the section 7A-375 requirement that four members of the JSC be "members of the State Bar who have actively practiced in the courts of the State for at least 10 years," N.C.G.S. § 7A-375(a), Article 30 makes no other provision for the involvement of the State Bar in the discipline of judges. Furthermore, although the JSC has existed for more than forty years, the State Bar can cite to no previous instances of the DHC's claiming concurrent jurisdiction to discipline a sitting judge for conduct while in office. Instead, the DHC has pursued disciplinary action against a judge for his conduct as an attorney before becoming a judge, *see N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 657 S.E.2d 378 (2008), and against an attorney who was no longer a member of the General Court of Justice, *see N.C. State Bar v. Badgett*, 212 N.C. App. 420, 713 S.E.2d 791, 2011 WL 2226426 (2011) (unpublished) (*Badgett III*).

Ethridge involved an appeal to the Court of Appeals from the decision of the DHC to disbar Judge James B. Ethridge. 188 N.C. App. at 655, 657 S.E.2d at 380. Judge Ethridge was elected to the district court in 2004. *Id.* at 655, 657 S.E.2d at 380. Several years before taking the bench, Judge Ethridge had represented a sixty-nine-year-old woman named Rosalind Sweet, who suffered from dementia. *Id.* at 655, 657 S.E.2d at 380. Judge Ethridge was investigated and ultimately disbarred by the

DHC for depositing funds entrusted to him by Sweet into his own personal checking account, disbursing those funds for the benefit of himself and third parties, preparing and recording a deed conveying Sweet's real estate to himself without her approval, and "falsely representing on the public record that he had given Ms. Sweet $48,000 in consideration for the property she deeded to him." *Id.* at 657-58, 657 S.E.2d at 381-82. Finding "adequate and substantial evidence supporting the DHC's findings and [that] those findings support[ed] its conclusions," the Court of Appeals upheld the DHC's decision to disbar Judge Ethridge. *Id.* at 670, 657 S.E.2d at 388-89.

In *Badgett III* the Court of Appeals considered the decision of the DHC to disbar former judge Mark H. Badgett after his removal from office. 2011 WL 2226426, at *1. Judge Badgett had been censured and suspended from office for sixty days by this Court in March 2008 based upon the JSC's findings that he had failed, *inter alia*, to disclose to interested parties his business relationship with an attorney who appeared before him in several matters and had failed to disqualify himself from those matters. *In re Badgett*, 362 N.C. 202, 203-04, 210, 657 S.E.2d 346, 347-48, 351 (2008) (*Badgett I*). In addition, the JSC had determined that Judge Badgett coerced a guilty plea from a criminal defendant and attempted to do so with another criminal defendant. *Id.* at 203, 657 S.E.2d at 347. In a proceeding arising from a separate incident, Judge Badgett was found to have engaged in additional misconduct and subsequently was censured, removed from office, and barred from ever holding another judicial office by this Court. *In re Badgett*, 362 N.C. 482, 483-87, 491, 666 S.E.2d 743, 744-46, 749 (2008) (*Badgett II*). After Judge Badgett's removal from office, the DHC exercised its authority to discipline him as a private attorney, utilizing the misconduct that served as the basis for his judicial discipline. *Badgett III*, 2011 WL 2226426, at *1. The Court of Appeals subsequently affirmed the DHC's decision to disbar Judge Badgett. *Id.* at *13.

As an initial matter, we note that *Ethridge* and *Badgett III* are decisions of the Court of Appeals that are not binding on this Court. Furthermore, both cases are distinguishable from the present case. Neither *Ethridge* nor *Badgett III* conflicts with the General Assembly's statutory scheme for the discipline of judges in Article 30. In *Ethridge*, although Judge Ethridge was a member of the General Court of Justice when disbarred, the conduct at issue occurred while he was still an attorney engaged in the private practice of law. *See Ethridge*, 188 N.C. App. at 655, 657 S.E.2d at 380. By contrast, the conduct in question here occurred while defendant was a member of the General Court of

Justice. Similarly, *Badgett III* is distinguishable because the DHC disbarred Judge Badgett for his conduct while a judge once he was no longer a member of the General Court of Justice. *See Badgett III*, 2011 WL 2226426, at *3 ("On 10 June 2009, the Bar filed an amended complaint seeking disciplinary action for the misconduct that led to *Badgett I* and *Badgett II*."). The DHC did not attempt to discipline Judge Badgett for his judicial conduct while he was still in office, as the DHC is attempting to do in the present case. *Ethridge* and *Badgett III* illustrate only that the DHC has disciplined a sitting judge for conduct as an attorney before becoming a judge, and has disciplined an attorney who was no longer a judge for conduct that occurred while on the bench.

In the instant case the State Bar contends that N.C.G.S. § 7A-410 implies the statutory authority of the DHC to discipline defendant. Section 7A-410 states in pertinent part:

> When a judge of the district court, judge of the superior court, judge of the Court of Appeals, justice of the Supreme Court, or a district attorney is no longer authorized to practice law in the courts of this State, the Governor shall declare the office vacant. . . . For purposes of this Article, the term 'no longer authorized to practice law' means that the person has been disbarred or suspended and all appeals under G.S. 84-28 have been exhausted.

N.C.G.S. § 7A-410 (2015). The State Bar argues that this statute "would simply have no meaning if the General Assembly intended that the Council and the DHC should have no jurisdiction to discipline a lawyer who was also sitting as a judge." We disagree. Contrary to the State Bar's analysis, section 7A-410 simply explains what should occur when, as in *Ethridge*, a judge is disbarred for conduct that occurred before he became a judge.

The State Bar asserts that a judge is still a lawyer after taking office and therefore, must comply with both the Code of Judicial Conduct and the Rules of Professional Conduct as required by section 84-28.[6] Therefore, the State Bar contends that the DHC may discipline a sitting judge because "[j]udicial discipline concerns the fitness of a judge to serve as a judge. Attorney discipline concerns the fitness of a lawyer

6. "Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt . . . ." N.C.G.S. § 84-28(a).

to be a lawyer. The same conduct may implicate both fitness to be a judge and fitness to be a lawyer." We agree that a judge's conduct may affect his or her fitness to be a lawyer. In *Badgett III* the DHC disbarred the defendant once he was removed from judicial office; however, while a judge remains in office, only this Court or the JSC may impose discipline for his or her conduct as a judge.

In the present case defendant was a member of the General Court of Justice when he engaged in the misconduct set forth above. As a result, he was investigated and disciplined by the JSC pursuant to sections 7A-376 and 7A-377. Having accepted the JSC's public reprimand, defendant remains a sitting member of the General Court of Justice. Based upon the history and language of Article 30 of Chapter 7A of the General Statutes, we conclude that jurisdiction to discipline sitting judges for their conduct while in office rests solely with the JSC and this Court, and not with the DHC.[7] Consequently, we hold that the DHC does not have jurisdiction to discipline defendant as a sitting member of the General Court of Justice for his conduct while a member of the General Court of Justice. Accordingly, we reverse the DHC's denial of defendant's motion to dismiss the State Bar's complaint against him and remand this case to the DHC with instructions to dismiss with prejudice the State Bar's complaint.

REVERSED AND REMANDED.

Chief Justice MARTIN concurring.

I fully join the majority opinion. The Constitution of North Carolina requires that the General Assembly "prescribe a procedure, in addition to impeachment and address set forth in this section . . . for the censure and removal of a Justice or Judge of the General Court of Justice." N.C. Const. art. IV, § 17(2). The constitution thus provides for only three methods to discipline sitting judges: impeachment, address, and "a procedure" prescribed by the General Assembly.

The procedure that the General Assembly has, in fact, prescribed establishes the Judicial Standards Commission (JSC) as the sole mechanism by which sitting judges may be disciplined or removed. *See* N.C.G.S. §§ 7A-374.1 to -377 (2015). Indeed, the statutory text specifically

7. Because defendant's appeal is resolved on these grounds, we do not decide whether the State Bar is estopped from prosecuting conduct for which defendant has already been subject to a binding and final order of discipline by the JSC. We also do not decide whether the DHC violated defendant's procedural and substantive due process rights.

mandates that "[t]he procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with this Article." *Id.* § 7A-374.1. Judges therefore cannot be disciplined or removed in any way other than impeachment, address, or the statutory procedure that the General Assembly has devised.

By initiating disciplinary proceedings against a sitting judge for conduct that the judge engaged in while on the bench, the State Bar is trying to circumvent both the constitution and the prescribed statutory procedure. I write separately to note the wisdom of the overall scheme that the General Assembly has prescribed, and to elucidate why the law should not expose sitting judges to discipline by the State Bar for actions that they take while they are members of the General Court of Justice.

The General Assembly's procedure places recommendations for judicial discipline and removal in the hands of the JSC and final decisions on discipline and removal in the hands of this Court. Other than the JSC's power to issue private letters of caution, *see id.* § 7A-377(a3), the JSC functions solely "as an arm of the Court" that "conduct[s] hearings for the purpose of aiding the Supreme Court in determining whether a judge" should be disciplined or removed from the bench. *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978).[1] This procedure is sound because it preserves judicial independence. In the words of United States Supreme Court Justice Stephen Breyer, judicial independence is important because the justice that stems from proper adjudication "is only attainable . . . if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors." Stephen G. Breyer, *Judicial Independence in the United States*, 40 St. Louis U. L.J. 989, 996 (1996). For society to be governed by the rule of law, judges must be able to apply the law dispassionately, "without fear of retribution or the need to curry favor." *See* Charles Gardner Geyh et al., *Judicial Conduct and Ethics* § 1.04, at 1-10 (5th ed. 2013). If a judge is fearful that a lawyer or group of lawyers who appear before her will attempt to expose her to discipline, then she

1. Before 2013, the JSC could issue public letters of reprimand without this Court's permission. *See, e.g.*, N.C.G.S. § 7A-377(a4) (2011); *cf. id.* § 7A-377(a4) (2013). But it has always been within this Court's sole discretion whether to accept the JSC's recommendation to censure or remove a judge. *See In re Hardy*, 294 N.C. at 97, 240 S.E.2d at 372 (noting as of 1978 that the JSC's "recommendations are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove[,] or decline to do either" (quoting *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977) (per curiam))).

may not be able to act according to her best legal judgment in the cases that come before her. This is just one example of why judges must, to the greatest extent possible, be free from all outside pressures—political, financial, and personal—that could affect their ability to act with fairness and impartiality.

Judges, of course, need to be held accountable when they act in ways that do not befit a judge. Otherwise, public trust and confidence in the courts would erode. Judges cannot be above the law, and that is why the JSC exists. The JSC arose out of the Courts Commission of 1971's recommendation that a disciplinary process be created that would, as the majority notes, balance the need for judicial independence with the need for judicial accountability. *See* State of N.C. Courts Comm'n, *Report of the Courts Commission to the North Carolina General Assembly* 19-30 (1971) [hereinafter *Courts Commission Report*]. The JSC's sole mission is to ensure that judges conduct themselves in accordance with the Code of Judicial Conduct. *See* N.C.G.S. § 7A-376. Because this mission is the one goal that unites all of the members of the JSC—which has a diverse set of members culled from the bench, the bar, and citizens who are laypeople in the law, *see id.* § 7A-375(a)—the JSC is far less prone to being influenced by outside motives than other bodies may be. The JSC, with the help of this Court's oversight, is therefore uniquely positioned to balance judicial independence and judicial accountability.

Furthermore, because the JSC is duty-bound to enforce North Carolina's Code of Judicial Conduct, it is duty-bound to uphold judicial independence by the very terms of the Code. The very first words of the Code's Preamble state that "[a]n independent and honorable judiciary is indispensable to justice in our society," and the Code's first canon states that "[a] judge should uphold the integrity and independence of the judiciary." Code Jud. Conduct pmbl., Canon 1, 2016 N.C. R. Ct. (State) 509, 509. The Code that the JSC enforces thus places judicial independence at the very center of the values that the JSC must uphold.

Other state supreme courts have long since concluded that a system in which attorneys discipline judges is inconsistent with the goal of judicial independence and is contrary to good public policy. For instance, at the mid-point of the twentieth century, the Oklahoma Supreme Court held that lawyer disciplinary bodies cannot discipline members of the judiciary because it "would result in nothing more than discord, and could result in confusion, pernicious partisan political activity concerning the judiciary, and other results not beneficial to the administration of justice." *Chambers v. Cent. Comm. of Okla. Bar Ass'n*, 1950 OK 287, ¶16, 203 Okla. 583, 586, 224 P.2d 583, 586-87 (1950). Some years later,

the Alabama Supreme Court concluded that, "regardless of how honorable the motives of the would-be prosecutors may be," it is proper to shield judges from discipline by lawyers acting through the State Bar so that judges "may remain free to function without fear or favor." *Ala. State Bar ex rel. Steiner v. Moore*, 282 Ala. 562, 566, 213 So.2d 404, 408 (1968). Indeed, mindful of the need to "maintain and restore public confidence in the integrity, independence, and impartiality of [its] judiciary," every state "has established a judicial conduct organization charged with investigating and prosecuting complaints against judicial officers." Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 Just. Sys. J. 405, 405 (2007). And in all but two states, "the state supreme court has the final word" on the appropriate disciplinary measure to impose on a sitting judge. Cynthia Gray, *State Supreme Courts Play Key Role in Judicial Discipline*, 86 Judicature 267, 267 (2003). The JSC as it exists in North Carolina thus mirrors the national trend.

For all of these reasons, the best way to ensure judicial independence is to place the JSC and this Court—and no other individual or entity—at the helm of non-impeachment proceedings to discipline or remove judges.

Additionally, there would be practical problems if both the JSC and the State Bar had the power to discipline sitting judges for acts that they perform while they are on the bench. For example, a judge may be loath to enter into a stipulated disposition with the JSC—even though those dispositions are an effective way to resolve disciplinary disputes in a manner that both does justice in individual proceedings and preserves the public's trust and confidence in the judicial system as a whole—because doing so could adversely affect the judge's ability to defend against a disciplinary proceeding by the State Bar.

Placing the State Bar at the helm of proceedings to discipline judges would also undermine the judiciary's inherent authority to discipline the attorneys that appear in the General Court of Justice. Part of a judge's role is to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Code Jud. Conduct Canon 3B(3), 2016 N.C. R. Ct. (State) at 510; *see also* N.C.G.S. § 84-36 (2015) (clarifying that the creation of the State Bar does not "disabl[e] or abridg[e] the inherent powers of the court to deal with its attorneys"); *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 182, 695 S.E.2d 429, 436 (2010) ("[A] court possesses inherent authority to discipline attorneys."). This Court has characterized this power as one of "two methods for enforcing attorney discipline." *Sisk*, 364 N.C. at 182, 695 S.E.2d at 436

(citing *In re Delk*, 336 N.C. 543, 550, 444 S.E.2d 198, 201 (1994)). If the State Bar also had the power to discipline judges, judges might be hesitant to exercise their power to discipline attorneys because of the fear of a disciplinary counterattack.

A system in which the State Bar assumes the authority to discipline judges would therefore inevitably impair a judge's ability to perform an important judicial function. It could also place the members of the bench in a no-win scenario because, if a judge were afraid to exercise her inherent powers over attorneys who had engaged in unprofessional conduct, she would be guilty of violating Canon 3B—and then she herself would need to be disciplined. The disciplinary process envisioned by the State Bar would be like having the batter critique the umpire's ball and strike calls, rather than letting the umpire call pitches as he sees them. Under the State Bar's process, a judge would not be free to follow the law as she sees it when considering matters of attorney discipline. The result would be that the justice system would lose a key component of the very public trust that both the State Bar and the JSC are designed to protect and promote.

Furthermore, the State Bar's investigative process could dramatically interfere with the performance of a judge's duties. Under the JSC's process, the matter remains confidential until this Court issues an order of "public reprimand, censure, suspension, or removal." N.C.G.S. § 7A-377(a6). This ensures that a judge wrongly accused of misconduct is protected against "unjustified public attack." *Courts Commission Report* at 25. But the State Bar's process does not preserve confidentiality once the State Bar's Grievance Committee has found "probable cause to believe that the attorney is guilty of misconduct justifying disciplinary action" and has directed counsel "to prepare and file a complaint against the respondent." 27 NCAC 1B .0113(a), (h) (Oct. 8, 2009); 27 NCAC 1B .0133(a)(1) (Sept. 22, 2016). If a judge were subjected to this process, and an unjustified public attack became public knowledge before the judge was actually found to have committed misconduct, a judge might want to steer clear of even the possibility that someone would bring a grievance against her. That, in turn, could affect how she decided the cases before her and compromise her ability to faithfully follow the law. This practical difference in the State Bar's process would, once again, be inconsistent with the very notion of judicial independence.

In sum, the comprehensive and well-designed scheme prescribed by the General Assembly preserves judicial independence and avoids practical concerns that could result from a process involving a greater number of disciplinary bodies. The scheme envisioned by the State Bar,

by contrast, would undermine judicial independence and would present a number of practical problems. Judges must decide according to the law, not based on outside pressures. When judges are free to do so, this in turn increases public confidence in the courts. The current constitutional and statutory scheme, which establishes the JSC process as the sole means to discipline sitting judges for conduct committed while an incumbent judge, thus maximizes the public's trust in the courts and enables judges to do justice in every case that comes before them. These are goals of both the judiciary specifically and the legal profession as a whole. And the General Assembly has wisely borne these goals in mind in its statutory procedure for disciplining sitting judges. I therefore concur fully in the majority opinion.

Justice EDMUNDS joins in this concurring opinion.

Justice ERVIN concurring in the result.

Although I agree with my colleagues' decision that the State Bar lacks the authority to seek the imposition of attorney discipline against defendant in this case, I am unable to agree with the Court's apparent determination that the State Bar has no authority to sanction a sitting judge for any reason during the time that the judge remains in office. I would be the first to concede that the constitutional and statutory provisions that we are called upon to construe in this case are in tension, if not in actual conflict.[1] However, when the relevant constitutional and statutory provisions are carefully examined in light of the differing purposes served by the disciplinary systems administered by the Judicial Standards Commission[2] and the State Bar, I believe that there is a way to preserve the core jurisdiction of each agency without any undue friction between or interference with the essential function of each disciplinary

1. The lack of obvious interaction between the various provisions of the General Statutes applicable to attorney and judicial discipline suggests the appropriateness of action by the General Assembly for the purpose of clarifying the roles that it wishes for the agencies in question to play.

2. As the majority explains, this Court is the ultimate disciplinary authority under the statutory scheme for judicial discipline set out in Article 30 of Chapter 7A of the General Statutes. Although I will refer to the disciplinary system administered by the Judicial Standards Commission throughout the remainder of this separate opinion, I do so only for purposes of convenience and do not wish to be understood by using that phraseology as overlooking or minimizing the fact that this Court has ultimate responsibility for the more serious disciplinary decisions made in the process administered by the Judicial Standards Commission.

system. After construing the relevant constitutional and statutory provisions in the manner that I believe to be appropriate, I agree with the Court that the State Bar lacks the authority to proceed against defendant on the basis of the theory outlined in its complaint, albeit for different reasons than those advanced in the Court's opinion.

According to Article IV, Section 22 of the North Carolina Constitution, "[o]nly persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of [the] District Court." N.C. Const. art. IV, § 22. "Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina," to practice law in this state. N.C.G.S. § 84-4 (2015). In order to regulate the practice of law in North Carolina, the General Assembly has "created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar," *id.* § 84-15 (2015), with the State Bar Council having "the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals," *id.* § 84-23(a) (2015). The active membership of the State Bar "shall be all persons who have obtained a license or certificate, entitling them to practice law in the State of North Carolina, who have paid the membership dues specified, and who have satisfied all other obligations of membership." *Id.* § 84-16 (2015). "Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt," *id.* § 84-28(a) (2015), with attorneys being subject to discipline in the event that they are "[c]onvict[ed] of, or . . . [have] tender[ed] and accept[ed] . . . a plea of guilty or no contest to, a criminal offense showing professional unfitness," *id.* § 84-28(b)(1) (2015); found to have committed a "violation of the Rules of Professional Conduct adopted and promulgated by the Council in effect at the time of the act," *id.* § 84-28(b)(2) (2015); or made a "[k]nowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; fail[ed] to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or [engaged in] contempt of the Council or any committee of the North Carolina State Bar," *id.* § 84-28(b)(3) (2015). According to Rule 8.4 of the Revised Rules of Professional Conduct, which have been adopted pursuant to the State Bar's rulemaking authority, *id.* § 84-21 (2015), "[i]t is professional misconduct for a lawyer to:"

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official;
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
>
> (g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

N.C. St. B. Rev. R. Prof'l Conduct 8.4, 2016 Ann. R. N.C. 1137, 1260. "When a judge of the district court, judge of the superior court, judge of the Court of Appeals, justice of the Supreme Court, or a district attorney is no longer authorized to practice law in the courts of this State, the Governor shall declare the office vacant," with "no longer authorized to practice law" being defined as a situation in which "the person has been disbarred or suspended and all appeals under G.S. 84-28 have been exhausted." N.C.G.S. § 7A-410 (2015).

Similarly, Article IV, Section 17(2) of the North Carolina Constitution provides that

> [t]he General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction

> of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

N.C. Const. art. IV, § 17(2).

> Upon recommendation of the [Judicial Standards] Commission, the Supreme Court may issue a public reprimand, censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

N.C.G.S. § 7A-376(b) (2015). A violation of the "Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings." Code Jud. Conduct pmbl., 2016 Ann. R. N.C. 863, 863.

The relevant constitutional and statutory provisions do not, when read literally, directly address the problem that we face in this case, which stems from the fact that both the Judicial Standards Commission and the State Bar have attempted to sanction defendant based upon the same conduct and a very similar, if not identical, legal theory. As I read the relevant constitutional and statutory provisions, there does not appear to be any obvious bar to the exercise of concurrent jurisdiction by both agencies given that the Judicial Standards Commission has clear responsibility for the discipline of judges and that the State Bar has clear responsibility for the discipline of attorneys, a group of which judicial officials are, of necessity, a subset. The relevant constitutional provisions provide that judges must be lawyers and that the General Assembly must establish a process for addressing judicial incapacity and misconduct without in any way explicitly stating that the rules governing the professional discipline of attorneys do not apply to judges or explicitly providing that the constitutionally required process for disciplining judges overrides the legal obligations otherwise imposed upon members of the State Bar. Similarly, the relevant statutory provisions, including the rules adopted in accordance with the State Bar's rulemaking authority, simply identify the circumstances under which each agency has the authority to seek to discipline individuals subject to its jurisdiction without acknowledging any limitations on either body's authority arising from the existence of the other. As a result, the language of the relevant constitutional

and statutory provisions provides little direct guidance as to how the issue that confronts us in this case should be resolved and certainly does not suggest that authority granted to either body is exclusive.

Upon stepping back, examining the issue that we have before us on a more global level, and giving thought to the relevant rules of constitutional and statutory construction in context, the proper resolution of this case becomes clearer. Although I may be belaboring the obvious, the fact that Article IV, Section 22 requires members of the judiciary to be authorized to practice law in North Carolina necessarily suggests that the State Bar has, and retains, jurisdiction over members of the judiciary even after they assume judicial office.[3] Allowing judges to remain licensed attorneys for any length of time after they have committed serious acts of professional misconduct undermines public confidence in both the judiciary and the legal profession. The strength of this inference is further reinforced by the fact that the General Assembly provided in N.C.G.S. § 7A-410 for the removal from office of judicial officials who have been disbarred without in any way limiting the grounds upon which the judge in question was subject to disbarment. As a result, these constitutional and statutory provisions suggest that the State Bar did not, in fact, lose all authority to discipline lawyers following their elevation to the bench.

On the other hand, there can be little question that the Judicial Standards Commission has primary responsibility for addressing allegations of judicial misconduct. Any other conclusion would constitute a failure to recognize that the process of judicial discipline administered by the Judicial Standards Commission postdates the creation of the process of attorney discipline administered by the State Bar. As the Court notes, had the process for disciplining attorneys been deemed adequate to address issues arising from allegations of judicial misconduct, there would have been little reason for the adoption of Article IV, Section 17(2) of the North Carolina Constitution and the enactment of Article 30

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3. Admittedly, the language of Article IV, Section 22 directly addresses the need for individuals elected or appointed to judicial office to be licensed attorneys. However, this Court has long held that "[c]onstitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption," *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953). In view of the fact that the clear purpose of Article IV, Section 22 was to ensure that members of the judiciary were licensed attorneys, it makes little sense to read that constitutional provision as allowing individuals who were licensed at the time of their election and appointment, but who have been disbarred or otherwise lost their licenses to practice law, to remain in judicial office. In fact, N.C.G.S. § 7A-410 might be subject to constitutional challenge in the event that Article IV, Section 22 was to be read in this manner.

of Chapter 7A of the General Statutes. In addition, the justification for the creation of a system of judicial discipline separate and apart from impeachment by the General Assembly and the imposition of sanctions by the State Bar discussed in the Court's opinion, and the other policy-based justifications advanced in the Chief Justice's concurring opinion, including the necessity for preserving the independence of the judiciary, provide further support for the proposition that the disciplinary system administered by the Judicial Standards Commission, rather than the disciplinary system administered by the State Bar, should be the primary means for addressing issues of judicial misconduct.

A decision to construe the relevant constitutional and statutory provisions so as to treat the State Bar and the Judicial Standards Commission as having fully concurrent jurisdiction over every conceivable instance of judicial misconduct poses both legal and practical difficulties. As the facts contained in the present record reveal, there will undoubtedly be instances in which the State Bar and the Judicial Standards Commission have differing views as to the manner in which particular allegations of judicial misconduct should be addressed. The State Bar's assertion that it has unlimited authority, regardless of the position taken by the Judicial Standards Commission, to address allegations of judicial misconduct could well put a sitting judge in the position of questioning whether he is entitled to rely on advice provided by the Judicial Standards Commission in resolving particular ethics-related issues, despite the fact that the relevant constitutional and statutory provisions give the Judicial Standards Commission primary responsibility for addressing allegations of judicial misconduct. Similarly, a decision by the State Bar to seek the imposition of professional discipline upon a judicial official who has already been sanctioned by the judicial disciplinary process raises possible collateral estoppel or res judicata issues, not to mention basic questions of fundamental fairness. As a result, given the risk of conflict stemming from the fact that the Judicial Standards Commission and the State Bar appear to have concurrent jurisdiction over sitting judges and the fact that requiring sitting judges to satisfy multiple regulatory agencies that could take differing views of the manner in which the same issue should be resolved poses obvious legal and practical problems, I believe that it would be appropriate to attempt to determine whether there is any way to read the relevant constitutional and statutory provisions so as to reconcile the State Bar's concurrent jurisdiction over judicial officials in their capacity as lawyers with the Judicial Standards Commission's primary responsibility for addressing issues relating to judicial misconduct.

As an initial matter, I note that the purpose of the process for addressing allegations of judicial misconduct administered by the Judicial Standards Commission is to protect the public against improper judicial actions, while the purpose of the attorney discipline process administered by the State Bar is to protect the public against misconduct by practicing attorneys. For that reason, it is not surprising that the disciplinary authority exercised by each agency focuses on its core function. For example, as has already been noted, the State Bar has the authority to discipline members of the Bar for violating a Rule of Professional Conduct, engaging in criminal conduct or acts of dishonesty, engaging in conduct prejudicial to the administration of justice, claiming the ability to improperly influence a judicial official, assisting a judicial officer in unlawful conduct, or damaging his or her client. For the most part, members of the judiciary are unlikely to violate a Rule of Professional Conduct while acting in a judicial capacity or by claiming the ability to improperly influence a judicial official, assisting a judicial official in improper conduct, or damaging a client. However, a judicial official could, in some instances, be guilty of criminal conduct, acts of dishonesty, or conduct prejudicial to the administration of justice. Similarly, the disciplinary authority of the Judicial Standards Commission is available when the judicial official engages in willful misconduct in office, persistently fails to perform his or her duties, is habitually intemperate, is convicted of a crime involving moral turpitude, or engages in conduct prejudicial to the administration of justice that brings the judicial office into disrepute. As should be obvious, a judicial official could be guilty of any of these types of misconduct. Thus, given the primary responsibility for judicial discipline assigned to the process administered by the Judicial Standards Commission, the ultimate question before us in this case is the extent, if any, to which the State Bar is entitled to exercise concurrent jurisdiction over judicial officials who engage in the limited range of conduct that could make them liable to attorney discipline.

As a general proposition, I have no difficulty in concluding that the State Bar ought to be able to sanction a judicial official for violating any Rule of Professional Conduct that would have been applicable to the judge at the time that the alleged violation occurred, for committing a criminal act, or for engaging in dishonest or fraudulent conduct. In my opinion, the members of the public should not be subjected to the unfettered risk that individuals who have engaged in such conduct would be allowed to provide them with legal services regardless of their current eligibility to do so. On the other hand, given the risk of conflicting decisions and the other legal and practical problems that I have outlined

above, I have trouble understanding why a judicial official should be subject to discipline by both the Judicial Standards Commission and the State Bar for conduct prejudicial to the administration of justice, particularly when the conduct in question involved actions taken by the judge in the course of carrying out his or her perceived judicial responsibilities. Allowing such a result seems to me to be inconsistent with the principle of statutory construction that, when possible, statutes should be construed in such a manner as to avoid producing an absurd outcome. *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (stating that, "where 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" (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979))). In addition, it would be consistent with the canon of statutory construction that, "[w]here there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized . . . ; but, to the extent of any necessary repugnancy between them, the special statute . . . will prevail over the general statute." *Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997) (second and third alterations in original) (quoting *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995)). As a result, in order to avoid inconsistent outcomes, the risk of conflicting advice, the potential for claim or issue preclusion questions to arise, undue confusion, and other difficulties, I believe that the Court should construe the relevant constitutional and statutory provisions in such a way as to preclude the State Bar from proceeding against an attorney on the basis of alleged conduct prejudicial to the administration of justice arising from activities undertaken by a judicial official in the conduct of his or her judicial duties that do not involve a violation of the Rules of Professional Conduct, a criminal act, dishonest or fraudulent conduct, claiming the ability to improperly influence another public official, or assisting another judicial official in committing an act of judicial misconduct[4] and to hold that the

4. Admittedly, conduct that violates these specific rule provisions would be "prejudicial to the administration of justice." However, because the relevant phrase is so broad that it could encompass judicial misconduct committed by a sitting judge arising only from his or her judicial duties, which is outside the purview of the State Bar's jurisdiction, the State Bar may not proceed on that legal theory alone and must, instead, specify how the conduct of a sitting judge violated his or her obligations and responsibilities *as an attorney.*

Judicial Standards Commission has exclusive responsibility for addressing such allegations.[5]

The Judicial Standards Commission disciplined defendant based upon determinations that his actions involved violations of Canon 1 (requiring a judge to "participate in establishing, maintaining, and enforcing" and to "personally observe[ ] appropriate standards of conduct to ensure that the integrity and independence of the judiciary [are] preserved"), Code Jud. Conduct Canon 1, 2016 Ann. R. N.C. 863, 863; Canon 2A (requiring a judge to "respect and comply with the law" and to "conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), *id.* Canon 2A, 2016 Ann. R. N.C. at 865; and Canon 3A(3) (requiring a judge to "be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity" and obligating a judge to "require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control"), *id.* Canon 3A(3), 2016 Ann. R. N.C. at 869, of the Code of Judicial Conduct, with these violations having (1) "created a public perception of a conflict of interest which threatens the public's faith and confidence in [his] integrity and impartiality," (2) been "reasonably perceived as coercive and retaliatory," and (3) constituted "conduct prejudicial to the administration of justice." Similarly, the State Bar alleged in the complaint that it filed in this case that defendant had "engaged in conduct that was prejudicial to the administration of justice in violation of Rule 8.4(d) [of the Rules of Professional Conduct]," as evidenced by a number of specific actions that he took in what he believed to be the performance of his judicial duties during his controversy with the Kill Devil Hills Police Department and the District Attorney's Office. In other words, both the Judicial Standards Commission and the State Bar sought to sanction defendant based upon their authority to discipline covered individuals for conduct prejudicial to the administration of justice based upon conduct arising from defendant's performance of his judicial duties. In view of my belief that the State Bar does not have the authority to seek the imposition of discipline based upon an

5. The validity of this approach is bolstered, at least in my opinion, by the fact that the State Bar's jurisdiction to sanction individuals for conduct prejudicial to the administration of justice is rule-based, while the Judicial Standards Commission's ability to do so stems from the language of the relevant constitutional and statutory provisions, which should not be negated if at all possible. *Sessions v. Columbus County*, 214 N.C. 634, 638, 200 S.E. 418, 420 (1939) (stating that "[r]econciliation is a postulate of constitutional as well as of statutory construction" (citing *Parvin v. Bd. of Comm'rs*, 177 N.C. 508, 99 S.E. 432 (1919))).

allegation that the attorney in question engaged in conduct prejudicial to the administration of justice stemming from acts committed while he or she was a member of the judiciary and those acts did not also violate specific obligations and responsibilities imposed upon attorneys, I do not believe that the State Bar has the authority to seek the imposition of attorney discipline upon defendant on the basis of the allegations set out in its complaint. As a result, because I believe that the State Bar's complaint against defendant should be dismissed for this reason, I concur in the result reached by the Court without joining its opinion.

Justices HUDSON and BEASLEY join in this concurring opinion.

RICHARD O'NEAL, EMPLOYEE
v.
INLINE FLUID POWER, INC. & AUTOMOTIVE PARTS CO., INC., EMPLOYER,
AUTO OWNERS INSURANCE COMPANY, CARRIER

No. 261PA15

Filed 21 December 2016

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 574 (2015), affirming an opinion and award filed on 4 June 2014 by the North Carolina Industrial Commission. Heard in the Supreme Court on 10 October 2016.

Jernigan Law Firm, by Leonard T. Jernigan, Jr., Anthony L. Lucas, and Kristina B. Thompson, for plaintiff-appellant.

McAngus Goudelock & Courie, by Viral V. Mehta and Carl M. Short III, for defendant-appellees.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

PIRO v. McKEEVER

[369 N.C. 291 (2016)]

MICHAEL C. PIRO
v.
REBECCA HADDEN McKEEVER, L.C.S.W.; CYNTHIA L. SAPP, PH.D.; KAREN BARRY, M.F.T., LMFT; AND DAVIDSON COUNSELING ASSOCIATES

No. 93A16

Filed 21 December 2016

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. ___, 782 S.E.2d 367 (2016), affirming an order entered on 3 November 2014 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Supreme Court on 11 October 2016.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and Michelle D. Connell, for plaintiff-appellant.

Epstein Law Firm, PLLC, by Andrew J. Epstein, for defendant-appellee Rebecca Hadden McKeever, L.C.S.W.

McGuireWoods LLP, by Mark E. Anderson and Monica E. Webb, for National Association of Social Workers, amicus curiae.

PER CURIAM.

In this case we consider whether plaintiff's complaint sufficiently alleged claims for negligent infliction of emotional distress and intentional infliction of emotional distress. Because the members of the Court are equally divided as to both issues, the holding of the Court of Appeals is left undisturbed and stands affirmed without precedential value. *See, e.g.*, *State v. Long*, 365 N.C. 5, 705 S.E.2d 735 (2011) (per curiam); *State v. Greene*, 298 N.C. 268, 258 S.E.2d 71 (1979) (per curiam).

AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
BRITTANY TAYLOR ALLMAN

No. 25A16

Filed 21 December 2016

Search and Seizure—warrant to search house—probable cause

In a prosecution for drug offenses, the facts alleged in a detective's affidavit were sufficient to support probable cause to issue a warrant to search defendant's house where two half-brothers were stopped in a car, drugs were found in the car, an investigation revealed that they lived in defendant's house, the warrant was issued, and more drugs and paraphernalia were found in the house. Under the totality of the circumstances, the magistrate had a substantial basis to conclude that probable cause existed to search defendant's home.

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. ___, 781 S.E.2d 311 (2016), affirming an order entered on 2 October 2014 by Judge Jack Jenkins in Superior Court, New Hanover County. Heard in the Supreme Court on 30 August 2016.

Roy Cooper, *Attorney General*, *by Derrick C. Mertz*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Paul M. Green*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Chief Justice.

The sole issue before us is whether the trial court properly granted defendant's motion to suppress evidence. The Court of Appeals affirmed the trial court's ruling. We hold that the magistrate in this case had a substantial basis to find that probable cause existed to issue the challenged search warrant, and we therefore reverse the decision of the Court of Appeals.

Defendant lived with Sean Whitehead and Jeremy Black, who were half-brothers, at 4844 Acres Drive in Wilmington, North Carolina. The police stopped a car that Black was driving. Whitehead was a passenger.

Inside the car, the police found 8.1 ounces of marijuana and over $1600 in cash. This stop ultimately led to the issuance of a warrant to search defendant's home. Based on evidence found there, defendant was charged with six offenses pertaining to the manufacture, possession, and sale or delivery of illegal drugs.

Defendant moved to suppress evidence seized during the search of her home, arguing that the warrant to conduct the search was not supported by probable cause. After a hearing, the trial court granted defendant's motion, and the State appealed. The Court of Appeals affirmed the trial court's ruling, with one judge dissenting. *State v. Allman*, ___ N.C. App. ___, ___, 781 S.E.2d 311, 318 (2016); *id.* at ___, 781 S.E.2d at 318-20 (Dillon, J., dissenting). The State then filed a notice of appeal with this Court.

The Fourth Amendment to the United States Constitution protects the people from "unreasonable searches and seizures." U.S. Const. amend. IV. Absent exigent circumstances, the police need a warrant to conduct a search of or seizure in a home, *see Payton v. New York*, 445 U.S. 573, 586 (1980), and a warrant may be issued only on a showing of probable cause, U.S. Const. amend. IV. Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause. *See State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984).

The Supreme Court of the United States has adopted the totality of the circumstances test to determine whether probable cause exists under the Fourth Amendment. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). This Court has adopted the same totality of the circumstances test to determine whether probable cause exists under Article I, Section 20 of the state constitution. *See Arrington*, 311 N.C. at 643, 319 S.E.2d at 260-61. And because the text of Article I, Section 20 does not "call[ ] for broader protection than that of the Fourth Amendment," *State v. Miller*, 367 N.C. 702, 706, 766 S.E.2d 289, 292 (2014), the probable cause analysis under the federal and state constitutions is identical.[1]

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1. In *State v. Carter*, this Court declined to adopt a good faith exception to the state constitution's exclusionary rule. *Compare State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988), *with United States v. Leon*, 468 U.S. 897, 913 (1984) (adopting a good faith exception to the Fourth Amendment exclusionary rule). But the holding in *Carter*, which concerns the proper remedy for an unreasonable search or seizure, does not affect the scope of our probable cause analysis, which concerns whether an unreasonable search or seizure happened in the first place.

In general, "a neutral and detached magistrate," not an "officer engaged in the often competitive enterprise of ferreting out crime," must determine whether probable cause exists. *Gates*, 462 U.S. at 240 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). To determine whether probable cause exists under the totality of the circumstances, a magistrate may draw "[r]easonable inferences from the available observations." *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991). A single piece of evidence may not necessarily be conclusive; as long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue a warrant. *See Massachusetts v. Upton*, 466 U.S. 727, 733 (1984) (per curiam); *see also Gates*, 462 U.S. at 238.

Reviewing "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Riggs*, 328 N.C. at 222, 400 S.E.2d at 434-35 (alterations in original) (quoting *Gates*, 462 U.S. at 236). Because " '[a] grudging or negative attitude by reviewing courts toward warrants' is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant," a reviewing court should not subject the issuing magistrate's probable cause determination to de novo review. *Gates*, 462 U.S. at 236 (citation omitted) (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). The magistrate's probable cause determination should instead be given "great deference." *Id.* (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). In practice, the reviewing court gives deference to the magistrate's determination by "ensur[ing] 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 258 (emphasis added) (second and third alterations in original) (quoting *Gates*, 462 U.S. at 238-39).

Under North Carolina law, an application for a search warrant "must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items [subject to seizure] are in the place[ ] . . . to be searched." N.C.G.S. § 15A-244(3) (2015). A supporting affidavit is sufficient when it gives the magistrate "reasonable cause to believe that the search will reveal the presence of the [items] sought on the premises described in the [warrant] application," and that those items "will aid in the apprehension or conviction of the offender." *State v. Bright*, 301 N.C. 243, 249, 271 S.E.2d 368, 372 (1980). But a magistrate cannot lawfully issue a search warrant based on an affidavit that is "purely conclusory" and that does not state the underlying circumstances allegedly giving rise to probable cause. *Id.*

The affidavit in this case, which was submitted by Detective Anthony E. Bacon Jr. of the New Hanover County Sheriff's Office, contained all of the following allegations:

Agent Joe Cherry of the Brunswick County Sheriff's Office stopped a car that Jeremy Black was driving. Black's half-brother Sean Whitehead was a passenger in the car. Agent Cherry used a K-9 unit to conduct an exterior sniff of the car, and the dog "alerted on the vehicle for illegal controlled substances." Agent Cherry then searched the car and found 8.1 ounces of marijuana packaged in a Ziploc bag, which was inside of a vacuum sealed bag, which in turn was inside of a manila envelope. He also found over $1600 in cash.

Detective Bacon checked both Black's and Whitehead's criminal histories. He discovered that Whitehead had previously been charged on several occasions with "crimes relating to the illegal sale and distribution of marijuana" and had been convicted of possession with the intent to sell and deliver marijuana. Detective Bacon also discovered that Black had pleaded guilty to first-degree burglary and had been charged with cocaine distribution and possession of marijuana. During the vehicle stop, Whitehead maintained that he and Black lived at 30 Twin Oaks Drive in Castle Hayne, North Carolina. Whitehead said that he and Black had been on their way back there before they were stopped.

On the same day as the vehicle stop, Detective Bacon went to 30 Twin Oaks Drive. When he got there, he discovered that neither half-brother lived at that address but that Whitehead's and Black's mother, Elsie Black, did. Ms. Black told Detective Bacon that the two men lived at 4844 Acres Drive in Wilmington and had not lived at 30 Twin Oaks Drive for about three years.[2] She described the Acres Drive property as a small one-story residence that had "a big, tall privacy fence in the backyard" and said that "there should be an old red truck and an old white truck at the house." At that point, another detective went to 4844 Acres Drive. The property matched the description given by Ms. Black, and one of the two trucks outside of the house was registered to Jeremy Black.

In addition to stating all of these allegations, the affidavit recited Detective Bacon's extensive training in law enforcement and extensive experience with drug investigations and trials. The affidavit also stated, based on Detective Bacon's training and experience, that drug dealers

2. Here and elsewhere, the affidavit mistakenly listed the Acres Drive address as 4814, not 4844.

typically keep evidence of drug dealing at their homes, including but not limited to the drugs themselves, records of drug dealing activities, tools and materials used to weigh and package drugs, large amounts of cash, and expensive things purchased with drug money.

Supported by his affidavit, Detective Bacon applied for a warrant to search the property at 4844 Acres Drive, and the magistrate issued it.[3] When detectives searched the Acres Drive house (several hours after Detective Bacon went to 30 Twin Oaks Drive), they found varying amounts of marijuana throughout the living room and a shotgun in defendant's bedroom. According to a police inventory sheet, the detectives also found, among other things, digital scales, plastic packaging material, sandwich bags, smoking pipes, and rolling papers in the house. In addition, the detectives discovered a wall safe that contained syringes filled with a liquid later identified as psilocybin mushrooms, a controlled substance.

When reviewing a trial court's ruling on a motion to suppress, we analyze whether the trial court's "underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The trial court found virtually all of the facts that we have just recounted, and its findings were supported by competent evidence—namely, by the affidavit itself.

But the trial court erred in its conclusion of law that the facts alleged in Detective Bacon's affidavit were insufficient to support a finding of probable cause to issue the search warrant. Based on the quantity of marijuana and the amount of cash found in the car, the fact that the marijuana appeared to be packaged for sale, and Whitehead's and Black's criminal histories, it was reasonable for the magistrate to infer that the half-brothers were drug dealers. Based on the mother's statement that Whitehead and Black really lived at 4844 Acres Drive, the fact that her description of 4844 Acres Drive matched the appearance of the actual premises, and the fact that one of the trucks there was registered to Black, it was reasonable for the magistrate to infer that Whitehead and Black lived there. And based on the insight from Detective Bacon's training and experience that evidence of drug dealing is likely to be found at a drug dealer's home, and the fact that Whitehead lied about where he and Black lived, it was reasonable for the magistrate to infer

3. Because the warrant replicated the error in the affidavit, it listed the property's address as 4814 Acres Drive. Defendant does not argue that this error makes the warrant invalid.

that there could be evidence of drug dealing at 4844 Acres Drive. These are just the sort of common-sense inferences that a magistrate is permitted to make when determining whether probable cause exists.

We acknowledge that nothing in Detective Bacon's affidavit directly linked defendant's home with evidence of drug dealing. But federal circuit courts have addressed this precise situation and held that a suspected drug dealer's lie about his address, in combination with other evidence of drug dealing, can give rise to probable cause to search his home. In *United States v. Whitner*, for example, the Third Circuit noted that "direct evidence linking the crime to the location to be searched is not required to support a search warrant," 219 F.3d 289, 297 (3d Cir. 2000), and that a suspected drug dealer's lie to federal agents about where he lived was an "important piece of evidence linking the crime to" the suspect's apartment, *id.* at 298. "[W]hen combined with . . . other information" from the attesting officer's affidavit, the Third Circuit ruled, the suspect's lie "logically suggests that [he] was storing some evidence of illegal activity at [his] apartment which he did not want the agents to discover." *Id.* at 299. And in *United States v. Caicedo*, the Sixth Circuit held that probable cause existed to search a suspected drug dealer's home because, among other reasons, the suspect "had lied about his address in statements" that he made after his arrest. 85 F.3d 1184, 1193 (6th Cir. 1996).

The Court of Appeals maintained that the facts here were "materially indistinguishable" from those in *State v. Campbell*. *See Allman*, __ N.C. App. at ___, 781 S.E.2d at 316. In *Campbell*, we held that the facts alleged in the affidavit in that case were too conclusory to support a finding of probable cause to search the home of suspected drug dealers. *State v. Campbell*, 282 N.C. 125, 129-32, 191 S.E.2d 752, 756-57 (1972). But the facts of *Campbell* can be distinguished from the facts here in two ways. First, in contrast to the affidavit supporting the warrant in this case, there is no indication that the affidavit in *Campbell* mentioned any insights from the affiant's training and experience, or used them to link evidence of drug dealing with the home of the suspected dealers. *See id.* at 130-31, 191 S.E.2d at 756; *see also State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 825 (2015) (stating that evidence supporting a warrant application is "viewed from the perspective of a police officer with the affiant's training and experience"). Second, while a suspect in this case lied to Agent Cherry about his true address, nothing in the *Campbell* opinion indicates that any of the subjects of that search lied to the authorities about their home address. So *Campbell* does not alter our conclusion.

Defendant has argued that N.C.G.S. § 15A-244(3) provides an independent basis for granting her motion to suppress. As we have noted above, subsection 15A-244(3) specifies that a warrant application must be supported by at least one affidavit that states with particularity the facts and circumstances that establish probable cause. Although defendant suggests that this provision limits the scope of what qualifies as probable cause, she is mistaken. The provision does not change the probable cause standard at all; it just specifies the type of evidence that the police have to produce to *meet* the standard.

In sum, under the totality of the circumstances, the magistrate in this case had a substantial basis to conclude that probable cause existed to search defendant's home. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
JAMES ANTHONY BARNETT, JR.

No. 36PA16

Filed 21 December 2016

Sexual Offenders—no contact order—third parties—victim's minor children

In a case arising from convictions for attempted second-degree rape and other offenses, the trial court had the authority under the catch-all provision of N.C.G.S. § 15A-1340.50 to enter a no contact order specifically including the victim and her minor children. N.C.G.S. § 15A-1340.50 protects the victim of the sex offense, not third parties, and the catch-all provision cannot be read to expand the reach of the statute. However, the victim can be protected from indirect contact by the defendant through the victim's family or friends when appropriate findings are made by the trial court.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 784 S.E.2d 188

(2016), finding no error at trial after appeal from judgments entered on 16 July 2014 by Judge Edwin G. Wilson, Jr. in Superior Court, Rockingham County, but reversing, reversing and remanding, and vacating in part and remanding three related orders entered the same day. Heard in the Supreme Court on 10 October 2016.

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

Jennifer Harjo, Public Defender, New Hanover County, by Brendan O'Donnell, Assistant Public Defender, for defendant-appellee.

HUDSON, Justice.

Defendant James Anthony Barnett, Jr. was convicted by a jury on 16 July 2014 of a number of offenses, including attempted second-degree rape. At sentencing, the trial court entered a "Convicted Sex Offender Permanent No Contact Order" under N.C.G.S. § 15A-1340.50, prohibiting defendant from any interaction with the victim. Here we must decide whether the trial court has authority to include in such an order the names of individuals other than the original victim, and if so, under what circumstances. We conclude that the court does have that authority, if supported by appropriate findings as required by the statute.

The order entered here contains the following language under the final section, entitled "Restrictions": "This order includes the following individuals: [three named individuals who are minor children of the victim]." On appeal the Court of Appeals vacated the no contact order and remanded for the trial court to "remove mention of any individuals other than the victim," concluding that "the trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not 'victims' of the 'sex offense' committed by Defendant." *State v. Barnett*, ___ N.C. App. ___, ___, 784 S.E.2d 188, 200 (2016); *see also* N.C.G.S. § 15A-1340.50(f)(7) (2015). We allowed the State's petition for discretionary review.

We agree with the Court of Appeals that N.C.G.S. § 15A-1340.50 protects the victim of the sex offense, and not third parties, and that the catch-all provision in N.C.G.S. § 15A-1340.50(f)(7) cannot be read to expand the reach of the statute. *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 199-200. But, because we hold that N.C.G.S. § 15A-1340.50 can authorize protection for the victim from indirect contact by the defendant through the victim's family or friends when appropriate findings are

made by the trial court, we reverse in part the decision of the Court of Appeals and remand this case for entry of a new permanent no contact order not inconsistent with this opinion.

The evidence presented at trial revealed that from late January until late April 2013, defendant dated the victim. During the last two months of the relationship, defendant stayed in the victim's apartment with her and her three daughters, ages thirteen years, eleven years, and eleven months.

On or about 22 April 2013, defendant left the apartment to meet with his probation officer. That same day, while defendant was away, the victim communicated with him over the telephone to terminate their relationship. On 22 May 2013, defendant showed up at the victim's apartment to retrieve his clothes while the victim was at home with her youngest child. The victim asked defendant to wait in the living room while she gathered his belongings. Defendant asked the victim for a hug, and the victim obliged. Then defendant asked the victim to engage in sexual intercourse with him. The victim repeatedly refused, asking defendant to leave her apartment.

When defendant refused to leave, the victim entered the bathroom "to sort of kill time." Defendant followed her and stood outside the bathroom door, blocking her way when she attempted to exit the room. Defendant pulled the victim into her children's bedroom, threw her onto the floor and then onto a bed, and began attempting to engage in sexual intercourse with her. During this process, defendant repeatedly struck the victim in the head and face.

The victim stated that before defendant left the apartment, he told her he would kill her if she called the police. Nonetheless, she asked a neighbor to call for emergency assistance. The responding officer found the victim crying, in a disheveled condition, and with "severe bruises" on her face and body and "a lot of swollen . . . lumps on her head."

After being released from the hospital, the victim began receiving text messages from defendant, stating that he would come back and "finish the job," and that he was "coming back to the neighborhood" to kill her. From 31 May to 4 August 2013, while defendant was incarcerated, he wrote at least eight threatening letters to the victim or one of her daughters. *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 192. On 31 May 2013, defendant wrote:

> What did I tell you, would happen if you took charges; out on me? You remember, what I told you. And I'ma stand by

> my word. Because you knew not to press charges or go to the hospital. You knew better then that. . . . I miss you deeply and love you like crazy. You are not just going to walk, away from me this easily. Because before you do so, I will kill you or have you killed.

In a later letter to the victim, defendant reminded the victim of his earlier threats and referred to "order[ing] a hit." Defendant also wrote:

> So I'ma put you below, before you can put me away for X amout of yrs. . . . I'll send my lil CЯIP homies at you and your family. . . . I will orcastrate some shit, from in here behind these walls and make it happen ASAP. If I'ma go back to prison it's going to be for some real serious shit. Not some bullshit or some bullshit lies, that you done told on me. It is going to be for, accessory to 1st degree murder and mastermind 1st degree murder. Not just one body, but 3 more precious bodies. (4 counts 1st Degree murder and 4 counts mastermind 1st Degree Murder) You understand me and feel what I'm getting at?

Additionally, defendant sent a letter to one of the victim's daughters in which he stated that, if the victim failed to "drop[ ]" the charges against him, he would "order some things to happen which means [he] will never, get out of prison again," that he "will never see, the courtroom," and that the same would be true of the victim, who would "be dead, because of [his] orders." Finally, on 4 August 2013, defendant wrote to the victim, "I done told you before, I have people watching your apartment. . . . But just know, if God spares my life and I'm able to get out and walk the streets again one day. I'm coming to get you and my family back."

On 8 July 2013, defendant was indicted in Rockingham County for: (1) attempted second-degree rape, second-degree kidnapping, and assault on a female on 22 May 2013; (2) two counts of deterring an appearance by a witness on 4 and 20 June 2013 in that defendant attempted to prevent the alleged victim from attending court to testify regarding the 22 May events "by threatening to kill her and have her killed if she appeared"; and (3) habitual misdemeanor assault under N.C.G.S. § 14-33.2. A separate undated indictment charged defendant as an habitual felon, listing convictions dated between September 1999 and June 2009, and showed offense dates of 22 May, 4 June, and 20 June 2013. All offenses were later joined for trial, plus a charge of assault inflicting serious injury, also alleged to have occurred on 22 May 2013.

Defendant was tried during the criminal session of Superior Court, Rockingham County that began on 14 July 2014 before Judge Edwin G. Wilson, Jr. Defendant entered into a plea arrangement in which he pleaded guilty to habitual misdemeanor assault based on the prior convictions set out in the indictment. Two days later a jury found defendant guilty of attempted second-degree rape, assault on a female, and both counts of deterring appearance by a witness. Defendant then pleaded guilty to having attained habitual felon status.

On 16 July 2014, the trial court sentenced defendant to a term of 110 to 144 months for attempted second-degree rape, and ordered that he register as a sex offender and enroll in satellite-based monitoring for life upon his release from prison. The trial court also entered a "Convicted Sex Offender Permanent No Contact Order" (using Form AOC-CR-620, Rev. 12/11), which includes the following:

> FINDINGS OF FACT
>
> . . . .
>
> 4. The following grounds exist for the victim to fear any future contact with the defendant:
>
> DUE TO THE AGGRAVATED NATURE OF THE OFFENSE AND THE DEFENDANT'S HISOTRY [sic] OF VIOLENCE AS WELL AS THE DEFENDANT'S PERONAL KNOWLEGED [sic] OF THE VICTIM AND HER FAMILY.
>
> CONCLUSIONS OF LAW
>
> Based on the foregoing findings, the Court concludes that (*select one*):
>
> [Checked Box] 1. reasonable grounds exist for the victim to fear any future contact with the defendant.
>
> . . . .
>
> ORDER
>
> [Checked Box] . . . It is hereby Ordered that the defendant is prohibited from having any contact with ____[ ]____ (*name of victim*) during the remainder of the defendant's natural life as specified in the Restrictions below. This no contact order is incorporated into the judgment imposing sentence in this case.
>
> . . . .

RESTRICTIONS

The following restrictions apply under the no contact order entered on above (*check all that apply*):

[Checked Box] 1. The defendant shall not threaten, visit, assault, molest, or otherwise interfere with the victim.

[Checked Box] 2. The defendant shall not follow the victim, including at the victim's workplace.

[Checked Box] 3. The defendant shall not harass the victim.

[Checked Box] 4. The defendant shall not abuse or injure the victim.

[Checked Box] 5. The defendant shall not contact the victim by telephone, written communication, or electronic means.

[Checked Box] 6. The defendant shall refrain from entering or remaining present at the victim's residence, school, place of employment, and (*specify other place(s)*) ____ [empty blank]____ at times when the victim is present.

[Checked Box] 7. Additional necessary and appropriate restriction(s):

THIS ORDER INCLUDES THE FOLLOWING INDIVIDUALS:

[three named individuals who are minor children of the victim]

The trial court entered a separate judgment on the consolidated convictions for deterring appearance by a witness, assault on a female, and habitual misdemeanor assault in which the court sentenced defendant to a second term of 110 to 144 months, to be served consecutively.

Defendant appealed to the Court of Appeals, where he argued, *inter alia*, that the trial court erred in extending the permanent no contact order to the victim's children. *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 198. In a unanimous opinion filed on 19 January 2016, the Court of Appeals agreed with defendant's argument on that issue, vacated the order because of the language relating to the children, and remanded for entry of a new order. *Id.* at ___, 784 S.E.2d at 200. Specifically, the Court of Appeals concluded that the trial court's authority to enter an

order under N.C.G.S. § 15A-1340.50 "is limited to prohibiting actions by the defendant against 'the victim' based on the plain language of the statute." *Id.* at ___, 784 S.E.2d at 200. As a result, the trial court lacked "authority under the catch-all provision to enter a no contact order specifically including persons who were not 'victims' of the 'sex offense' committed by Defendant." *Id.* at ___, 784 S.E.2d at 200. The State filed a petition for discretionary review, which we allowed on 13 April 2016.

The State argues that the Court of Appeals erred in holding that the trial court was without statutory authority to include prohibitions on contact with the victim's minor children as a term of the permanent no contact order. We conclude that the trial court had authority to enter such prohibitions if supported by appropriate findings, and thus reverse that portion of the Court of Appeals' opinion holding otherwise. We agree with the Court of Appeals that N.C.G.S. § 15A-1340.50 protects the victim of the sex offense, and not third parties, and that the catch-all provision in N.C.G.S. § 15A-1340.50(f)(7) cannot be read to expand the reach of the statute to protect individuals other than the victim. *Id.* at ___, 784 S.E.2d at 199-200. But we also conclude that a trial court may enter a no contact order prohibiting indirect contact with the victim through her children or others who may be specified in the section entitled "Restrictions" under subdivisions (f)(1) through (f)(6), as well as (f)(7) of N.C.G.S. § 15A-1340.50, if supported by appropriate findings. N.C.G.S. § 15A-1340.50 (2015). By "appropriate findings," we mean findings indicating that the defendant's contact with specific individuals would constitute indirect engagement in any of the actions prohibited in subdivisions (f)(1) through (f)(7).

This Court reviews the decision of the Court of Appeals to determine whether the decision contains an error of law. N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010). This case presents a question of statutory interpretation, which is an issue of law. "The intent of the Legislature controls the interpretation of a statute." *State v. Joyner*, 329 N.C. 211, 217, 404 S.E.2d 653, 657 (1991) (quoting *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982), *overruled by Mumford*, 364 N.C. at 402, 699 S.E.2d at 916). "In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983) (citation omitted). "When a statute is unambiguous, this Court 'will give effect to the plain meaning of the words without resorting to judicial construction.' " *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (quoting *State v. Byrd*, 363 N.C. 214, 219, 675 S.E.2d 323, 325

(2009)). "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." *Byrd*, 363 N.C. at 219, 675 S.E.2d at 325 (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)).

The statute at issue here, N.C.G.S. § 15A-1340.50, reads in pertinent part:

> (a) The following definitions apply in this Article:
>
> (1 Permanent no contact order.— A permanent injunction that prohibits any contact by a defendant with the victim of the sex offense for which the defendant is convicted. The duration of the injunction is the lifetime of the defendant.
>
> (2) Sex offense.— Any criminal offense that requires registration under Article 27A of Chapter 14 of the General Statutes.
>
> (3) Victim.— The person against whom the sex offense was committed.
>
> . . . .
>
> (e) At the conclusion of the show cause hearing the judge shall enter a finding for or against the defendant. If the judge determines that reasonable grounds exist for the victim to fear any future contact with the defendant, the judge shall issue the permanent no contact order. The judge shall enter written findings of fact and the grounds on which the permanent no contact order is issued. The no contact order shall be incorporated into the judgment imposing the sentence on the defendant for the conviction of the sex offense.
>
> (f) The court may grant one or more of the following forms of relief in a permanent no contact order under this Article:
>
> (1) Order the defendant not to threaten, visit, assault, molest, or otherwise interfere with the victim.
>
> (2) Order the defendant not to follow the victim, including at the victim's workplace.

(3) Order the defendant not to harass the victim.

(4) Order the defendant not to abuse or injure the victim.

(5) Order the defendant not to contact the victim by telephone, written communication, or electronic means.

(6) Order the defendant to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified places at times when the victim is present.

(7) Order other relief deemed necessary and appropriate by the court.

N.C.G.S. § 15A-1340.50(a), (e), (f).

The paramount purpose of N.C.G.S. § 15A-1340.50 is to protect a victim of a sex offense from further contact, harm, or molestation by his or her assailant. *See id.* § 15A-1340.50 (titled "Permanent no contact order prohibiting future contact by convicted sex offender with crime victim."); Act of July 21, 2009, ch. 380, 2009 N.C. Sess. Laws 721 (captioned in part: "An act to provide that when sentencing a defendant convicted of a sex offense and upon request of the district attorney, the court may enter a permanent no contact order prohibiting any future contact of a convicted sex offender with the crime victim . . . ."); *see also State v. Hunt*, 221 N.C. App. 48, 55, 727 S.E.2d 584, 590 ("[T]he legislative purpose . . . [is] to protect an individual who fears contact with the defendant from being contacted or harmed, either mentally or physically, by the convicted sex offender who purportedly victimized him or her."), *appeal dismissed and disc. rev. denied*, 366 N.C. 390, 732 S.E.2d 581 (2012).

The statute provides that when "reasonable grounds exist for the victim [of a sex offense] to fear any future contact with the defendant, the judge shall issue [a] permanent no contact order." N.C.G.S. § 15A-1340.50(e). A permanent no contact order is defined as "[a] permanent injunction that prohibits any contact by a defendant with the victim of the sex offense for which the defendant is convicted." *Id.* § 15A-1340.50(a)(1). The "victim" is "[t]he person against whom the sex offense was committed." *Id.* § 15A-1340.50(a)(3). The trial court must "enter written findings of fact and the grounds on which the permanent no contact order is issued," and "[t]he no contact order shall be incorporated into the judgment." *Id.* § 15A-1340.50(e).

In the no contact order the trial court may impose various forms of relief specifically enumerated in the statute, as well as "other relief deemed necessary and appropriate by the court." *Id.* § 15A-1340.50(f). Each of the specifically enumerated forms of relief involves an order to the defendant not to engage in certain conduct towards the victim. *See id.* § 15A-1340.50(f)(1)-(6). The catch-all provision in subdivision (f)(7), however, does not specify whom the "other relief" may protect, and thus, can be viewed as ambiguous. *Id.* § 15A-1340.50(f)(7).

The title of the statute, the definition of "permanent no contact order" in subdivision (a)(1), and the specifically enumerated forms of relief in subdivisions (f)(1) through (f)(6) all unambiguously contemplate protection of the particular victim. Accordingly, because the purpose of the statute and the intent of the legislature appear to be to protect the particular victim of the sex offense, the catch-all provision in subdivision (f)(7) should similarly be limited to "other relief" for the protection of the victim of the sex offense only. *Cf. State v. Elder*, 368 N.C. 70, 72-73, 773 S.E.2d 51, 53 (2015) (concluding that the catch-all provision in N.C.G.S. § 50B-3(a)(13), which reads "any additional prohibitions or requirements the court deems necessary" and follows a list of twelve other prohibitions or requirements that the judge may impose on a party to a DVPO, "limits the court to ordering a *party* to act or refrain from acting" and "does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence," as the trial court sought to do (emphasis added)).

Thus, we agree with the Court of Appeals that N.C.G.S. § 15A-1340.50 protects the victim of the sex offense, and not third parties, and that the catch-all provision in N.C.G.S. § 15A-1340.50(f)(7) cannot be read to expand the reach of the statute to protect individuals other than the victim of the sex offense. *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 199-200.

Nonetheless, we also hold that under the statute, the trial court may prohibit a convicted sex offender from engaging in any of these forms of contact *indirectly* with the victim through the victim's family, friends, or acquaintances. Nearly all the enumerated options for relief are prohibitions against actions that can be taken indirectly as well as directly against the victim; the catch-all provision in (f)(7) permits additional restrictions if "necessary and appropriate." *See* N.C.G.S. § 15A-1340.50(f). Accordingly, to the extent that a defendant's contact with other individuals constitutes indirect engagement in any of the actions prohibited in subdivisions (f)(1) through (f)(7), such indirect contact is inherently

within the scope of the conduct that the trial court is authorized to prohibit under the statute. To specifically prohibit such conduct, however, the trial court must make appropriate findings.

Additionally, because the catch-all provision in subdivision (f)(7) allows the trial court to "[o]rder other relief deemed necessary and appropriate," it is within the scope of the trial court's authority to specifically list people whom the defendant may not contact when the trial court has concluded that such contact would constitute a violation of the specific restrictions imposed upon the defendant under subdivisions (f)(1) through (f)(6). Thus, the Court of Appeals erred in concluding that "the trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not 'victims' of the 'sex offense' committed by Defendant." *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 200.

Here both parties agree that N.C.G.S. § 15A-1340.50 authorizes a permanent no contact order for the protection of the victim only, and not for third parties. The parties differ, however, with respect to how to interpret the trial court's no contact order. The State argues that to be consistent with the statute, we must interpret the order to mean that the children were listed by the trial court to protect the victim, rather than the children themselves. Defendant, on the other hand, interprets the no contact order as protecting the children directly from any and all contact by him to the same extent as the victim, regardless of whether the contact is related to the victim. Defendant argues that his interpretation conflicts with the statute because the statute does not authorize protection for third parties. This disparity arises here because the trial court failed to make appropriate findings in support of the restrictions on defendant's indirect contact with the victim through third parties.

In essentially adopting defendant's interpretation of the order, the Court of Appeals erred. We do not agree that inclusion of the children's names under the (f)(7) catch-all provision comprehensively extends the protections of the entire order to the children too, as if they were the victims of the original assault. As discussed earlier, the trial court is not authorized to prohibit contact with third parties for the protection of those individuals; however, the trial court can prohibit indirect contact with the victim through specifically identified third parties if such a prohibition is supported by appropriate findings in the no contact order.

Accordingly, we reverse the decision by the Court of Appeals on the issue upon which we allowed review, and remand this case to that court for further remand to the trial court for entry of a permanent no contact

order containing appropriate findings to support any "Restrictions" on indirect contact with the victim through third parties. The other issues addressed by the Court of Appeals are not before this Court, and the Court of Appeals' decision on those matters remains undisturbed.

REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA
v.
JOHN JOSEPH CARVALHO, II

No. 369A15

Filed 21 December 2016

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. ___, 777 S.E.2d 78 (2015), finding no error after appeal from a judgment entered on 7 April 2014 by Judge Christopher W. Bragg in Superior Court, Union County. On 17 March 2016, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 12 October 2016.

Roy Cooper, Attorney General, by Mary Carla Babb, Assistant Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

As to the issue before this Court under N.C.G.S. § 7A-30(2), the decision of the Court of Appeals is affirmed. Further, we conclude that the petition for discretionary review as to the additional issue was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
DONALD LEE CURTIS

No. 122A16

Filed 21 December 2016

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. ___, 782 S.E.2d 522 (2016), finding no error after appeal from judgments entered on 12 March 2014 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Supreme Court on 11 October 2016.

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

Narendra K. Ghosh for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. DALTON

[369 N.C. 311 (2016)]

STATE OF NORTH CAROLINA
v.
MELISSA AMBER DALTON

No. 336PA15

Filed 21 December 2016

1. Appeal and Error—two jury arguments—one objection—arguments not separate

In a murder prosecution in which defendant raised the insanity defense, two statements by the prosecutor about defendant's likelihood of release, viewed in context, were not separate and distinct. The second was a summary of the first, so that defendant's objection to the first was sufficient.

2. Criminal Law—insanity defense—closing argument—defendant's likelihood of release

The evidence in a first-degree murder prosecution in which defendant claimed insanity did not support the assertions made by the prosecutor during closing arguments about defendant's likelihood of release. The prosecutor's argument was that it was very possible that defendant would be released in fifty days if she was found not guilty by reason of insanity. The level of possibility or probability of release was not the salient issue; rather, it was the evidence and all reasonable inferences that could be drawn from that evidence which should have governed counsel's arguments in closing. The only reasonable inference to be drawn from the evidence presented at trial was that it was highly unlikely that defendant would be able to demonstrate by a preponderance of the evidence within fifty days that she was no longer dangerous to others.

3. Criminal Law—insanity defense—closing argument—prejudicial

In a first-degree murder prosecution in which defendant claimed insanity, there was prejudicial error where the prosecutor argued to the jury that it was "very possible" that defendant would be released in fifty days when the overwhelming evidence was that defendant had committed the violent acts and that she had a longstanding history of substance abuse and mental illness. It was unlikely that defendant could demonstrate within fifty days that she was no longer dangerous to others. A reasonable possibility existed that the jury would have found defendant not guilty by reason of

insanity if the prosecutor had not made the improper remarks during closing arguments.

Justice JACKSON concurring.

Justices EDMUNDS and ERVIN join in this concurring opinion.

Chief Justice MARTIN dissenting.

Justice NEWBY 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. ___, 776 S.E.2d 545 (2015), finding prejudicial error after appeal from judgments entered on 14 April 2014 by Judge Marvin P. Pope, Jr. in Superior Court, Transylvania County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 11 October 2016.

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

Ann B. Petersen for defendant-appellee.

BEASLEY, Justice.

We consider whether the Court of Appeals erred in holding that the prosecutor's closing arguments exaggerating a defendant's likelihood of being released from civil commitment upon a finding of not guilty by reason of insanity constituted prejudicial error. We hold that the statements at issue were improper and prejudicial. Accordingly, we affirm the decision of the Court of Appeals granting defendant a new trial.

Melissa Amber Dalton (defendant) has a long history of substance abuse and mental illness, including bipolar disorder and borderline personality disorder. On or about 29 July 2009, defendant received inpatient treatment for mental health and addiction issues at the Neil Dobbins Center, a crisis treatment facility. At that time Daniel Johnson, M.D. diagnosed defendant with cocaine dependence, cannabis abuse and substance induced mood disorder, borderline personality disorder, and intrauterine pregnancy. Dr. Johnson prescribed Lexapro, a selective serotonin reuptake inhibitor (SSRI). Unbeknownst to Dr. Johnson, defendant had previously reacted negatively to another

SSRI, Prozac. Defendant was discharged from the facility approximately three days later.

After defendant returned home from Neil Dobbins, she continued taking Lexapro. Defendant's boyfriend noticed that defendant was acting unpredictably, and he removed their infant daughter from defendant's apartment. On the night of 20 August 2009, defendant's boyfriend called defendant's mother and asked her to check on defendant because he noticed that defendant seemed depressed. After observing defendant's strange behavior, defendant's mother went to the magistrate's office and "tried to have [defendant] committed." The magistrate told her to speak with a social worker and return the next day. That evening defendant exchanged some electronics for a gram of crack cocaine.

Defendant lived in an apartment in Brevard, North Carolina, where Naomi Jean Barker (Barker) and Richard Holden (Holden) were her neighbors. Early in the morning of 21 August 2009, defendant knocked on Barker and Holden's front door claiming to have money she previously borrowed from them. When Holden opened the door, defendant pushed him against the wall and stabbed him repeatedly. Defendant then approached Barker, calling her by the wrong name, and stabbed her six times. Defendant removed five dollars from Holden's wallet and left the apartment. Barker called 911. The police arrived to find Holden dead at the scene and Barker suffering from serious injuries.

Shortly after the incident, a rescue squad member saw defendant, who was still wearing bloody clothes, trying to catch a ride at a nearby church. An officer located defendant at the church and brought her to the police station, where she was interviewed by an S.B.I. agent. When the agent recited defendant's *Miranda* rights, she refused to speak further and requested an attorney.

On 5 October 2009, defendant was indicted for first-degree murder, first-degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant indicated her intent to plead the defense of insanity and was subsequently evaluated by David Bartholomew, M.D. regarding her capacity to proceed and her mental condition at the time of the offense.

At trial the defense offered two expert witnesses to testify as to defendant's mental state. Wilkie Wilson, Ph.D., an expert in neuropharmacology, testified about the effects of drugs on defendant's behavior at the time of the crime. He opined that SSRIs, such as Lexapro, should not be prescribed to people with bipolar disorder because this class of drugs

"can greatly disturb their mental function and push them over from a controlled state into mania." Dr. Wilson also opined that at the time of the homicide defendant was in a manic state.

George Corvin, M.D., a psychiatrist, testified about defendant's past history of mental illness and her state of mind at the time of the homicide. He opined that defendant's mental illness, her negative reactions to SSRIs, and her drug use affected her mental state at the time of the homicide. Ultimately, Dr. Corvin testified that defendant was manic at the time of the homicide. He also opined that, although treatable, defendant's mental illness cannot be cured and she will always be an addict, and added that if "[defendant] were not in treatment at all and were in a highly unstable, chaotic, abusive environment again and were to resume use of illicit substances, [then] her danger and her risk of recidivism . . . would go up substantially." The State did not present any expert witnesses to testify regarding defendant's mental condition.

At the charge conference, the prosecutor asked if he could comment on the civil commitment procedures that would apply if defendant was found not guilty by reason of insanity. The trial court agreed to permit the comment, but cautioned the prosecutor not to exaggerate defendant's chance of being released after fifty days. During closing arguments, the prosecutor made the following statements:

> [Prosecutor]: . . . . [Defendant] doesn't remember, so she says you can't hold me accountable, so find me not guilty by reason of insanity.
>
> And that way, as one of the lawyers mentioned, then she can be committed to a hospital if you find that verdict. *And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home.*
>
> [Defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> [Prosecutor]: *She very well could be back home in less than two months.*

(Emphasis added.) The prosecutor also argued, without objection, that defendant's request for a lawyer during the police interview was evidence of her sanity at the time of the homicide.

On 14 April 2014, the jury found defendant guilty of first-degree murder under a theory of felony murder, first-degree burglary, and assault

with a deadly weapon inflicting serious injury. The jury declined to find defendant not guilty by reason of insanity for all offenses. The trial court sentenced defendant to life imprisonment without parole and a consecutive term of twenty-six to forty-one months' of imprisonment. The trial court arrested judgment on the first-degree burglary conviction.

Defendant appealed her convictions to the Court of Appeals, arguing: (1) The trial court erred in overruling her objection to the State's argument that if she was found not guilty by reason of insanity, it was "very possible" that she could be released from civil commitment in fifty days; and (2) The trial court erred in failing to intervene *ex mero motu* when the State argued that her request for counsel during a police interview showed that she was sane. In a unanimous opinion filed on 15 September 2015, the Court of Appeals found prejudicial error in the prosecutor's closing arguments regarding defendant's likelihood of release if found not guilty by reason of insanity and held that defendant was entitled to a new trial. The Court of Appeals did not address defendant's argument regarding invocation of her *Miranda* rights as evidence of sanity.

On 17 March 2016, this Court allowed the State's petition for discretionary review on the issue of "[w]hether the Court of Appeals erred in distorting the transcript, applying an incorrect standard of review, and finding prejudicial error based upon the prosecutor's statements in closing argument regarding the potential for defendant's release from civil commitment if found not guilty by reason of insanity."

[1] First, the State contends that the Court of Appeals applied the incorrect standard of review because the court improperly read the prosecutor's two separate statements as one. Specifically, the State argues that the second statement should be reviewed for gross impropriety, not abuse of discretion, because defendant did not object to that statement at trial. We disagree.

When a defendant objects at trial, this Court reviews closing arguments to determine "whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). In reviewing closing arguments for an abuse of discretion, this Court must "first determine[ ] if the remarks were improper." *Id.* at 131, 558 S.E.2d at 106. If so, this Court must then "determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* at 131, 558 S.E.2d at 106 (citing *Coble v. Coble*, 79 N.C. 589 (1878); and *State v. Tyson*, 133 N.C. 692, 698, 45 S.E. 838, 840 (1903)).

Conversely, when a defendant fails to object at closing, this Court must determine if the argument was "so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002) (quoting *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003).

Here the issue is whether the prosecutor's closing arguments mentioning defendant's likelihood of release upon a finding of not guilty by reason of insanity were prejudicial. The State asserts that the prosecutor's arguments should be reviewed as two separate and distinct statements, the first to which defense counsel objected[1] and the second to which counsel did not.[2] "[S]tatements made during closing arguments," however, "will not be examined in isolation. 'Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.' " *State v. Ward*, 354 N.C. 231, 265, 555 S.E.2d 251, 273 (2001) (citing and quoting *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999)). When viewed in context, especially considering the conversation that took place during the charge conference,[3] the second statement is not separate and distinct from the first. It was made immediately after the trial court overruled the defense's objection and is a summary of the first statement.

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1. "And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home."

2. "She very well could be back home in less than two months."

3. The following discussion took place during the charge conference:

> [Prosecutor]: Judge, I would just ask the Court to allow me in closing argument to comment on [the civil commitment instruction].
>
> . . . .
>
> THE COURT: . . . I would have to limit – I mean, if you would make a statement like, well, she'll be out on the street in 50 days, that's not correct according to the law, so I would have to give them an instruction to disregard that statement, to correct that statement.
>
> [Prosecutor]: But she could be. Or she could be in five days.
>
> THE COURT: She could –
>
> [Prosecutor]: I think these people need to know that.
>
> THE COURT: Okay. Just be careful what you say is all I'm saying. Be cautious about it.

[2] Next, the State contends that the Court of Appeals' analysis regarding the propriety of the prosecutor's closing arguments was flawed. Specifically, the State argues that the Court of Appeals erred in relying on *State v. Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437 (2005), and distinguishing *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988). We disagree.

Closing arguments must "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108; *see State v. Covington*, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976) (stating that counsel "may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case" (citations omitted)). "Improper remarks are those calculated to lead the jury astray," such as "references to matters outside the record." *Jones*, 355 N.C. at 133, 558 S.E.2d at 108. Additionally, "[i]ncorrect statements of law in closing arguments are improper." *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995).

Pursuant to section 15A-1321, if a jury finds a defendant not guilty by reason of insanity, the trial court must order that the defendant be civilly committed. N.C.G.S. § 15A-1321 (2015). Within fifty days of commitment, the trial court must provide the defendant with a hearing, *id.* § 122C-268.1(a) (2015), and if, at that time, the defendant shows "by a preponderance of the evidence" that she "(i) no longer has a mental illness" or "(ii) is no longer dangerous to others," the court will release the defendant, *id.* § 122C-268.1(i) (2015). A defendant is "dangerous to others" when

> within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. *Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.*

Id. § 122C-3(11)(b) (2015) (emphasis added).

"During closing arguments, attorneys are given wide latitude to pursue their case." *State v. Prevatte*, 356 N.C. 178, 237, 570 S.E.2d 440, 472 (2002) (citing *State v. Scott*, 343 N.C. 313, 343, 471 S.E.2d 605, 623 (1996)), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). These arguments, however, "must be viewed in context and in light of the overall factual circumstances to which they refer." *State v. Locklear*, 363 N.C. 438, 477, 681 S.E.2d 293, 320 (2009) (Brady, J., dissenting) (quoting *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008)). If a prosecutor's argument regarding a defendant's release after a finding of not guilty by reason of insanity is not supported by a reasonable inference drawn from the evidence presented at trial, then such an argument is improper. *See Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437.

In *Millsaps* the defendant raised an insanity defense to first-degree murder and other related charges. *Id.* at 341, 610 S.E.2d at 438. Evidence presented at trial indicated that the defendant's mental illness could be treated, but not cured, and that the defendant would probably always need to be hospitalized. *Id.* at 348, 610 S.E.2d at 442. During closing arguments, the prosecutor said, "We submit it's 99 percent certain that [a judge] someday can and will say that, oh that conviction was six or eight or ten years ago, that's irrelevant, release him." *Id.* at 345, 610 S.E.2d at 441. Using an abuse of discretion standard, the court in *Millsaps* determined that the prosecutor's statements constituted error because they were outside the evidence presented at trial and held that they were "impermissibly prejudicial." *Id.* at 348, 610 S.E.2d at 442-43.

Here, as in *Millsaps*, the evidence presented at trial does not support the assertions made by the prosecutor during closing arguments. Specifically, the evidence does not support the conclusion that if defendant was found not guilty by reason of insanity, it is "very possible" that she would be released in fifty days. Instead, the evidence demonstrated that defendant will suffer from mental illness and addiction "for the rest of her life," and that "defendant's risk of recidivism would significantly increase if she were untreated and resumed her highly unstable lifestyle." *State v. Dalton*, ___ N.C. App. ___, ___, 776 S.E.2d 545, 551 (2015) (discussing Dr. Corvin's testimony). The State did not present any expert evidence at trial to rebut these conclusions. Additionally, the homicide for which defendant was convicted is prima facie evidence of dangerousness to others. N.C.G.S. § 122C-3(11)(b). Therefore, the only reasonable inference to be drawn from the evidence presented at trial is that it is *highly unlikely* that defendant would be able to demonstrate by a preponderance of the evidence within fifty days that she is no longer dangerous to others.

We reject the State's contention that *Millsaps* is distinguishable from the facts of this case. In essence, *Millsaps* stands for the proposition that counsel's argument regarding the likelihood of a defendant's release after being found not guilty by reason of insanity must be supported by the evidence. The level of possibility or probability of release is not the salient issue; rather, it is the evidence and all reasonable inferences that can be drawn from that evidence which govern counsel's arguments in closing. This Court's prior decisions do not support the State's possibility versus probability dichotomy, and we decline to recognize such a dichotomy at this time.

This Court also disagrees with the State's argument that *Allen* governs the disposition of this case. In *Allen* the defendant raised the defense of insanity to charges of first-degree murder and first-degree arson. 322 N.C. at 180-82, 367 S.E.2d at 628-29. During closing arguments, the prosecutor contended that if the jury found the defendant not guilty by reason of insanity, then the defendant "might be released within ninety days." *Id.* at 194, 367 S.E.2d at 636. This Court found that the prosecutor erred by "misstat[ing] the maximum recommitment period," but concluded that such "misstatement did not rise to the level of prejudicial error."[4] *Id.* at 195, 367 S.E.2d at 637. This Court did not, however, address whether the evidence presented at trial supported the argument. Despite the State's contention, this Court's silence on the issue of likelihood of release does not support a conclusion that this Court condoned the statement. Because *Allen* only addressed a misstatement of law made during closing arguments and not a misapplication of the facts, it is distinguishable from the instant case.

[3] Finally, the State contends that the Court of Appeals' analysis regarding prejudice was flawed because defendant cannot show "a reasonable possibility" that a different result would have been reached at trial had the error not been committed. *See* N.C.G.S. § 15A-1443(a) (2015). We disagree.

"Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole." *Jones*, 355 N.C. at 133, 558 S.E.2d at 108. Here the overwhelming evidence demonstrated that defendant committed the violent acts for which she was convicted and that she had a long-standing history of

4. The closing arguments at issue in *Allen* were reviewed for gross impropriety. *Allen*, 322 N.C. at 195, 367 S.E.2d at 636-37.

substance abuse and mental illness. By improperly presenting to the jury that it was "very possible" that defendant would be released in fifty days, the prosecutor prejudiced defendant by persuading the jury against a finding of not guilty by reason of insanity. Therefore, a reasonable possibility exists that the jury would have found defendant not guilty by reason of insanity if the prosecutor had not made the improper remarks during closing arguments.

We hold, therefore, that the Court of Appeals correctly applied the abuse of discretion standard when reviewing the prosecutor's closing arguments. The prosecutor's arguments exaggerating the likelihood of defendant's release if found not guilty by reason of insanity constituted prejudicial error because they were not supported by the evidence. For the reasons stated, we affirm the opinion of the Court of Appeals.

AFFIRMED.

Justice JACKSON concurring.

Although I concur in the majority opinion, I write separately to emphasize the impropriety of the prosecutor's jury argument discouraging a potential verdict of not guilty by reason of insanity.

In any case in which a criminal defendant pleads not guilty by reason of insanity, evidence necessarily will be presented that the defendant has mental illness and that the mental illness had a causal role in the defendant's criminal behavior. *See, e.g.*, *State v. Jones*, 293 N.C. 413, 425, 238 S.E.2d 482, 490 (1977) ("[T]he test of insanity as a defense to a criminal charge is whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act." (citing, *inter alia*, *State v. Humphrey*, 283 N.C. 570, 196 S.E.2d 516, *cert. denied*, 414 U.S. 1042 (1973))). Because the defendant has the burden of proving the affirmative defense of insanity, *State v. Wetmore*, 298 N.C. 743, 746-47, 259 S.E.2d 870, 873 (1979), even the defendant's own attorney may provide evidence that the defendant's mental illness caused him or her to engage in conduct that a jury might find shocking or reprehensible. Consequently, this Court has acknowledged that juries may feel "fear for the safety of the community" in cases involving the insanity defense. *See State v. Hammonds*, 290 N.C. 1, 15, 224 S.E.2d 595, 604 (1976).

In *Hammonds*, a case decided before contemporary procedures dealing with a plea of not guilty by reason of insanity were put in place, this Court explained that "fear for the safety of the community" could motivate a jury to "insure that [a] defendant will be incarcerated for his own safety and the safety of the community at large." *Id.* at 15, 224 S.E.2d at 603-04. We noted that "[t]here was considerable evidence that [the] defendant was incapable of knowing right from wrong at the time [of the crime], and also evidence that his mental condition would worsen with age." *Id.* at 15, 224 S.E.2d at 603. We explained:

> [A]lthough the jury understands that a verdict of guilty means the defendant will be punished by a prison sentence or fine, and that a verdict of not guilty means the defendant will go free, the average jury does not know what a verdict of not guilty by reason of insanity will mean to the defendant. This uncertainty may lead the jury to convict the accused in a mistaken belief that he will be set free if an insanity verdict is returned.

Id. at 14, 224 S.E.2d at 603. In *Hammonds* the district attorney had stated during closing arguments that a finding of not guilty by reason of insanity would result in the defendant's "walk[ing] out of this courtroom not guilty, returned to this community." *Id.* at 11, 224 S.E.2d at 601. Although the trial court sustained the defendant's objection to the State's argument, the court refused the defendant's request for an instruction explaining the statutory procedure for commitment following a verdict of not guilty by reason of insanity. *Id.* at 11, 224 S.E.2d at 601. We concluded that "the fate of [the] defendant, should he be acquitted by reason of insanity, became a central and confusing issue in the arguments of counsel." *Id.* at 13, 224 S.E.2d at 602. Emphasizing "[t]he atmosphere . . . of confusion and of uncertainty" that pervaded the trial, we granted the defendant a new trial and held "that, upon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out in substance the commitment procedures . . . applicable to acquittal by reason of mental illness." *Id.* at 15, 224 S.E.2d at 604.

Here, in accordance with *Hammonds*, the trial court instructed the jury on the relevant commitment procedures. The trial court stated:

> The defendant found not guilty by reason of insanity shall immediately be committed to a State mental facility. After the defendant has been automatically committed, the defendant shall be provided a hearing within 50

> days. At this hearing the defendant shall have the burden of proving by a preponderance of the evidence that the defendant no longer has a mental illness or is no longer dangerous to others. If the court is so satisfied, it shall order the defendant discharged and released. If the court finds that the defendant has not met the defendant's burden of proof, then it shall order that inpatient commitment continue for a period not to exceed 90 days. This involuntary commitment will continue subject to periodic review until the court finds that the defendant no longer has a mental illness or is no longer dangerous to others.

Neverthless, even with the additional instructions required by *Hammonds*, uncertainty remains as to how long a defendant will be committed if acquitted by reason of insanity. A juror has no way to estimate the likelihood that the defendant could be released at the hearing that must be provided "before the expiration of 50 days from the date of his commitment." N.C.G.S. § 122C-268.1(a) (2015). As in *Hammonds*, a juror who believes the evidence of insanity might nevertheless be motivated to find the defendant guilty based on fear for the safety of the community. In light of the unique uncertainty involved in a plea of not guilty by reason of insanity, it is inappropriately inflammatory for a prosecutor to speculate about the possibility that a defendant who was found not guilty by reason of insanity could be released after a short period of time.

Other courts have considered this issue and have shed light on its unique nature. *See*, *e.g.*, *Dunn v. State*, 277 Ala. 39, 43, 166 So. 2d 878, 882 (1964) (reversing the defendant's murder conviction after the solicitor argued that "if [the jury] sent this defendant as an insane man up to Tuscaloosa, the State mental institution, he wouldn't stay up there more than ten days"); *People v. Castro*, 5 Cal. Rptr. 906, 908-09, 182 Cal. App. 2d 255, 259-60 (1960) (evaluating the district attorney's remarks that "[i]f your verdict comes back legally [in]sane . . . just as soon as he regains his sanity, he is released" and that "he will be snubbing his nose at the Court, the jury and the Police Department," and concluding that these remarks "were patently misconduct" and constituted "a direct appeal to passion and prejudice"); *see also Durham v. United States*, 237 F.2d 760, 762 (D.C. Cir. 1956) ("The judge's statement that the defendant would 'be released very shortly' was highly prejudicial, for it implied a warning that dire consequences might result from a finding that the defendant was not guilty by reason of insanity."). In *State v. Johnson*, 267 S.W.2d 642 (Mo. 1954), *cert. denied*, 351 U.S. 957 (1956), *and cert. denied*, 357 U.S. 922 (1958), the prosecutor argued in pertinent part that if the jury

found the defendant not guilty by reason of insanity, "he would be out in two months." *Id.* at 645. The Missouri Supreme Court concluded that the prosecutor "was attempting to engender in the minds of the jurors the fear that if [the] defendant were acquitted on his defense of insanity, [he] would be soon discharged to rape again." *Id.* The court stated that the effect of the argument was "to incite the jury" and to urge the jury to make a decision "without reference to . . . the evidence tending to prove or disprove that [the] defendant was insane." *Id.* The court reversed the defendant's convictions. *Id.* at 646.

In *People v. Stack*, 244 Ill. App. 3d 166, 613 N.E.2d 1175, *appeal denie*d, 151 Ill. 2d 574, 616 N.E.2d 345 (1993), the prosecutor stated that a finding of not guilty by reason of insanity would allow the defendant to "beat this case" and "get[ ] out the door." *Id.* at 170, 613 N.E.2d at 1178. The Illinois appellate court stated that "[t]hese types of comments could only play on an insanity jury's inherent fear that its verdict might set a dangerous man free." *Id.* at 171-72, 613 N.E.2d at 1179. The court explained that regardless of whether a prosecutor's comments suggest "an automatic release, an immediate release in the near future, or one sometime down the road," "[a]ll such comments have the same prejudicial effect in insanity cases, and all are not to be tolerated." *Id.* at 177, 613 N.E.2d at 1182.

In the case *sub judice* the prosecutor told the jury it was "very possible" that defendant could be released within fifty days if the jury returned such a verdict. While the prosecutor accurately also mentioned the finding that would have to be made before such a release became possible, the argument implied that such a finding was routine.

Instead, history shows that few who are acquitted of murder or another serious crime on the grounds of insanity are released shortly after their acquittal. One need look no further than the case of John Hinkley, Jr., who was acquitted in 1982 on the basis of insanity of shooting President Ronald Reagan and three others, but was not released from institutional psychiatric care until 2016. Gardiner Harris, *John Hinckley, Who Tried to Kill Reagan, Will Be Released*, N.Y. Times (July 27, 2016), http://www.nytimes.com/2016/07/28/us/hinckley-who-tried-to-kill-reagan-to-be-released.html. Closer to home, Michael Hayes was not released completely until 2012 following his 1989 acquittal on the basis of insanity of four murders in Forsyth County. Michael Hewlett, *For first time in 20 years, Michael Hayes is free of court supervision*, Winston-Salem J. (Mar. 1, 2012) http://www.journalnow.com/news/local/for-first-time-in-years-michael-hayes-is-free-of/article_d5514c21-a980-5bf3-934e-53b3e76e8c05.html.

A prosecutor may aptly oppose a verdict of not guilty by reason of insanity, but the argument should neither distort the process that follows such a verdict nor pander to the emotions of the jurors. The suggestion here that defendant could "very well" soon walk scot-free was inaccurate, misleading, and prejudicial. Accordingly, I join in the majority's conclusion that the prosecutor's argument in this case was improper.

Justices EDMUNDS and ERVIN join in this concurring opinion.

Chief Justice MARTIN dissenting.

Defendant entered her neighbors' home early one morning and repeatedly stabbed one person, who lived, and another person, who died. At trial, a jury rejected defendant's insanity defense and convicted her of first-degree murder and other offenses. The majority grants defendant a new trial because it misreads a statement by the prosecutor that actually had no prejudicial effect. And the concurring opinion adds to the confusion by injecting a legal concept (preventing prosecutors from leading the jury away from the evidence and appealing to its passions) that has little or no bearing on this case.

When the prosecutor made the statement at issue here during his closing argument, he was discussing what could happen if the jury found defendant not guilty by reason of insanity. The prosecutor said: "And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home. . . . She very well could be back home in less than two months."[1] This statement was nearly correct, but it did slightly misstate the law. When a defendant who has allegedly inflicted or attempted to inflict serious physical injury or death is found not guilty by reason of insanity, state law requires that she be committed to civil confinement, *see* N.C.G.S. § 15A-1321(b) (2015), and that, once committed, the now-respondent will have a hearing within fifty days, *id.* § 122C-268.1(a) (2015). At this hearing, if the respondent proves by a preponderance of the evidence that (1) she "no longer has a mental illness" or (2) she "is no longer dangerous to others," the court "shall order the respondent

1. As can be seen in the majority's quotation from the record, in the language omitted by the ellipsis, defense counsel made an objection that the trial court overruled. Defendant did not object to the portion of the statement that the prosecutor made after the ellipsis. Both defendant and the majority maintain that the objection should carry over to that portion for the purposes of the standard of review. I am inclined to agree, but it follows that the statement needs to be reviewed as a whole.

discharged and released." *Id.* § 122C-268.1(i) (2015). So one way for a respondent to be released from civil confinement is to show that she is no longer dangerous to others. Had the prosecutor merely said that, it would have been a correct statement of law. But the addition of the words "or herself" made his statement incorrect. A respondent in a civil commitment hearing does not have to prove that she is not dangerous to herself—only that she is not dangerous to others. Because "[i]ncorrect statements of law in closing arguments are improper," *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995), the prosecutor's statement was improper.

The trial court's decision not to sustain defendant's objection to this statement, however, is reversible only if the statement was prejudicial. *See id.* at 616-18, 461 S.E.2d at 328-29. Prejudice exists when a statement creates "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . . The burden of showing such prejudice . . . is upon the defendant." *Id.* at 617, 461 S.E.2d at 329 (alterations in original) (quoting N.C.G.S. § 15A-1443(a) (1988), which has not been amended since then). The statement that the prosecutor made here was not prejudicial at all, for two reasons.

First, the prosecutor's statement was nearly accurate, and to the extent that it was inaccurate, the inaccuracy cut against the very argument that the prosecutor was making. The prosecutor was trying to argue that defendant could be free within fifty days after being acquitted by reason of insanity, if she proved by a preponderance of the evidence that she was no longer dangerous to others (which, by law, is true). The prosecutor's only error was to add an extra hurdle for defendant to prove, which made it sound to the jury like she had to prove more than she really did. Because this error could only have hurt the prosecutor's argument, there is not a reasonable possibility that, in the error's absence, the trial would have resulted in something other than a guilty verdict.

Second, we have repeatedly held, "as a general rule, [that] a trial court cures any prejudice resulting from a prosecutor's misstatements of law by giving a proper instruction" about that area of the law "to the jury." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citing *State v. Trull*, 349 N.C. 428, 452, 509 S.E.2d 178, 194 (1998), *cert. denied*, 528 U.S. 835 (1999)), *cert. denied*, 555 U.S. 835 (2008); *see also*, *e.g.*, *State v. Buckner*, 342 N.C. 198, 238, 464 S.E.2d 414, 437 (1995); *State v. Harris*, 290 N.C. 681, 695-96, 228 S.E.2d 437, 445 (1976). In this case, the trial court followed the pattern jury instruction and instructed the jury as follows:

> The defendant found not guilty by reason of insanity shall immediately be committed to a State mental facility. After the defendant has been automatically committed, the defendant shall be provided a hearing within 50 days. At this hearing the defendant shall have the burden of proving by a preponderance of the evidence that the defendant no longer has a mental illness or is no longer dangerous to others. If the [hearing] court is so satisfied, it shall order the defendant discharged and released.

Thus, the trial court correctly instructed the jury about what defendant would have to prove at her civil commitment hearing if the jury found her not guilty by reason of insanity. So even if the prosecutor's minor misstatement of law about what defendant would have had to show at her hearing had been at all harmful to her (which, as I have shown, it was not), it would have been cured by the trial court's proper jury instruction.

Based on these two reasons, this Court should reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further proceedings. But by misreading the prosecutor's statement, the majority is effectively analyzing the facts of a case that does not exist.

First of all, when framing the issue in this case, the majority refers to "the prosecutor's closing arguments exaggerating a defendant's likelihood of being released from civil confinement" after being acquitted by reason of insanity. Later in its opinion, it refers to "[t]he prosecutor's arguments exaggerating the likelihood of defendant's release if found not guilty by reason of insanity." The majority thus seems to interpret the phrase "very possible" to mean something like "probable" or "likely." But this misunderstands what the phrase means. Black's Law Dictionary defines "possibility" as "[t]he quality, state, or condition of being conceivable in theory or in practice." *Possibility*, *Black's Law Dictionary* (10th ed. 2014). And the word "very" is simply a word of emphasis; when combined with "possible," it is essentially a synonym of "actually," as in "actually possible" or "very well could be."[2] Nowhere does the prosecutor say that anything is "probable" or "likely."[3]

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2. Indeed, the prosecutor followed up his "very possible" statement with the statement that defendant "very well could be back home in less than two months" if she could prove her case.

3. The concurring opinion claims that the prosecutor's statement "implied that . . . a finding [resulting in release from civil confinement in 50 days] was routine." But I see no basis for this inference, and the concurrence does not provide any.

That gets to an even more basic problem with the majority's reading of the prosecutor's statement: it incorrectly identifies what the prosecutor said was "very possible." The majority paraphrases the prosecutor as saying that, "if defendant was found not guilty by reason of insanity, it is 'very possible' that defendant *would be* released in fifty days," and that "it is 'very possible' that defendant *will be able* to show by a preponderance of the evidence in fifty days that she is no longer dangerous to others." (Emphases added.) But as it is plain to see, the prosecutor actually said nothing about the likelihood that defendant would win her hearing. He merely said that she would win her hearing *if she proved her case*. And except in the one particular that I have already discussed, the statement of law that followed the words "very possible that" was not only possible, but certain.[4] To the extent that this statement was improper, it was because the prosecutor got the law wrong, not because he said anything at all about the likelihood of defendant's release.

Given the certainty of the statute ("shall order the respondent . . . released," N.C.G.S. § 122C-268.1(i)), one might wonder why the prosecutor would have limited his statement of law with the words "very possible." On the record before us, the most likely reason for his use of those words is that he was responding to the trial judge's instruction at the charge conference. During that conference, when the prosecutor asked whether he could comment on the commitment procedures that follow a verdict of not guilty by reason of insanity,[5] the trial judge said, "Okay." But he then instructed the prosecutor, "Just be careful what you say is all I'm saying. Be cautious about it." By hedging his statement with the words "very possible," the prosecutor appears to have been trying to heed what the trial judge said.

Once one recognizes where the majority has gone wrong, it becomes clear why the majority mistakenly asks whether the prosecution's

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4. The concurring opinion says that "it is inappropriately inflammatory for a prosecutor to speculate about the possibility that a defendant who was found not guilty by reason of insanity could be released after a short period of time." Of course, if what the prosecutor said was an inflammatory "appeal[ ] to [the] jury's passions," *State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002), then the pattern jury instruction about insanity verdicts, and indeed the law itself in this area, is inflammatory as well.

5. Under this Court's holding in *State v. Hammonds*, when a defendant requests an instruction on the commitment procedure and proceedings that follow a verdict of not guilty by reason of insanity, and has presented evidence to support that verdict, the trial court must provide the appropriate instruction. 290 N.C. 1, 15, 224 S.E.2d 595, 604 (1976). Defendant did so here, and the trial court complied with *Hammonds* by agreeing to issue and then properly issuing the instruction.

(slightly inaccurate) statement of law is a reasonable inference from the evidence presented at trial—namely, because the majority has misunderstood what the prosecutor said. The prosecutor's statement did not draw *any* inference from the evidence; setting aside the words "or herself," the prosecutor made a statement of law that could be made about any defendant found not guilty by reason of insanity.

Proceeding from the premise that the prosecutor said something he did not say, the majority comments that "the only reasonable inference to be drawn from the evidence presented at trial is that it is *highly unlikely* that defendant would be able to demonstrate by a preponderance of the evidence within fifty days that she is no longer dangerous to others." Even this conclusion is likely mistaken. There are arguably no reasonable inferences that could be drawn from the evidence produced at trial about the results of defendant's future civil commitment hearing. The body of evidence produced at the two proceedings may not be—indeed, likely will not be—very similar. For instance, the majority discusses the testimony of Dr. Corvin, one of defendant's experts. But defendant would not have to tender Dr. Corvin as an expert in a future hearing. She could retain a new expert to evaluate her condition, who might reach different conclusions from Dr. Corvin. In fact, because defendant's goal at her civil commitment hearing would be to show that she was *not* insane, or at least that she was no longer dangerous to others in spite of her insanity, she would likely seek to offer different evidence at her hearing than she did at her trial. To be sure, it is concerning when either a defendant or the State engages in speculation as to the outcome of a future hearing, as the majority (incorrectly) accuses the State of doing in this case—and I fear that *Hammonds* instructions may invite this behavior.

The concurring opinion, meanwhile, does not accuse the prosecutor of speculation. Under its logic, though, a defendant can request and receive a *Hammonds* instruction, but the prosecutor cannot discuss that instruction in his closing statement. That ruling would prohibit the prosecutor from arguing the whole case—the law as well as the facts—even though he is legally entitled to do so. *See* N.C.G.S. § 7A-97 (2015) ("In jury trials the whole case as well of law as of fact may be argued to the jury."). Ironically, the concurrence does not seem to be concerned when the *defense* counsel argues the whole case, including the *Hammonds* instruction, which defense counsel did here. What is good for the goose should be good for the gander.

Finally, the majority wrongly invokes the Court of Appeals' decision in *State v. Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437 (2005), to support

its argument. The prosecutor's statement during his closing argument in *Millsaps* could hardly be more different from the prosecutor's statement here. In *Millsaps*, the prosecutor said that "it's 99 percent certain that [a] [j]udge someday can and will say that, oh that conviction was six or eight or ten years ago, that's irrelevant, release him." *Id.* at 345, 610 S.E.2d at 441. That statement forecast a very high likelihood of release as the result of a hearing many years in the future. Here, by contrast, the prosecutor did not predict defendant's likelihood of release at all. Saying that it is very *possible* a defendant will be released *if she proves her case* is not comparable to saying that it is nearly *certain* a defendant will be released in six to ten years without any conditions attached. One statement is a comment on what the law purportedly requires; the other is a prediction about the outcome of a future proceeding.

Both the majority opinion and the concurring opinion have inadvertently distorted this case. The majority has created imaginary facts, while the concurrence has reimagined the law. In reality, the statement that defendant challenges was not prejudicial. I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
COREY DEON FLOYD

No. 474PA14

Filed 21 December 2016

1. Assault—attempted—recognized in N.C.

Reversing a portion of the opinion of the Court of Appeals, the Supreme Court held that the offense of attempted assault with a deadly weapon inflicting serious injury is recognized in North Carolina. Although there was precedent that an attempted assault was an attempt of an attempt for which one may not be indicted, there were two common law rules under which a person could be prosecuted for assault. The second, the show-of-violence rule, did not involve an attempt to cause injury to another person. Because the attempted assault offense is recognized offense, defendant's 2005 conviction was valid, and the trial court did not err by denying defendant's motion to dismiss the charges of possession of a firearm by a felon and attaining habitual felon status.

2. Constitutional Law—effective assistance of counsel—disagreement over tactics

A prosecution was remanded to the Court of Appeals with entry of an order dismissing an ineffective assistance of counsel claim without prejudice to assert in a motion for appropriate relief where defendant told the trial court that his attorney was not asking the questions defendant wanted him to ask of a detective, the record did not shed light on the nature and substance of the questions, defendant was generally disruptive throughout trial, and it could not be ascertained whether defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings.

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

Justice NEWBY concurring.

Justice BEASLEY concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 238 N.C. App. 110, 766 S.E.2d 361 (2014), vacating in part judgments entered on 30 October 2013 by Judge Jack W. Jenkins in Superior Court, Lenoir County, finding error in defendant's conviction for possession of a weapon of mass destruction, and remanding for a new trial on that charge. Heard in the Supreme Court on 31 August 2015.

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

Marilyn G. Ozer for defendant-appellee.

JACKSON, Justice.

In this case we consider whether a prior conviction for "attempted assault with a deadly weapon inflicting serious injury" can support later charges for possession of a firearm by a convicted felon and attaining habitual felon status. We also consider whether defendant is entitled to a new trial on the basis that the trial court failed to act appropriately to address an impasse between defendant and his attorney concerning the questioning of a prosecution witness on cross-examination. We answer

the first inquiry in the affirmative. As to the second, we vacate the Court of Appeals' opinion and remand for entry of an order dismissing defendant's appeal without prejudice to his right to file a motion for appropriate relief.

On 16 October 2008, Kinston police received information that a man was "hanging" in a specific area of town while "carrying around" a "sawed-off shotgun . . . in his pants." Upon reaching the scene and seeing the man—whom one of the officers recognized as defendant—officers began chasing him. Detective Robbie Braswell, who was directly behind defendant, observed defendant pull a shotgun from the waistband of his pants and throw it over a fence into a yard. Detective Braswell stopped chasing defendant and secured the weapon.

Defendant was arrested approximately two years later. On 31 January 2011, defendant was indicted for possession of a firearm by a convicted felon, possession of a weapon of mass destruction, and attaining habitual felon status. The indictment for possession of a firearm by a convicted felon listed the underlying felony as "N.C.G.S. 14[-]32(a) Attempted Assault With a Deadly Weapon Inflicting Serious Injury," with defendant having "pled guilty on December 5, 2005," for which he was "sentenced to 25-30 months in the North Carolina Department of Corrections."[1] This conviction also was listed in the habitual felon indictment as one of the three prior felony offenses required to support a finding of habitual felon status. Defendant pleaded not guilty to all charges.

The case proceeded to trial in October 2013. The State submitted a copy of the 5 December 2005 judgment showing the prior conviction

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1. Section 14-32 describes three different types of felonious assault with a deadly weapon and assigns varying punishment levels to each as follows:

> (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.
>
> (b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.
>
> (c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

N.C.G.S. § 14-32 (2015). Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury pursuant to section 14-32(a), but ultimately pleaded no contest to "attempted assault with a deadly weapon inflicting serious injury." He was punished as a Class F felon.

for attempted assault with a deadly weapon inflicting serious injury. At the close of the State's evidence, defendant moved to dismiss the possession of a firearm by a convicted felon charge for insufficiency of the evidence on grounds that the underlying felony conviction listed in the indictment as the basis for this charge, attempted assault with a deadly weapon, is not a recognized crime in North Carolina. In addition to the 5 December 2005 judgment, the State submitted copies of two other prior felony conviction judgments in support of the habitual felon charge. Defendant moved to dismiss the habitual felon charge on the same grounds, asserting that the 5 December 2005 felony conviction is invalid. The trial court denied both motions. The jury found defendant guilty of possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and attaining habitual felon status. The trial court sentenced defendant to two concurrent terms of 151 to 191 months of imprisonment.

Defendant appealed. In a unanimous decision, the Court of Appeals concluded that "attempted assault is not a recognized criminal offense in North Carolina" and therefore that defendant's 2005 conviction for attempted assault with a deadly weapon inflicting serious injury could not support the convictions for possession of a firearm by a convicted felon and attaining habitual felon status. *Floyd*, 238 N.C. App. at 115, 766 S.E.2d at 366. In pertinent part, the court reasoned:

> In *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10, *cert. denied*, 281 N.C. 315, 188 S.E.2d 898-99, we . . . not[ed] that an assault consists of "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another." *Id.* at 265, 188 S.E.2d at 12 (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). As a result, since the effect of an attempted assault verdict was to find the defendant guilty of an "attempt to attempt" and since "[o]ne cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt," *id.*, we held that an attempted assault is simply not a recognized criminal offense in this jurisdiction.

Floyd, 238 N.C. App. at 114, 766 S.E.2d at 366 (second alteration in original). Accordingly, the court held that the trial court erred by denying defendant's motions to dismiss the charges of possession of a firearm by a convicted felon and attaining habitual felon status. *Id.* at 127, 766 S.E.2d at 374.

Turning to the remaining charge of possession of a weapon of mass destruction, the Court of Appeals concluded that the trial court failed to identify and properly address an impasse that arose between defendant and his trial counsel. The Court of Appeals determined that this failure violated defendant's constitutional right to control the nature of his defense and therefore granted defendant a new trial on this charge. *Id.* at 127-28, 766 S.E.2d at 374. The State filed a petition for discretionary review, which we allowed on 9 April 2015.

[1] In its appeal the State argues that the Court of Appeals' conclusion that attempted assault is not a recognized criminal offense in North Carolina was based upon an overly narrow definition of assault. As a result, the State contends that the Court of Appeals incorrectly held that defendant's 2005 conviction for attempted assault with a deadly weapon inflicting serious injury could not support the convictions for possession of a firearm by a convicted felon and attaining habitual felon status. We agree.

The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm. N.C.G.S. § 14-415.1(a) (2015). A person may be charged with attaining habitual felon status when he or she "has been convicted or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof." *Id.* § 14-7.1 (2015). In this case the State relied upon defendant's 2005 conviction for attempted assault with a deadly weapon inflicting serious injury to support charges against him pursuant to these statutes. Accordingly, the validity of defendant's convictions depends upon whether attempted assault with a deadly weapon inflicting serious injury is recognized as a criminal offense pursuant to our current law.

"The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense." *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) (citations omitted). An attempt crime "is punishable under the next lower classification as the offense which the offender attempted to commit." N.C.G.S. § 14-2.5 (2015). As a logical matter, these principles may be applied to the offense of assault with a deadly weapon inflicting serious injury in a straightforward fashion. A person who intends to "assault[ ] another person with a deadly weapon and inflict[ ] serious injury," and who does an overt act for that purpose going beyond mere preparation, but who

ultimately fails to complete all the elements of this offense—for example, by failing to inflict a serious injury—would be guilty of the attempt rather than the completed offense. N.C.G.S. § 14-32(b).

In *Currence* our Court of Appeals highlighted a different consideration: this Court has indicated that a person "cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt." 14 N.C. App. at 265, 188 S.E.2d at 12 (quoting *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912)). The court stated that

> assault is generally defined as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm."

Id. at 265, 188 S.E.2d at 12 (quoting *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305). The court then reasoned that attempted assault amounted to "an attempt to attempt." *Id.* at 265, 188 S.E.2d at 12 (quotation marks omitted).

Initially, we note that reliance upon *Hewett* may be questionable in this context because *Hewett* involved a substantially different legal issue. The defendant in *Hewett* was charged in an indictment that failed to allege his criminal intent. 158 N.C. at 628, 74 S.E. at 357. Nevertheless, this Court concluded that by alleging that the defendant attempted to commit rape, the indictment necessarily included the intent element. *Id.* at 629, 74 S.E. at 357. As support for this conclusion, the Court stated:

> practically all definitions of an attempt to commit a crime, when applied to the particular crime of rape, necessarily imply and include "an intent" to commit it.
>
> There may be offenses when in their application to them there is a distinction between "attempt" and "intent," but that cannot be true as applied to the crime of rape. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent to commit rape," and punished as such.
>
> As held by the Supreme Court of California, one cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt.

Id. at 629, 74 S.E. at 357 (citing, *inter alia*, *People v. Thomas*, 63 Cal. 482, 482 (1883) (per curiam)).[2] Since *Hewett* did not involve a defendant who was "indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt," *id.* at 629, 74 S.E. at 357, this statement is apparently dictum. In any event, because we conclude that attempted assault is not an attempt of an attempt, and thus does not implicate the dicta in *Hewett*, we do not address the extent to which *Hewett* may apply to other criminal offenses not at issue in the case *sub judice*.

Specifically, we observe that by stating that attempted assault amounts to "an attempt to attempt," 14 N.C. App. at 265, 188 S.E.2d at 12, the court in *Currence* overlooked an important aspect of the law of assault in North Carolina. Although our statutes criminalize the act of assault, *see*, *e.g.*, N.C.G.S. § 14-32.4(a) (2015), "[t]here is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules," *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. In *Roberts* we explained that our common law encompasses "two rules under which a person may be prosecuted for assault in North Carolina." *Id.* at 658, 155 S.E.2d at 305 (citation omitted).

First, as *Currence* recognized, we noted that assault may be defined as "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Roberts*, *id.* at 658, 155 S.E.2d at 305 (citations omitted) (quoting 1 Strong's North Carolina Index: *Assault and Battery* § 4 (1957)). We stated that this definition of assault "places emphasis on the intent or state of mind of the person accused." *Id.* at 658, 155 S.E.2d at 305.

Second, we described another definition of assault, which the Court of Appeals did not acknowledge in *Currence*. *Compare id.* at 658, 155 S.E.2d at 305, *with Currence*, 14 N.C. App. at 265, 188 S.E.2d at 12. We explained:

> The decisions of the Court have, in effect, brought forth another rule known as the "show of violence rule," which

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2. Although the 1912 decision in *Hewett* stated that "[t]here is no such criminal offense as an 'attempt to commit rape,' " the offense of attempted rape is recognized in our law today. *See*, *e.g.*, *State v. Wortham*, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987) ("[T]he elements of attempted rape are (1) 'the *intent* to commit the rape and [2] an *overt act* done for that purpose. . . .' ") (alterations in original) (quoting *State v. Freeman*, 307 N.C. 445, 449, 298 S.E.2d 376, 379 (1983))).

> places the emphasis on the reasonable apprehension of the person assailed. The "show of violence rule" consists of a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed.

Roberts, 270 N.C. at 658, 155 S.E.2d at 305. Our jurisprudence regarding the show-of-violence rule appears to have evolved from early cases in which a person caused another to flee, leave a place sooner than desired, or otherwise alter course through the threatened use of a weapon. *See State v. Rawles*, 65 N.C. 334 (1871); *State v. Church*, 63 N.C. 15 (1868); *State v. Hampton*, 63 N.C. 13 (1868). In *State v. Shipman*, 81 N.C. 513 (1879), one of the earliest cases in which this Court articulated the show-of-violence rule, the evidence showed that the defendant had used threatening language against another man and walked with a knife in his hand to within six feet of where the other man was standing. *Id.* at 514. Upon seeing this threatening display, the other man became "alarmed" and "left immediately." *Id.* at 516. In concluding that the defendant's behavior constituted assault, this Court explained that the definition of assault encompasses a situation in which "persons having in their possession dangerous weapons, by following and threatening [the victim], put him in fear and induce him to go home sooner than he would have done, or by a different road from that he was wont to go." *Id.* at 515 (citing *Rawles*, 65 N.C. 334).

As defined in *Roberts*, and as illustrated by *Shipman*, the show-of-violence rule does not involve an attempt to cause injury to another person, but is based upon a violent act or threat that causes fear in another person. Accordingly, although North Carolina law provides one definition of assault that describes the offense in terms of "an overt act or an attempt, or the unequivocal appearance of an attempt," our common law also provides a second definition that does not include any reference to attempt. *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. Attempted assault is not an attempt of an attempt because assault may be defined by the show-of-violence rule. *Cf. State v. May*, 137 Ariz. 183, 186, 669 P.2d 616, 619 (Ct. App. 1983) (explaining that because the defendant was charged pursuant to an Arizona statute that defines assault in terms of "an act complete in itself and not an attempt to commit a different crime," "the academic arguments of whether criminal sanctions should attach to an attempt to commit an attempt are inapplicable"); *State v. Music*, 40 Wash. App. 423, 432, 698 P.2d 1087, 1093 (1985) (" 'Attempt

to attempt' problems may arise with respect to the first type of assault because the *attempt* to commit a battery is an element of that type of assault. . . . However, since there is no attempt element in the second type of assault, a charge of attempted assault within that definition is not an 'attempt to attempt.' " (internal citation omitted)). We note that there is substantial overlap between the two definitions of assault because an overt act or attempt to do immediate physical injury to another person is likely to constitute a show of violence that causes fear and a change of behavior. As a result, relying upon the show-of-violence rule to define attempted assault does not create a significant limitation on the conduct covered by this offense.

For these reasons, we hold that the offense of attempted assault with a deadly weapon inflicting serious injury is recognized in North Carolina. We therefore reverse the portion of the Court of Appeals' opinion concluding that attempted assault is not recognized in this state, that defendant's 2005 conviction is a nullity, and that as a result, the trial court erred by denying defendant's motion to dismiss the charges of possession of a firearm by a felon and attaining habitual felon status.[3]

[2] Next, the State argues that the Court of Appeals incorrectly determined that defendant was entitled to a new trial based upon the trial court's alleged failure to recognize and address an impasse between defendant and his attorney during the trial. At the conclusion of defense counsel's cross-examination of Detective Braswell, defendant became agitated because he did not believe defense counsel was asking the right questions. Defendant stated, "I need to say something to the witness," began interrupting the trial judge, and then attempted to speak again, at which point the judge directed the jury to step out of the courtroom. After the jury had left the courtroom, this exchange took place:

> [Defendant]: You won't ask him what I need to ask him.
>
> The Court: Thank you. All right, let the record reflect that the twelve members of the jury and the alternate juror have left the courtroom. Let the record reflect that while the jurors were in here, [defendant] started asking questions. I called [defense] counsel to the bench, asked

3. The State alternatively argues that even if attempted assault with a deadly weapon inflicting serious injury is not a recognized offense, defendant cannot raise that challenge at this stage in this proceeding because doing so would constitute an impermissible collateral attack. Because we conclude that this offense is recognized in this state, we do not reach the State's alternative argument.

> counsel . . . to go back and talk to [defendant], privately, to determine what [defendant's] questions were or what [defendant] wanted to present to the jury. [Defense counsel] attempted to do so. In the meantime, [defendant] began speaking out on his own volition in the presence of the jury, and so the Court immediately sent the jury out of the courtroom.
>
> And, [defendant], I can't let you disrupt this trial, and I've already warned you --
>
> [Defendant]: I mean, I can -- I can question the witness.
>
> The Court: Your lawyer questions the witness. You don't --
>
> [Defendant]: Then I'll represent myself. I'm firing my lawyer.
>
> The Court: No. No, you can't do that, I'm sorry.
>
> [Defendant]: See, I can represent myself.
>
> The Court: No, I'm sorry. In my discretion, I'm not allowing you to do that.
>
> [Defendant]: I can represent myself. I can represent myself. It ain't -- ain't no kind of mess like that, because he ain't questioned him what I'm going to question him.
>
> The Court: Well, you ask [defense counsel] what you want him to ask the --
>
> [Defendant]: I done told him, and ain't none of that stuff been done, and I'm going for the --
>
> The Court: You ask [defense counsel] what questions you want to present to the witnesses in front of the jury.

The State then requested a determination regarding whether defendant should be held in contempt and removed from the courtroom for making repeated statements in front of the jury. The trial court instructed defendant to wait his turn before speaking and admonished him to cease engaging in disruptive behavior. Defendant made additional comments regarding the questions he desired to pose to Detective Braswell:

> [Defendant]: . . . I waited till it was our turn to question this witness, and now I ain't even questioned him.

> The Court: Well, but the way the process works, you don't ask the questions, your attorney asks the questions.
>
> [Defendant]: He didn't ask -- I told him to ask him. Things wasn't stated. It was things I needed -- I needed to [sic] them to hear.
>
> The Court: He is a professional. He is --
>
> [Defendant]: The truth be told about --
>
> The Court: -- very experienced. He knows what he's doing. The manner in which he asks questions is part of the expertise provided by counsel. It's part of the assistance of counsel that's provided. And you are not an attorney, and you are relying on his assistan[ce].
>
> [Defendant]: I know the law. I know the law.
>
> The Court: -- and you can talk to him and confer with him and let him know what questions you think should be asked, but he asks the questions, not you.
>
> [Defendant]: He got -- he got to ask them, then, and put things out. That's the thing, I'll represent myself. I don't even need a counsel.

The trial court again denied defendant's request to represent himself and ordered that he be removed from the courtroom in light of his disruptive behavior throughout the trial, but stated that defense counsel would be given frequent opportunities to consult with his client. Nonetheless, before his removal, defendant continued to challenge his counsel's questioning of Detective Braswell:

> [Defendant]: Well, see, I'll tell him the question, to ask him something, and he don't do it. Come on, man.
>
> The Court: Sir, you're doing it now, and I have not held you in contempt. In my discretion, I have not done that. The State has not brought any obstruction charges --
>
> [Defendant]: Well, I'm -- I'm gonna give him -- I'm gonna have -- I'm gonna talk to him so he can say what I would say?
>
> The Court: That's how it works, sir.
>
> [Defendant]: Exactly. And he didn't do it. That's what I'm talking about.

> The Court: Well, that's between you and [your trial counsel] --
>
> [Defendant]: I'm gonna get another attorney.
>
> The Court: -- that's not for me to interject.
>
> . . . .
>
> The Court: I've given you ample opportunity to not be disruptive, to assist in your defense while in the courtroom. It's readily apparent to the Court that you're not willing to do that.

The record does not disclose the nature of the questions defendant wanted his attorney to ask Detective Braswell.

Defendant argues that the trial court's failure to adequately address the impasse between defendant and his counsel regarding the questions to be asked of Detective Braswell, and the court's failure to instruct counsel to comply with defendant's wishes at that time, amounted to a denial of his constitutional rights to control his defense and confront witnesses. Defendant argues, and the Court of Appeals held, that the trial court's actions violated this Court's opinion in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991).

In *Ali* we recognized that tactical decisions, including how to conduct cross-examination, which jurors to strike, and the motions to be made at trial are within the province of the attorney. *Id.* at 404, 407 S.E.2d at 189 (citation omitted). The defendant in *Ali* argued that "the trial court denied him his right to assistance of counsel by allowing him, rather than his lawyers, to make the final decision regarding whether [a particular individual] would be seated as a juror." *Id.* at 402, 407 S.E.2d at 189. We stated that

> when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship. In such situations, however, defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.

Id. at 404, 407 S.E.2d at 189. Because defense counsel in *Ali* made such a record, we concluded that the defendant was not denied effective assistance of counsel. *Id.* at 404, 407 S.E.2d at 189-90.

We have stated that

> [ineffective assistance of counsel (IAC)] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. . . .
>
> . . . .
>
> Accordingly, should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief (MAR)] proceeding.

State v. Fair, 354 N.C. 131, 166-67, 557 S.E.2d 500, 524-25 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114 (2002). Here, defendant told the trial court that his attorney was not asking the questions defendant told him to ask Detective Braswell; however, the record does not shed any light on the nature or the substance of those desired questions. We note that defendant was generally disruptive throughout trial, was forced to leave the courtroom when this behavior escalated while Detective Braswell was on the witness stand, and had to consult with his attorney outside of court thereafter. In light of defendant's disruptive behavior, we cannot ascertain, without engaging in conjecture, whether defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings. As a result, it cannot be determined from the cold record whether an absolute impasse existed as described in *Ali*. Accordingly, we vacate this portion of the Court of Appeals' opinion and remand this case to that court for entry of an order dismissing defendant's IAC claim without prejudice to his right to assert it in a motion for appropriate relief.

REVERSED IN PART; VACATED IN PART AND REMANDED.

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

Justice NEWBY concurring.

I fully agree with the majority opinion. I write separately simply to emphasize another way to understand the validity of the attempt

crime at issue. It seems confusion has arisen because the term "assault" sometimes refers to an attempted battery, but often in our criminal code "assault" refers to a completed battery. Here the disputed crime is attempted felonious assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32. In this context, the term "assault" does not mean an attempted battery but requires a completed battery.

Section 14-32 describes three different types of felonious assault with a deadly weapon and assigns varying punishment levels to each:

> (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.
>
> (b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.
>
> (c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

N.C.G.S. § 14-32 (2015).

In *State v. Birchfield* we recognized that the statutory definition of "assault" under N.C.G.S. § 14-32 requires a completed battery:

> To warrant the conviction of an accused of a felonious assault *and battery* under G.S. 14-32 . . . the State must produce evidence sufficient to establish beyond a reasonable doubt that he did these four things: (1) That he committed an assault *and battery* upon another; (2) that he committed the assault and battery with a deadly weapon; (3) that he committed the assault and battery with intent to kill the victim of his violence; and (4) that he thus inflicted on the person of his victim serious injury not resulting in death.

235 N.C. 410, 413, 70 S.E.2d 5, 7 (1952) (emphases added) (citations omitted) (upholding conviction for assault with a deadly weapon inflicting serious bodily injury). Thus, while the statute uses the term "assault," it means "assault and battery" or a completed battery. *See Williams v. United States*, No. 1:11CR408-1, 2014 WL 1608268, at *1 (M.D.N.C. Apr. 22, 2014) (unpublished) (noting that "while other . . . cases suggest a definition of misdemeanor assault under N.C. Gen. Stat. § 14-33 . . . the *Birchfield* definition of felony assault highlights the presence of a battery element").

Assault and battery is commonly defined as "the act of threatening to attack someone physically and then actually doing it." *Assault and Battery*, *Black's Law Dictionary* (10th ed. 2014). One who intends to commit felonious assault and battery with a deadly weapon, and who does an overt act for that purpose going beyond mere preparation, but who ultimately fails to complete all the elements of this offense, would be guilty of attempted felonious assault and battery under N.C.G.S. § 14-32 rather than the completed offense. *See State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) (Proving "attempt" requires the State to show that a defendant intended to commit the underlying crime and committed "an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense.").

The record reflects that defendant, represented by counsel, pled guilty to the offense of attempted assault with a deadly weapon inflicting serious injury in violation of N.C.G.S. § 14-32. Nevertheless, defendant suggests that he should not be held accountable for a conviction based upon his own admissions and plea agreement and further asks us to speculate as to which of the elements under N.C.G.S. § 14-32 were satisfied. Since we are dealing with a theoretical issue, the question is simply whether under any scenario a defendant could be convicted of attempted assault with a deadly weapon inflicting serious injury in violation of N.C.G.S. § 14-32. Because the statutory definition of "assault" as used in N.C.G.S. § 14-32 requires a completed battery, one can be convicted of attempting to commit the offense.

Justice BEASLEY concurring in part and dissenting in part.

I concur with the judgment of the Court as to defendant's challenge to the right to control his defense in the cross-examination of Detective Braswell. But, because I would conclude that attempted assault with a deadly weapon inflicting serious injury is not a cognizable offense in North Carolina, I would affirm the judgment of the Court of Appeals on this issue, and therefore, I respectfully dissent.

The issue before this Court is whether "attempted assault with a deadly weapon inflicting serious injury" describes a cognizable felony offense that can serve as an underlying felony conviction in a charge for possession of a firearm by a convicted felon and for attaining habitual felon status. I would hold that it is not for several reasons. First, the statutory framework laid out by our General Assembly in Chapter 14, Article 8 of the North Carolina General Statutes evidences the legislature's determination that one cannot be convicted of *attempting* an

"assault with a deadly weapon inflicting serious injury." Second, I would hold that the show-of-violence definition of assault is not applicable to the term "assault" in "assault with a deadly weapon inflicting serious injury." Finally, I would conclude that the show-of-violence theory of assault cannot be logically extended to include an inchoate crime—namely, an attempt.

First, the statutory framework laid out in Chapter 14, Article 8 demonstrates a legislative decision that attempted "assault with a deadly weapon inflicting serious injury" is not a crime for which a defendant may be convicted. Chapter 14, Article 8 was enacted to provide different punishments for varying degrees of the common law crime of assault and not as an endeavor to "create separate and distinct criminal offenses." *State v. Lefler*, 202 N.C. 700, 701, 163 S.E. 873, 874 (1932) ("The Legislature did not mean to create separate and distinct criminal offenses, such as assault with [a] deadly weapon, assault with serious damage, assault upon a woman when the man is over eighteen years of age, or any other kind of assault which is aggravated in its circumstances or [of] serious and lasting damage in its consequences." (quoting *State v. Smith*, 157 N.C. 578, 584, 72 S.E. 853, 855 (1911))). "There is but one offense, the crime of assault, and the varying degrees of aggravation were mentioned only for the purpose of graduating the punishment." *Id.* at 701, 163 S.E. at 874 (quoting *Smith*, 157 N.C. at 584, 72 S.E. at 855 (1911)).

For example, subsection 14-32(b) states that "[a]ny person who assaults another person with a deadly weapon *and* inflicts serious injury shall be punished as a Class E felon," N.C.G.S. § 14-32(b) (2015) (emphasis added), and subdivision 14-33(c)(1) states that any person who commits an assault and "[i]nflicts serious injury upon another person *or* uses a deadly weapon" is "guilty of a Class A1 misdemeanor," *id.* § 14-33(c)(1) (2015) (emphasis added). Under either statute a defendant would be guilty of assault but, based on how the assault was carried out, would be punished differently.

Here defendant was convicted in 2005 of attempted assault with a deadly weapon inflicting serious injury.[1] *See id.* § 14-32(b) ("Any person

1. Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury pursuant to subsection 14-32(a), but ultimately pleaded no contest to "attempted assault with a deadly weapon inflicting serious injury" and was punished as a Class F felon. Though the indictment against defendant in the present action states that his previous felony conviction was under subsection 14-32(a), it appears defendant's 2005 conviction was actually under subsection 14-32(b), as indicated by the language of what

who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon."). According to section 14-2.5, "[u]nless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense which the offender attempted to commit." *Id.* § 14-2.5 (2015). As such, defendant was punished as a Class F felon. The conduct that would constitute an "attempt" to "assault with a deadly weapon inflicting serious injury" is, however, subject to a different classification covered by another assault statute, namely subdivision 14-33(c)(1). Therefore, defendant should not have been punished under the provisions of N.C.G.S. §§ 14-32(b) and 14-2.5.

As the majority reiterates, an attempt is (1) an intent to commit an act, and (2) "an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense." *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) (citations omitted). Because an attempt occurs when the defendant's actions "fall[ ] short of the completed offense," it follows that attempt necessitates that some element of the crime is not complete. As applied to the crime of "assault with a deadly weapon inflicting serious injury,"[2] the majority states:

> As a logical matter, these principles may be applied to the offense of assault with a deadly weapon inflicting serious injury in a straightforward fashion. A person who intends to "assault[ ] another person with a deadly weapon and inflict[ ] serious injury," and who does an overt act for that purpose going beyond mere preparation, but who ultimately fails to complete all the elements of this offense—for example, by failing to inflict a serious injury—would be guilty of the attempt rather than the complete offense.

Contrary to the majority's assertion, if a person "fails to complete all of the elements of the offense—for example, by failing to inflict a serious injury" or failing to use a deadly weapon—that person is guilty

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he pleaded to as well as how he was punished. Thus, I use subsection 14-32(b), as does the majority, as an illustration. However, the same rationale that follows can be applied to subsection 14-32(a), namely that any uncompleted element of that assault puts the offense under another enumerated statute, and is not properly classified as an attempt to violate that particular statute.

2. The elements of assault with a deadly weapon inflicting serious injury are "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Wilson*, 203 N.C. App. 110, 114, 689 S.E.2d 917, 920 (2010) (quoting *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997)).

of the type of assault described in N.C.G.S. § 14-33(c)(1),[3] which is an assault inflicting serious injury upon another person *or* by use of a deadly weapon, and *not* an attempt to violate subsection 14-32(b).

> The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor.

State v. Lowe, 150 N.C. App. 682, 685, 564 S.E.2d 313, 316 (2002) (quoting *State v. Owens*, 65 N.C. App. 107, 110-11, 308 S.E.2d 494, 498 (1983)) (holding that it was plain error for the trial court not to instruct on misdemeanor assault inflicting serious injury under N.C.G.S. § 14-33 when it was questionable whether fists and a toilet seat or lid were used as deadly weapons).[4] Any "attempt" to "assault[ ] another person with a deadly weapon and inflict[ ] serious injury" that "fall[s] short of the completed offense" is, per the legislature's determination, an assault as described in another statute, such as misdemeanor assault. Thus, in such a situation, a defendant should be convicted under the appropriate assault statute and not under a theory of "attempt" of a different statute.

That a defendant should be convicted under the appropriate assault statute is especially important given the legislature's classifications of various types of assault and their corresponding punishments. As stated above, a person who violates subsection 14-32(b) is guilty of a Class E felony and a person who violates subdivision 14-33(c)(1) is guilty of a Class A1 misdemeanor. If a person commits a subdivision 14-33(c)(1) misdemeanor assault by either inflicting serious injury on another person or by use of a deadly weapon, but is convicted for an attempted assault under section 14-32(b) instead, then that person would be punished for a Class F felony instead of a misdemeanor. *See* N.C.G.S. § 14-2.5.

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3. "Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (1) Inflicts serious injury upon another person or uses a deadly weapon[.]" N.C.G.S. § 14-33(c)(1).

4. In *Owens* the Court of Appeals held that the trial judge should have submitted a jury instruction on misdemeanor assault with a deadly weapon under N.C.G.S. § 14-33 as well as on felonious assault under section 14-32 when there was evidence that the victim's injury was not serious. 65 N.C. App. at 111, 308 S.E.2d at 498.

The majority's holding here undermines the legislature's determination of how to differentiate and punish different types of assault by sanctioning charging and convicting defendants of a felony when these defendants would otherwise be facing a misdemeanor charge or conviction under the statutes as written.

Therefore, given the statutory scheme for assaults laid out by the General Assembly in Chapter 14, Article 8 of the North Carolina General Statutes, I would conclude that one cannot be convicted of attempting an "assault with a deadly weapon inflicting serious injury."

Second, attempted assault with a deadly weapon inflicting serious injury is not cognizable under the show-of-violence theory of assault. "There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). Citing *Roberts*, the majority notes that this Court has defined two theories of assault. A person commits assault by

> an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

Id. at 658, 155 S.E.2d at 305 (quoting 1 Strong's North Carolina Index: *Assault and Battery* § 4 (1957)). A person also commits assault by "a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed." *Id.* at 658, 155 S.E.2d at 305.

In determining that attempted assault with a deadly weapon inflicting serious injury is a recognized offense in North Carolina, the majority holds that this attempted assault is possible under this Court's "show-of-violence" theory of assault.[5] Nonetheless, at the end of its analysis, the majority does not explain how an assault under the show-of-violence

5. The majority seems to acknowledge without explicitly stating that there is no such crime as an attempted "attempted battery" type of assault. I agree. Though the majority calls into question this Court's statement to that effect in *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912) by labeling it dicta, "[i]t is universally agreed that there is no such crime as an attempt to commit an assault of the attempted battery variety." *Dabney v. State*, 159 Md. App. 225, 246, 858 A.2d 1084, 1096 (2004) (noting other states' stances on attempt of "attempted battery" assault as discussed in Marjorie A. Shields, Annotation, *Attempt to Commit Assault as Criminal Offenses*, 93 A.L.R. 5th 683 (2004)).

theory would apply in the context of an attempted assault with a deadly weapon inflicting serious injury.

The majority states that

> [T]here is a substantial overlap between the two definitions of assault because an overt act or attempt to do immediate physical injury to another person is likely to constitute a show of violence that causes fear and change of behavior. As a result, relying upon the show-of-violence rule to define attempted assault does not create a significant limitation on the conduct covered by this offense.

I disagree. The majority's combination or "substantial overlap" of the two definitions of assault is essentially a reiteration of one definition of assault, specifically the "attempted battery" definition of assault: "[A]n overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to *put a person of reasonable firmness in fear of immediate bodily harm*." *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305 (emphasis added) (citations omitted) (quoting 1 Strong's North Carolina Index: *Assault and Battery* § 4 (1957)). This definition of assault already takes into account that an overt act of violence or attempt to do immediate physical injury to another person is likely to cause fear and probably a change of behavior in another person. The show-of-violence theory then must be something different.

As noted by the majority in this case and this Court in *Roberts*, the show-of-violence rule developed from early decisions by this Court in which a person "offered to strike" another person, without yet "attempting to strike," but still the offer to strike—or show of violence—was such that it caused the other person to reasonably fear that immediate bodily harm would ensue if he or she did not take a different course of conduct. *See State v. Shipman*, 81 N.C. 513 (1879) (holding that the defendant committed assault when he used threatening language and walked within six feet of the victim with a knife in hand, which alarmed the victim and caused him to immediately leave in order to avoid imminent danger); *State v. Rawles*, 65 N.C. 334, 336-37 (1871) (holding that the defendants committed assault—an offer to strike—when they approached the victim with weapons while using threatening language, which caused the victim to fear imminent bodily injury and take a different path home, though none of the weapons were "taken from the [bearer's] shoulder" and they did not get nearer to the victim than about

seventy-five yards); *State v. Church*, 63 N.C. 15 (1868) (holding that the defendant committed assault—an offer of violence—when he drew a pistol from its sheath but did not cock or point it and walked within ten steps of the victim using threatening language causing the victim to fear bodily harm and leave); *State v. Hampton*, 63 N.C. 13 (1868) (holding that the defendant committed assault—an offer of violence—when he threatened to hit the victim and made a fist, but did not draw his arm back to hit him, causing the victim to fear bodily harm and take another course). As these early cases demonstrate, a show of violence—or an offer of violence as it was previously termed—is something less than an attempted violent act. *Hampton*, 63 N.C. 14 ("An assault is usually defined to be an offer, or attempt to strike another. An *attempt* means something more than an *offer*."). As such, one cannot attempt to "show violence" because by its nature a "show of violence" is something less than an attempt of violence.

Based on the observation that a show of violence is less than an attempt, I would conclude that the show-of-violence definition is not applicable to the statutory offense of "assault with a deadly weapon inflicting serious injury," much less an attempt of such action. As the majority notes in its opinion, "the show-of-violence rule does not involve an attempt to cause injury to another person, but is based upon a violent act or threat that causes fear in another person." And, as just described above, this show of violence is something less than or precedes an attempt to physically harm another. Thus, the show-of-violence definition of assault is inapposite to the type of assault described in subsection 14-32(b), in which infliction of a serious injury is an element. As such, only the common law definition that defines assault as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another" is applicable to this assault statute.[6] For this reason as well, I disagree with the majority's conclusion that one can attempt an assault with a deadly weapon inflicting serious injury under a show-of-violence theory of assault.

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6. Admittedly, it would be helpful if the legislature included a definition of assault in the felony assault statute as the statute does seem to envision a battery as the concurrence asserts. While *State v. Birchfield* describes the elements of section 14-32 to include a battery, 235 N.C. 410, 413, 70 S.E.2d 5, 7 (1952), this Court has recognized on numerous other occasions that the elements of the offense do not require a completed battery. *See*, *e.g.*, *State v. King*, 343 N.C. 29, 35-36, 468 S.E.2d 232, 237 (1996) ("The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are: '(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death.' " (quoting *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994))), *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994) ("The essential elements of the crime

Lastly, I disagree with the majority that North Carolina law recognizes any type of attempted assault. As this Court noted in *Roberts*, the difference between the two theories of assault is where the emphasis is placed. The common law rule "places emphasis on the intent or state of mind of the person accused," whereas the show-of-violence rule "places the emphasis on the reasonable apprehension of the person assailed." *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. Thus, assault is either an attempt to cause injury or a show of violence that would put a reasonable person in fear imminent injury. The majority concludes that attempted assault is a cognizable offense in North Carolina under the show-of-violence theory of assault but does not explain how one may attempt to show violence, except to say that the definition of a show-of-violence assault "does not include any reference to attempt," and thus by definition, because it is not an attempt to attempt, it may be attempted. As explained above, relying upon the show-of-violence rule to describe attempted assault is not logical because a show of violence causing someone to reasonably fear an injury is something less than even attempting to injure.

Therefore, I would conclude that attempted assault with a deadly weapon inflicting serious injury is not a crime in North Carolina.[7] Because I would hold that attempted assault with a deadly weapon is not a cognizable offense in North Carolina and therefore cannot serve as an underlying conviction for possession of a firearm by a felon or for attaining habitual felon status, these judgments should be vacated. For the reasons stated above, I would affirm the Court of Appeals on this issue and conclude that attempted assault is not a crime in North Carolina under our common law definition of assault. Thus, I respectfully dissent from the majority's holding on this issue.

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are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death."), *State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 640 (1968) ("The crime of felonious assault, created and defined by G.S. s 14-32, consists of these essential elements: (1) An assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) Not resulting in death."); *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962) ("The statutory offense embodies (1) assault, (2) with a deadly weapon, (3) the use of the weapon must be with intent to kill, (4) the result of the use must be the infliction of serious injury, and (5) which falls short of causing death.").

7. The State argued in its brief that the defendant could not challenge his conviction of attempted assault with a deadly weapon inflicting serious injury because such a challenge would be an impermissible collateral attack. At oral arguments, however, the State conceded that an indictment that alleges an offense that does not exist would not create jurisdiction in the trial court. The trial court does not have jurisdiction to enter judgment on a nonexistent crime and thus defendant's attempted assault conviction would be a nullity.

STATE OF NORTH CAROLINA
v.
JORGE JUAREZ

No. 360PA15

Filed 21 December 2016

1. Homicide—instructions—felony murder—instructions—lesser included offenses

The trial court correctly denied defendant's request for instructions on second-degree murder and voluntary manslaughter in a felony murder prosecution where there was no conflict in the evidence regarding whether defendant committed the underlying felony of discharging a firearm into an occupied vehicle while it was in operation. The conflicting evidence must relate to whether defendant committed the crime charged, not whether defendant was legally justified in committing the crime.

2. Homicide—felony murder—instructions—aggressor doctrine—no plain error

There was no plain error where the trial instructed the jury on the aggressor doctrine of self-defense in a felony murder prosecution. The State did not solely rely on the theory that defendant was the aggressor but also offered evidence that tended to contradict defendant's evidence as to each of the other elements of self-defense. Defendant failed to establish that, absent an instruction on the aggressor doctrine, the jury would have credited his account of the night's events over other contrary testimony.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 325 (2015), finding no error in part and reversing in part and remanding a judgment entered on 6 June 2014 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Supreme Court on 30 August 2016.

Roy Cooper, *Attorney General*, *by I. Faison Hicks*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Emily H. Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

BEASLEY, Justice.

We consider whether the Court of Appeals erred in reversing the trial court's judgment based upon defendant's conviction for first-degree felony murder and remanding this case to the trial court for a new trial. The Court of Appeals held that the trial court committed reversible error by failing to instruct the jury on the lesser-included offenses of second-degree murder and voluntary manslaughter, and that the trial court committed plain error when it instructed the jury on the aggressor doctrine of self-defense. For the reasons stated herein, we reverse the decision of the Court of Appeals and reinstate the jury's verdict and the trial court's judgment.

This case involves events surrounding the death of Alfonzo Canjay (Canjay) in the early morning hours of 31 October 2012. On the evening of 30 October 2012, Jorge Juarez (defendant) and four acquaintances—Marcos Chaparro (Chaparro), Karen Gonzalez (Gonzalez), Erick Martinez (Martinez), and Karina Rodriguez (Rodriguez)—were drinking beer and smoking marijuana at Chaparro's Durham residence. Around 11:30 p.m., the group left Durham in Chaparro's Acura to drive Rodriguez home to Foxhall Village in Raleigh. The group arrived at Rodriguez's residence at around 12:00 a.m. on 31 October. After dropping off Rodriguez, Chaparro and Martinez decided to steal car stereos from vehicles parked at Foxhall Village, while Gonzales and defendant waited in the Acura.

As Chaparro and Martinez searched for car stereos to steal, the noises awoke Canjay and his wife, who looked outside and saw the two men peering into the family's car and trying to steal things. Upon being discovered, Chaparro and Martinez ran away to find Gonzalez and defendant. Once the four reunited, either Chaparro or Martinez insisted Gonzales drive back toward Canjay's house to retrieve a stereo they had hidden nearby before leaving Foxhall Village.

Meanwhile, Canjay got in his car and began searching for the men, while his wife and daughter unsuccessfully tried to call the police. Canjay saw the Acura as it neared the main office at the complex, and he drove toward it from the opposite direction such that Gonzalez had to swerve to go around his vehicle. Canjay turned his vehicle around to pursue the Acura and pulled up to its passenger side, making two separate sideswipe contacts with the Acura. After the second impact, defendant fired one shot from his handgun into the driver's side of Canjay's vehicle. The shot struck Canjay in the heart, killing him. Gonzales then drove the group back to Durham.

On 8 April 2013, defendant was indicted for the first-degree murder of Alfonzo Canjay. The State proceeded against defendant on the theory of felony murder based on the underlying felony of discharging a firearm into an occupied vehicle while it was in operation. The trial court denied defendant's motion to dismiss at the close of the State's evidence and again at the close of all of the evidence. The trial court also denied defendant's request for instructions on the lesser-included offenses of second-degree murder and voluntary manslaughter. The trial court instructed the jury on perfect self-defense including the aggressor doctrine; defendant did not object to this instruction. The jury found defendant guilty of first-degree felony murder, and the trial court sentenced him to life imprisonment without parole. Defendant appealed.

On appeal defendant argued that the trial court (i) erred in denying his motion to dismiss; (ii) erred in denying his request for instructions on the lesser-included offenses of second-degree murder and voluntary manslaughter; and (iii) erred in instructing the jury that perfect self-defense was unavailable if defendant was the initial aggressor. The Court of Appeals held that the trial court did not err in denying defendant's motion to dismiss, *State v. Juarez*, ___ N.C. App. ___, ___, 777 S.E.2d 325, 328 (2015), but did err by not instructing the jury on the lesser-included offenses and also erred by instructing on the aggressor doctrine of self-defense, *id.* at ___, ___, 777 S.E.2d at 330, 331.

We allowed the State's petition for discretionary review of the Court of Appeals' decision regarding the trial court's two alleged errors. Before this Court the State argues that the Court of Appeals erred in concluding that the trial court should have given jury instructions on second-degree murder and voluntary manslaughter as lesser-included offenses of first-degree murder. The State also argues that the Court of Appeals erred in concluding that the trial court's instruction on the aggressor doctrine amounts to plain error. We agree on both counts.

[1] First, we consider whether the Court of Appeals correctly concluded that the trial court erred in not instructing the jury on the lesser-included offenses. The court held that it was error not to instruct on the lesser-included offenses because the evidence was conflicting as to whether defendant acted in self-defense when he shot into Canjay's vehicle, which could render him not guilty of first-degree felony murder, and there was sufficient evidence to support a lesser-included offense. *Id.* at ___, 777 S.E.2d at 331. The Court of Appeals' reasoning was incorrect.

Felony murder is a murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery,

kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17 (2015). This statute expresses the legislature's deliberate policy choice to hold individuals accountable "for deaths occurring during the commission of felonies," regardless of whether the murder was intentional or unintentional. *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994), *cert. denied*, 515 U.S. 1163, 115 S. Ct. 2619 (1995). Because "the purpose of the felony murder rule is to deter even accidental killings from occurring during the commission of a dangerous felony," self-defense is not a defense to felony murder. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995).

Perfect self-defense, however, may be a defense to the underlying felony, which would thereby defeat the felony murder charge, *id.* at 668-69, 462 S.E.2d at 499, as well as any other homicide charge, *see, e.g.*, *State v. Bush*, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982) ("Perfect self-defense excuses a killing altogether. . . ."). Perfect self-defense is a right that "rests upon necessity" to save one's self and is "only available to a person who is without fault," thus excusing a defendant altogether. *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). If a person cannot establish perfect self-defense, but can establish imperfect self-defense,[1] that person's actions are not excused and he is still at fault, though to a lesser degree. *See State v. Crisp*, 170 N.C. 785, 792, 87 S.E. 511, 514-15 (1916) (explaining that perfect self-defense is only available "where the party . . . was wholly free from wrong or blame," whereas if a party "was in the wrong . . . then the law justly limits his right of self-defense,

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1. Perfect self-defense requires the existence of all four of the following elements:

> (1) [I]t appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
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> (2) [D]efendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) [D]efendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) [D]efendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

Bush, 307 N.C. at 158-59, 297 S.E.2d at 568 (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (italics omitted)). Imperfect self-defense is available when elements (1) and (2) listed above are met, but either the defendant "was the aggressor or used excessive force." *Id.* at 159, 297 S.E.2d at 568.

and regulates it according to the magnitude of his own wrong" (quoting *Reed v. State*, 11 Tex. Ct. App. 509, 517-18 (1882))). Therefore, imperfect self-defense is not available as a defense to the underlying felony utilized to support a felony murder charge because allowing for such a defense, when the defendant is in some manner at fault, would defeat the purpose of the felony murder rule. *Richardson*, 341 N.C. at 668, 462 S.E.2d at 499.

Here, if defendant acted in perfect self-defense when he shot into Canjay's vehicle, the killing would be excused and defendant absolved of any fault. *Bush*, 307 N.C. at 158, 297 S.E.2d at 568. Only under a theory of imperfect self-defense could defendant be found guilty of a lesser degree of homicide. *See id.* at 159, 297 S.E.2d at 568 (stating that when a defendant shows "only that he exercised the imperfect right of self-defense," instead of perfect self-defense, he "remain[s] guilty of at least voluntary manslaughter"). Allowing jury instructions on the lesser-included offenses of second-degree murder and voluntary manslaughter would permit the jury to find defendant not guilty of felony murder while at the same time finding defendant was, in some manner, at fault for shooting into Canjay's vehicle—the underlying felony in question. This outcome would undermine the imperfect self-defense limitation set out in *Richardson* and the purpose of the felony murder rule. Therefore, the trial court was correct to deny defendant's request for instructions on second-degree murder and voluntary manslaughter.

The Court of Appeals' and defendant's reliance on *State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002), is misguided, as is defendant's further reliance on *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), and *State v. Camacho*, 337 N.C. 224, 446 S.E.2d 8 (1994). In *State v. Millsaps* this Court explained that when the State prosecutes a defendant for first-degree murder solely on a felony murder theory, a trial court must instruct on lesser-included offenses when the evidence of the underlying felony is in conflict and the evidence would support a lesser-included offense. 356 N.C. at 565, 572 S.E.2d at 773 (citing *Thomas*, 325 N.C. 583, 386 S.E.2d 555). The trial court is not required to instruct on lesser-included offenses if the evidence of the underlying felony is not in conflict and all the evidence supports felony murder. *Id.* at 565, 572 S.E.2d at 774 (citing *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976)). Here evidence of the underlying felony is not in conflict and the evidence does not rationally support the lesser-included offenses.

In *Thomas* the State prosecuted the defendant for first-degree murder on the theory of felony murder, which rested on the theory that the

defendant acted in concert with the passenger in her car. 325 N.C. at 594-95, 386 S.E.2d at 561.

> In order to convict defendant . . . of first degree felony murder the State was required to offer evidence that, among other things, defendant did act in concert with [her passenger] when he committed the underlying felony of discharging a firearm into the [victim's] residence. If there is conflicting evidence on this aspect of the case, *i.e.*, evidence that defendant did not act in concert with [her passenger] and, therefore, did not commit the underlying felony, then defendant is entitled to an instruction on whatever degree of homicide less than first degree murder the evidence supports.

Id. at 595, 386 S.E.2d at 562 (citing *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973)). This Court determined that there was conflicting evidence regarding whether the defendant shared a common purpose or plan with her passenger. *Id.* at 596-98, 386 S.E.2d at 562-63. The State's evidence tended to show that she was acting in concert with the passenger, while other evidence indicated that the defendant did not know that her passenger had a gun or was going to shoot it. *Id.* at 597, 386 S.E.2d at 563. Thus, "the trial court's failure to instruct the jury on the lesser included offense of involuntary manslaughter" when the evidence would support such a conviction was reversible error. *Id.* at 599, 386 S.E.2d at 564.

Similarly, in *Camacho* the State prosecuted the defendant for first-degree murder on the theory that the defendant was lying in wait for the victim. 337 N.C. at 227, 446 S.E.2d at 9. This Court determined that the evidence was conflicting regarding whether the crime was committed by means of lying in wait. *Id.* at 231, 446 S.E.2d at 12. The State's evidence tended to show that the defendant was lying in wait, while the defendant's evidence tended to show that he was in the victim's room only to retrieve personal belongings. *Id.* at 232, 446 S.E.2d at 12. Thus, the trial court's failure to instruct the jury on second-degree murder and involuntary manslaughter when the evidence would support such a conviction was error. *Id.* at 234-35, 446 S.E.2d at 14.

As these cases demonstrate, the conflicting evidence must relate to whether defendant *committed* the crime charged, not whether defendant was legally *justified* in committing the crime. *See Camacho*, 337 N.C. at 231-32, 446 S.E.2d at 12; *Thomas*, 325 N.C. at 598, 386 S.E.2d at 563; *see also State v. Gause*, 227 N.C. 26, 30, 40 S.E.2d 463, 466 (1946)

(finding that the evidence conflicted as to whether the defendant was lying in wait; therefore, the trial court erred by not instructing the jury on second-degree murder).

Here there is no conflict in the evidence regarding whether defendant committed the underlying felony of discharging a firearm into an occupied vehicle while it was in operation.[2] The Court of Appeals aptly notes that "[t]here is no question that this transpired. Defendant fired a gun into Canjay's vehicle while Canjay was driving it." *Juarez*, ___ N.C. App. at ___, 777 S.E.2d at 331. Defendant does not dispute that he *committed* this crime. Rather, defendant claims that his conduct was *justified* because he was acting in self-defense. While the evidence regarding whether defendant acted in self-defense is in conflict, there is no conflict in the evidence regarding whether defendant discharged a firearm into Canjay's vehicle while Canjay was driving it. Thus, the evidence that defendant committed the underlying felony is not in conflict.

Moreover, in *Millsaps* this Court reiterated that "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." 356 N.C. at 561, 572 S.E.2d at 771 (citing *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, 516 U.S. 884, 116 S. Ct. 223 (1995)). Here the jury could not rationally find defendant guilty of the lesser-included offenses of second-degree murder or voluntary manslaughter and acquit him of the greater offense of first-degree murder. As discussed above, because defendant was prosecuted on the basis of a felony murder theory, he could only be acquitted of first-degree murder if the jury found he acted in perfect self-defense regarding the underlying felony. If defendant acted in perfect self-defense, a jury could not find him guilty of the lesser-included offenses of second-degree murder or voluntary manslaughter because "[p]erfect self-defense excuses a killing altogether." *Bush*, 307 N.C. at 158, 297 S.E.2d at 568. Therefore, the Court of Appeals erred in concluding that the trial court should have instructed on the lesser-included offenses.

[2] Next, we consider whether the Court of Appeals correctly concluded that the trial court erred when it instructed the jury on the aggressor doctrine of self-defense. Because defendant did not object to the instruction as given at trial, we consider whether this instruction constitutes plain

2. The elements of discharging a firearm into an occupied vehicle while in operation are (1) willfully and wantonly discharging (2) a firearm (3) into an occupied vehicle (4) that is in operation. N.C.G.S. § 14-34.1(b) (2015).

error. *See* N.C. R. App. P. 10(a)(4); *see also State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

The plain error standard requires a defendant to "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 citation omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[P]lain error is to be 'applied cautiously and only in the exceptional case' " in which a defendant can show that the prejudicial error is "one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* at 518, 723 S.E.2d at 334 (alteration in original) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict. *Id.* at 518, 723 S.E.2d at 334.

Here, when the trial court instructed the jury on perfect self-defense, it included instructions on the aggressor doctrine—that a defendant is not entitled to the benefit of self-defense if he was the aggressor in the situation. *See Marsh*, 293 N.C. at 354, 237 S.E.2d at 747 (describing the aggressor element of self-defense). When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct the jury on the aggressor doctrine of self-defense. *See State v. Washington*, 234 N.C. 531, 535, 67 S.E.2d 498, 501 (1951); *see also State v. Jenkins*, 202 N.C. App. 291, 297, 688 S.E.2d 101, 105-06 (citations omitted), *disc. rev. denied*, 364 N.C. 245, 698 S.E.2d 665 (2010). On appeal the Court of Appeals determined there was no evidence that defendant was the aggressor in the situation, and thus, it was error to instruct on the aggressor doctrine. The Court of Appeals, however, failed to analyze whether such error had the type of prejudicial impact that "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceeding." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Therefore, the court's analysis was insufficient to conclude that the alleged error rose to the level of plain error.

On review, it is not necessary for this Court to decide whether an instruction on the aggressor doctrine was improper, because defendant failed to show that the alleged error was so fundamentally prejudicial as to constitute plain error. For defendant to meet his burden under *Lawrence*, he would have to show that, absent the erroneous instruction, it is probable that the jury would have found that he acted

in perfect self-defense. To find that defendant acted in perfect self-defense, the jury would have to find that defendant honestly believed his actions of shooting into an occupied car were necessary to protect himself from the threat of death or serious bodily harm, that defendant's belief was reasonable, and that defendant did not use excessive force or more force than necessary to protect himself from death or great bodily harm.[3] *See State v. Moore*, 363 N.C. 793, 796-97, 688 S.E.2d 447, 449-50 (2010). Defendant failed to sufficiently demonstrate that, absent instructions on the aggressor doctrine, the jury would not have rejected his claim of self-defense for other reasons.

On appeal defendant mainly focused on the evidence that tended to show he was not the aggressor. The jury, however, could have rejected defendant's claim of self-defense for other reasons. The State did not solely rely on the theory that defendant was the aggressor, but offered evidence that tended to contradict defendant's evidence as to each of the other elements of self-defense as well. Defendant has failed to establish that, absent an instruction on the aggressor doctrine, the jury would have credited his account of the night's unfolding over other contrary testimony.

Defendant has not shown that "the jury probably would have returned a different verdict" if the trial court had not instructed the jury on the aggressor doctrine. *Lawrence*, 365 N.C. at 519, 732 S.E.2d at 335. Therefore, assuming, without deciding, that the trial court's instruction on the aggressor doctrine was erroneous, we hold that the error does not rise to the level of such fundamental error as to constitute plain error.

For the reasons stated herein, we find no reversible error in the trial court's instructions to the jury and thus reverse the decision of the Court of Appeals. The remaining issue determined by the Court of Appeals is not before us, and the court's decision on that matter remains undisturbed.

REVERSED.

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3. Perfect self-defense also requires that the defendant not be the aggressor in the fray, *see State v. Moore*, 363 N.C. 793, 796-97, 688 S.E.2d 447, 449-50 (2010); however, as explained above, if there is no evidence that the defendant was the aggressor, the trial court should not instruct on that element. Here, if the trial court had not instructed on the aggressor doctrine, the jury would have had to find the other three elements exist to make a finding of perfect self-defense.

STATE OF NORTH CAROLINA
v.
DAVID MATTHEW LOWE

No. 278PA15

Filed 21 December 2016

1. Search and Seizure—search warrant—house—probable cause

Where there was an anonymous tip that the resident (Michael Turner, with whom defendant was staying) was "selling, using and storing narcotics at" his house, and where a detective's affidavit in support of the search warrant listed his training and experience, Turner's history of drug-related arrests, and the detective's discovery of both marijuana residue and correspondence addressed to Turner in trash from Turner's residence, under the totality of the circumstances there was probable cause for issue of a search warrant for the house.

2. Search and Seizure—search warrant for house—rental car in curtilage—nature of items to be seized

A rental car parked in the curtilage of a residence was within the scope of a search warrant and could be searched pursuant to the warrant to search the house. It was undisputed that when officers arrived at the target residence to execute the warrant, the rental car parked in the driveway was within the curtilage of the home and the nature of the items to be seized was such that the items could be easily stored in a vehicle.

On discretionary review upon separate petitions by the State and defendant pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 774 S.E.2d 893 (2015), reversing judgments entered on 8 July 2014 by Judge Reuben F. Young in Superior Court, Wake County, and remanding for further proceedings. Heard in the Supreme Court on 31 August 2016.

Roy Cooper, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant/appellee.

M. Gordon Widenhouse, Jr. for defendant-appellant/appellee.

HUDSON, Justice.

Here we are asked to consider the validity of a search warrant authorizing a search of the premises on which defendant was arrested, and whether the search of a vehicle located on those premises was within the scope of the warrant. We conclude that the warrant was supported by probable cause and therefore affirm that part of the decision of the Court of Appeals. However, we conclude that the search of the subject rental car did not exceed the scope of the warrant and thus reverse that part of the decision below.

Defendant David Matthew Lowe was indicted on 2 December 2013 in Wake County for two counts of trafficking in MDMA under N.C.G.S. § 90-95(h)(4) and one count of possession of LSD with intent to sell or deliver under N.C.G.S. § 90-95(a)(1). The trial court denied defendant's pretrial motions to quash the search warrant for a residence where defendant was a visitor at the time the warrant was executed, and to suppress evidence seized from the residence and from a rental car used by defendant and his girlfriend that was parked in the driveway of the target residence at the time of the search. On 8 July 2014, defendant pleaded guilty to the controlled substances violations while reserving the right to appeal the trial court's denial of his motions. On appeal, the Court of Appeals unanimously affirmed the search of the residence, holding that the warrant was supported by probable cause, but reversed the search of the rental car on the basis that the vehicle search exceeded the scope of the warrant. *State v. Lowe*, ___ N.C. App. ___, 774 S.E.2d 893 (2015).

Background

On 24 September 2013, Detective K.J. Barber of the Raleigh Police Department obtained a search warrant from the local magistrate for 529 Ashebrook Drive in Raleigh. Detective Barber filed an affidavit in support of the search warrant in which he swore to the following facts:

> In September of 2013, I received information that a subject that goes by the name "Mike T" was selling, using and storing narcotics at 529 Ashbrooke [sic] Dr. Through investigative means, I was able to identify Terrence Michael Turner as a possible suspect.
>
> Terrence Michael [T]urner, AKA: Michael Cooper Turner has been charged with PWISD Methylenedioxymethamphetamine, Possess Dimethyltryptamine, PWISD Psylocybin, PWISD Cocaine, Possess Heroin, PWIMSD Schedule I, Maintain a Vehicle/Dwelling, Trafficking in

> MDMA, Conspire to sell Schedule I and other drug violations dating back to 2001.
>
> On 9/24/2013 I conducted a refuse investigation at 529 Ashebrook Dr. St [sic] Raleigh, NC 27609. The 96 gallon City of Raleigh refuse container was at the curb line in front of 529 Ashebrook Dr.
>
> Detective Ladd removed one bag of refuse from the 96 gallon container and we took it to a secured location for further inspection. Inside the bag of refuse, I located correspondence to Michael Turner of 529 Ashebrook Dr. Raleigh, NC 27600 [sic], also in this bag of refuse, I located a small amount of marijuana residue in a fast food bag, which tested positive as marijuana utilizing a Sirche # 8 field test kit.
>
> Based on the above stated facts coupled with my training and experience it is my reasonable belief that illegal narcotics are being used and/or sold from inside this location. Based on the above, I respectfully request this warrant be issued.

The warrant authorized the search of the "premises, vehicle, person and other place or item described in the application for the property and person in question." On the following day, 25 September 2013, Detective Barber and other officers executed a search of the residence.

When the officers arrived on scene, they observed a Volkswagen rental car parked in the driveway. Detective Barber was aware that Mr. Turner had an Infinity registered in his name, as well as an outdated registration for a Toyota, but neither of those vehicles was present at the scene. Detective Barber had never seen the Volkswagen rental car before. Inside the residence officers encountered defendant and his girlfriend, Margaret Doctors, who were overnight guests of Mr. Turner. A search of the residence revealed 853 grams of marijuana in the home, as well as 14 grams of crushed MDMA in the room that had been occupied by defendant and Ms. Doctors. Detective Barber testified, without further elaboration, that "once we entered the house on the search warrant, we were able to determine that the vehicle was being operated by [defendant] and Ms. Doctors." After searching the house, officers searched the rental car and discovered in the trunk defendant's book bag and identifying documents, 360 dosage units of MDMA, 10 strips of LSD, and $6000 in U.S. currency.

On 11 April 2014, defendant filed pretrial motions to quash the search warrant and to suppress the evidence seized from the residence and the rental car, as well as incriminating statements he made afterwards. After hearing the motions on 7 and 8 July 2014, the trial court denied defendant's motions on 8 July 2014. Defendant pleaded guilty to all charges but reserved the right to appeal the trial court's denial of his motion to suppress evidence. The trial court sentenced defendant to two concurrent terms of thirty-five to fifty-one months of imprisonment for trafficking in MDMA by possession, and a consecutive term of seven to eighteen months for possession of LSD with intent to sell or deliver. Defendant appealed to the Court of Appeals.

At the Court of Appeals, defendant first argued that the search warrant was not supported by probable cause and that any evidence seized from the ensuing search should have been suppressed. *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 896. The court disagreed, holding that the totality of the circumstances—the marijuana discovered in the trash, in conjunction with Turner's history of drug-related arrests and the anonymous tip that Turner was "selling, using and storing" narcotics in his home—"formed a substantial basis to conclude that probable cause existed to search his home for the presence of contraband or other evidence." *Id.* at ___, 774 S.E.2d at 898-99.

Defendant next argued that the search of the rental car parked in Turner's driveway exceeded the scope of the warrant issued to search Turner's residence. *Id.* at ___, 774 S.E.2d at 899. The Court of Appeals agreed. The court recognized that "[t]here is long-standing precedent in North Carolina and other jurisdictions that, '*[a]s a general rule*, "if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car." ' " *Id.* at ___, 774 S.E.2d at 899 (second alteration in original) (emphasis added) (quoting *State v. Courtright*, 60 N.C. App. 247, 249, 298 S.E.2d 740, 742, *appeal dismissed and disc. rev. denied*, 308 N.C. 192, 302 S.E.2d 245 (1983)). Nonetheless, the court stated that "[t]he crucial fact distinguishing this case . . . relates to law enforcement officers' knowledge about the ownership and control of the vehicle." *Id.* at ___, 774 S.E.2d at 899. On that basis, and in reliance on the United States Supreme Court's decision in *Ybarra v. Illinois*, the Court of Appeals concluded that the search of the rental car exceeded the scope of the warrant issued for Turner's residence and that the evidence seized

from the car should have been suppressed.[1] *Id.* at ___, 774 S.E.2d at 899-901.

Finally, the Court of Appeals noted that that the record did not make clear which portion of contraband attributable to defendant was found in the home as opposed to the rental car, and therefore which portion of contraband was subject to suppression. *Id.* at ___, 774 S.E.2d at 901. Accordingly, the court reversed the trial court's denial of defendant's motion to suppress evidence obtained from the vehicle and remanded with instructions to determine which portion of the contraband attributable to defendant was seized from the home.[2] *Id.* at ___, 774 S.E.2d at 901. Defendant and the State both filed petitions for discretionary review on 25 August and 8 September 2015, respectively. We allowed both petitions on 28 January 2016.

I. Probable Cause

[1] Here defendant again contends that the search warrant was not supported by probable cause, and therefore, any evidence seized in the ensuing search should have been suppressed. We do not agree.

The United States and North Carolina Constitutions both protect against unreasonable searches and seizures of private property. U.S. Const. amend. IV; N.C. Const. art. I, § 20. The Fourth Amendment to the United States Constitution provides that "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. In addressing whether a search warrant is supported by probable cause, we employ the "totality of the circumstances" test, under which we must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989). "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law."

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1. The Court of Appeals also rejected an argument by the State that the evidence seized from the rental car should be admissible under the "good faith exception" to the exclusionary rule. *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 901. The court held that the exception did not apply because the error lay with the police executing the warrant, not with the warrant itself. *Id.* at ___, 774 S.E.2d at 901. The State has abandoned this argument on review here.

2. Because we are reversing the suppression of items from the vehicle, this determination is no longer necessary.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)).

Defendant asserts that this case is analogous to *State v. Benters*, in which we held that a lack of sufficient independent corroboration precluded a finding of probable cause. 367 N.C. 660, 673, 766 S.E.2d 593, 603 (2014). We conclude, as did the Court of Appeals, that defendant's reliance upon *Benters* is misplaced.

In *Benters*, we addressed the probable cause determination in a case involving an anonymous tip, as opposed to a case in which a tip is received from a confidential informant, and we stated, "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.* at 666, 766 S.E.2d at 598-99 (brackets in original) (quoting *State v. Hughes*, 353 N.C. 200, 205, 539 S.E.2d 625, 629 (2000)). The anonymous tip in *Benters* was that the defendant was growing marijuana. *Id.* at 661-62, 669, 766 S.E.2d at 596, 600. The corroborating evidence proffered by the police consisted of: (1) utility records of power consumption for the target residence; (2) gardening equipment observed at the target residence (coupled with the apparent absence of significant gardening activity); and (3) the investigating officer's expertise and knowledge of the defendant. *Id.* at 661-62, 669, 766 S.E.2d at 596, 600-01. We held that these allegations were not "sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause." *Id.* at 673, 766 S.E.2d at 603.

The distinctions between the two cases are apparent. Here the anonymous tip was that Michael Turner was "selling, *using* and *storing* narcotics at" his house. Detective Barber's affidavit in support of the warrant listed his training and experience, as well as Michael Turner's history of drug-related arrests, and stated that Detective Barber had discovered marijuana residue in trash from Michael Turner's residence, along with correspondence addressed to Michael Turner. As the Court of Appeals stated, "Although there were many reasons the gardening equipment may have been outside the defendant's house in *Benters*, the presence of marijuana residue in defendant's trash offers far fewer innocent explanations." *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 898. Furthermore, in the description of crimes for which evidence was sought, Detective Barber listed possession of controlled substances in violation of N.C.G.S. § 90-95 in the affidavit. Thus, unlike in *Benters*, the affidavit presented the magistrate with "direct evidence of the crime for which the officers sought to collect evidence." *Id.* at ___, 774 S.E.2d at

898; *see also State v. Williams*, 149 N.C. App. 795, 798-99, 561 S.E.2d 925, 927 ("[A] residue quantity of a controlled substance, despite its not being weighed, is sufficient to convict a defendant of possession of the controlled substance . . . ."), *disc. rev. denied*, 355 N.C. 757, 566 S.E.2d 481, *cert. denied*, 537 U.S. 1035, 1235 S. Ct. 553, 154 L. Ed. 2d. 455 (2002).

Accordingly, we agree with the Court of Appeals and hold that under the totality of the circumstances there was a substantial basis for the issuing magistrate to conclude that probable cause existed.

II. Search of the Vehicle

[2] The State argues that the Court of Appeals erred in holding that the rental car parked in the curtilage of the residence could not be searched pursuant to the warrant. We conclude that the search of the vehicle here was within the permissible scope of the search conducted under the valid warrant.

The authorized scope of a valid warrant can depend upon the nature of the object of the search because "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *United States v. Ross*, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 2170-71, 72 L. Ed. 2d 572, 591 (1982). "Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside." *Id.* at 821, 102 S. Ct. at 2171, 72 L. Ed. 2d at 591.

We previously addressed the scope of a search warrant with regard to vehicles in *State v. Reid*, in which we held:

> The authority to search described premises would include personal property located thereon. Authority to search a house gives officers the right to search cabinets, bureau drawers, trunks, and suitcases therein, though they were not described. "*It has been held that if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car.*"

286 N.C. 323, 326, 210 S.E.2d 422, 424 (1974) (emphasis added) (citations omitted). In the case of a private residence, "the premises" by necessity

encompasses the curtilage of the home. This is because "the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746, 751 (1886)); *see also Courtright*, 60 N.C. App. at 250, 298 S.E.2d at 742 (explaining that the curtilage "is an area within which the owner or possessor assumes the responsibilities and pleasures of ownership or possession").

Here Detective Barber obtained a valid search warrant based on probable cause for 529 Ashebrook Drive authorizing the search of "premises, vehicle, person and other place or item described in the application for the property and person in question." It is undisputed that when Detective Barber and other officers arrived at the target residence to execute the warrant, the rental car parked in the driveway was within the curtilage of the home. The nature of the items to be seized (including, *inter alia*, controlled substances, drug paraphernalia, and any evidence relating to the use or sale of controlled substances) was such that the items could be easily stored in a vehicle. Because the rental car was within the curtilage of the residence targeted by the search warrant, and because the rental car was a proper place "in which the object of the search may be found," we conclude that the search of the rental car was authorized by the warrant. *Ross*, 456 U.S. at 820, 102 S. Ct. at 2170, 72 L. Ed. 2d at 591. Accordingly, we hold that the search of the rental car did not exceed the scope of the warrant and that the trial court properly denied defendant's motion to suppress.

In departing from the general rule of *Reid*, the Court of Appeals erred. The court determined that "law enforcement officers' knowledge about the ownership and control of the vehicle" constituted a "crucial fact distinguishing this case" from *Reid* and its progeny. *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 899. As an initial matter, it is unclear from the record precisely what knowledge about the ownership and control of the vehicle the officers acquired, as well as when and how they acquired it. The trial court entered no written findings of fact or conclusions of law, although the trial judge did make oral findings at the time of his rulings. The sole witness to testify, Detective Barber, gave sparing and possibly contradictory testimony on the subject.[3] Nonetheless, regardless of

3. Detective Barber testified that "once we entered the house on the search warrant, we were able to determine that that vehicle was being operated by [defendant] and Ms. Doctors." Yet, he later testified that the vehicle was registered to "Hertz Rental," and that

whether the officers knew the car was a rental, we hold that the search was within the scope of the warrant.

The Court of Appeals, noting that that our appellate courts had not yet addressed the specific issue here, namely whether "a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant," *id.* at ___, 774 S.E.2d at 899-900, looked to cases addressing the somewhat analogous situation of a search of an individual present at a premises described in a warrant. To that end, the court relied on the seminal case of *Ybarra v. Illinois*, in which the Supreme Court held that when officers obtained a warrant to search a tavern at which the defendant happened to be a patron, the search of the defendant, in the absence of additional facts, was unconstitutional. 444 U.S. 85, 88-92, 100 S. Ct. 338, 340-43, 62 L. Ed. 2d 238, 243-46 (1979). There the Court held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . The Fourth and Fourteenth Amendments protect the 'legitimate expectations of privacy' of persons, not places." *Id.* at 91, 100 S. Ct. at 342, 62 L. Ed. 2d at 245 (citations omitted). Applying the reasoning of *Ybarra* here, the Court of Appeals was persuaded "that a warrant authorizing the search of a house or business does not automatically cover the search of a vehicle owned, operated, or controlled by a stranger to the investigation." *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 900 (citations omitted). On that basis, and in light of the knowledge purportedly acquired by the officers about the vehicle, the court concluded that the search of the rental car exceeded the scope of the search warrant. *Id.* at ___, 774 S.E.2d at 899-901.

The reasoning proffered by the Court in *Ybarra*, sound as it is in the context of a search of an individual present at a tavern open to the public, is not similarly applicable to the search of a vehicle on the premises of a private residence that is the target of a warrant. The owner or possessor of a premises cannot exercise possession, control, or dominion over an individual located on the premises in the same manner that he can do so over items of personal property, such as a vehicle. The two are inherently different and carry with them separate privacy considerations. *See*

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the information he obtained from defendant and Ms. Doctors regarding the operation and rental of the vehicle was obtained during interviews "at the police station," at which point "the vehicle in the driveway had already been searched." As a result, it is unclear if the officers obtained information about the rental car prior to the search of the car, and if so, whether it was obtained verbally from the individuals in the residence.

Zurcher v. Stanford Daily, 436 U.S. 547, 555, 98 S. Ct. 1970, 1976, 56 L. Ed. 2d 525, 535 (1978) ("Search warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things,' . . . ." (brackets in original) (quoting *United States v. Kahn*, 415 U.S. 143, 155 n.15, 94 S. Ct. 977, 984 n.15, 39 L. Ed. 2d 225, 237 n.15 (1974))); *Ybarra*, 444 U.S. at 91, 100 S. Ct. at 342, 62 L. Ed. 2d at 245 ("[A] search or seizure of a person must be supported by probable cause particularized with respect to that person. . . . The Fourth and Fourteenth Amendments protect the 'legitimate expectations of privacy' of persons, not places."). Moreover, a commercial patron at a tavern open to the public can, in the absence of additional facts, be fairly characterized as being in "mere propinquity" to the suspected criminal activity targeted by the warrant. *Ybarra*, 444 U.S. at 91, 100 S. Ct. at 342, 62 L. Ed. 2d at 245. But, the same cannot be said of personal property, like a vehicle located within a dwelling's curtilage, over which the "owner or possessor assumes the responsibilities and pleasures of ownership or possession," and which has presumably been permitted, if not invited, onto the premises. *Courtright*, 60 N.C. App. at 250, 298 S.E.2d at 742. Accordingly, we conclude that *Ybarra* is inapposite.

Moreover, the Court of Appeals erred in construing the officers' purported knowledge of the rental car as support for a conclusion that the car was unrelated to the target of the search warrant. To the contrary, defendant was not on the premises by accident, but rather was an overnight guest at a residence targeted for suspected drug trafficking. The officers were informed about defendant's operation of the rental car only after they entered the home, in which they discovered defendant, along with 853 grams of marijuana, as well as 14 grams of crushed MDMA in the room that defendant had been occupying. Far from establishing that defendant was "a stranger to the investigation," *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 900, the officers' knowledge of the rental car only served to further connect the car to the suspected criminal activity targeted by the warrant. Accordingly, we reverse the Court of Appeals' holding that the search of the rental car exceeded the scope of the warrant.

For the reasons stated herein, we affirm in part and reverse in part the decision of the Court of Appeals.

AFFIRMED IN PART; REVERSED IN PART.

STATE v. MOIR

[369 N.C. 370 (2016)]

STATE OF NORTH CAROLINA
v.
JAMES KEVIN MOIR

No. 49PA14

Filed 21 December 2016

Sentencing—sex offender registration—petition to terminate

In a case involving the trial court's denial of defendant's petition to terminate his sex offender registration, the North Carolina Supreme Court remanded to the trial court for application of the "modified categorical approach" to determine whether defendant was eligible for termination of the registration requirement. Federal statutory provisions governing termination of sex offender registration, which involve tier levels for different categories of sexual offenses, interact with state law. Defendant's eligibility for termination of registration depended upon the extent to which his convictions for indecent liberties were comparable to or more severe than convictions for abusive sexual conduct under the federal statute.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 231 N.C. App. 628, 753 S.E.2d 195 (2014), vacating an order entered on 18 February 2013 by Judge Richard D. Boner in Superior Court, Catawba County, and remanding this case to the Superior Court, Catawba County, for further proceedings. Heard in the Supreme Court on 16 February 2015.

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

Crowe & Davis, P.A., by H. Kent Crowe; and LeCroy Law Firm, PLLC, by M. Alan LeCroy, for defendant-appellee.[1]

ERVIN, Justice.

In this case, we consider whether the Court of Appeals erred by vacating and remanding the trial court's order denying a petition filed by defendant James Kevin Moir seeking termination of the requirement

1. H. Kent Crowe filed an appellee's brief on defendant's behalf before unexpectedly dying prior to the holding of oral argument. On 29 January 2015, this Court allowed defendant's motion to substitute M. Alan LeCroy as defendant's counsel.

that he register as a sex offender on the grounds that the trial court had erroneously determined that defendant was not eligible to have his registration terminated in light of certain provisions of federal law. After careful consideration of the State's challenges to the Court of Appeals' decision, we conclude that the Court of Appeals' decision should be modified and affirmed and that this case should be remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

On 9 January 2001, the Catawba County grand jury returned bills of indictment charging defendant with having committed two counts of first-degree statutory sexual offense and two counts of taking indecent liberties with a child.[2] On 28 November 2001, defendant entered a plea of guilty to two counts of taking indecent liberties with a child. Based upon defendant's guilty plea, Judge James W. Morgan consolidated defendant's convictions for judgment and entered a judgment sentencing defendant to a term of sixteen to twenty months of imprisonment, with that sentence being suspended and with defendant being placed on supervised probation for five years on the condition that defendant serve an active sentence of one hundred ten days imprisonment, pay the costs, comply with the usual terms and conditions of probation and the special terms and conditions of probation applicable to sex offenders, and have no contact with the victim except to the extent that such contact is allowed by the victim's mother. In the course of entering judgment, Judge Morgan ordered defendant to "[i]mmediately register" as a sex offender as required by N.C.G.S. § 14-208.7, a mandate with which defendant complied on 15 March 2002. After defendant received an extension of the probationary period in October 2006 for the purpose of allowing defendant to complete the sex offender treatment program, Judge Timothy S. Kincaid entered an order on 25 June 2007 terminating defendant's probation. On 22 May 2012, defendant filed a petition pursuant to N.C.G.S. § 14-208.12A seeking to have the requirement that he register as a sex offender pursuant to Part 2 of Article 27A of Chapter 14 of the North Carolina General Statutes terminated on the grounds that he had "been subject to the North Carolina registration requirements . . . for at least ten (10) years beginning with the" date of initial registration; that he had "not been convicted of any subsequent offense

2. Although the record on appeal only contains a single indictment charging defendant with one count of first-degree statutory sexual offense and one count of taking indecent liberties with a child, the remaining documents contained in the record on appeal and the briefs that the parties submitted to both the Court of Appeals and this Court indicate that defendant was actually charged with two counts of both offenses.

requiring registration" since the date of his conviction; that he had "not been arrested for any offense that would require registration" since the completion of his sentence; and that proper notice of his request for relief from his sex offender registration requirement had been provided to the appropriate entities.

Defendant's petition came on for hearing before the trial court at the 11 February 2013 criminal session of the Superior Court, Catawba County. On 18 February 2013, the trial court entered an order denying defendant's petition. In its order, the trial court found as fact that:

> 1. On November 28, 2001, the defendant entered pleas of guilty to two counts of taking indecent liberties with a minor child as part of a plea agreement.
>
> 2. Prior to the court's sentencing of the defendant, the State gave a statement of facts in support of the plea during which it was stated that the defendant had engaged in improper touching of the defendant's daughter, a child of the age of 4 years, and that he had masturbated in the presence of the child.
>
> 3. The State's statement of facts indicated that the improper touching had occurred in the vaginal area of the child.
>
> 4. The defendant was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes as a result of his guilty pleas.
>
> 5. The defendant has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least 10 years beginning with the date of the initial North Carolina registration.
>
> 6. Since the date of conviction, the defendant has not been convicted of any subsequent offenses requiring registration under Article 27A, Chapter 14.
>
> 7. Since the completion of his sentence for the indecent liberties offenses, the defendant has not been arrested for any offense that would require registration under Article 27A, Chapter 14.
>
> 8. The defendant served his petition on the Office of the District Attorney for Catawba County at least three weeks prior to the hearing held in this matter.

9. The risk of the defendant re-offending is low.

10. The defendant is not a current or potential threat to public safety.

11. Touching of the genital area of a minor with the intent to gratify sexual desire is considered "sexual contact" under the provisions of 18 U.S.C. § 2246(3), and sexual contact is classified as "abusive sexual contact" under 18 U.S.C. § 2244.

12. Abusive sexual contact is considered to be a Tier II offense under the provisions of 42 U.S.C. § 16911(3)(A)(iv).

13. The registration for Tier II offenses under the provisions of the Jacob Wetterling Act, 42 U.S.C. § 14071, and the provisions of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911, *et seq.*, is 25 years. This registration period cannot be reduced.

14. The defendant has not been registered as a sex offender for at least 25 years.

Based upon these findings of fact, the trial court concluded as a matter of law:

1. That the termination of defendant's obligation to register as a sex offender would not comply with the current provisions of the Adam Walsh Child Protection and Safety Act of 2006, which are applicable to the termination of a registration requirement and are required to be met as for the receipt of federal funding by the State of North Carolina.

2. [That t]he defendant is not entitled to termination of the registration requirement.

As a result, the trial court determined that defendant's "request to terminate the sex offender registration is denied" and that "defendant shall continue to maintain a current registration under Part 2 of Article 27A of Chapter 14." Defendant noted an appeal to the Court of Appeals from the trial court's order.

On 7 January 2014, the Court of Appeals filed an opinion vacating the trial court's order and remanding this case to the Superior Court, Catawba County, for further proceedings on the grounds that the trial court had erred by determining that defendant was a Tier II sex offender

who was ineligible to obtain relief from the sex offender registration requirement. *State v. Moir*, 231 N.C. App. 628, 631-32, 753 S.E.2d 195, 196-97 (2014). According to the Court of Appeals, the trial court reached this erroneous conclusion based upon an incorrect understanding of the relevant provisions of federal law. *Id.* at 631, 753 S.E.2d at 197. In the Court of Appeals' view, the extent to which an individual should be classified as a Tier I, Tier II, or Tier III offender hinges upon the nature of "the offense charged" rather than upon "the facts underlying the case," as the trial court appeared to believe. *Id.* at 631, 753 S.E.2d at 197. As a result, because the crime of taking indecent liberties with a child did not inherently involve the type of conduct required to make defendant a Tier II offender, the Court of Appeals concluded that defendant should be treated as a Tier I, rather than a Tier II, offender. *Id.* at 631-32, 753 S.E.2d at 197 (citing *In re Hamilton*, 220 N.C. App. 350, 358, 725 S.E.2d 393, 399 (2012), and *In re McClain*, 226 N.C. App. 465, 469, 741 S.E.2d 893, 896, *disc. rev. denied*, 366 N.C. 600, 743 S.E.2d 188 (2013)). However, because "the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion," *id.* at 362, 753 S.E.2d at 197 (quoting *In re Hamilton*, 220 N.C. App. at 359, 725 S.E.2d at 399 (citing N.C.G.S. § 14-208.12A(a1) (2012))), the Court of Appeals vacated the trial court's order and remanded this case to the trial court for the entry of a new order containing appropriate findings of fact and conclusions of law based upon a correct understanding of the applicable law and, in the event that the trial court determined that defendant was eligible to be relieved from his existing obligation to comply with the sex offender registration program, the making of a discretionary decision concerning the extent to which defendant's petition should be allowed or denied, *id.* at 632, 753 S.E.2d at 197. We granted the State's request for discretionary review on 19 August 2014.

Section 14 208.12A of our General Statutes, which governs requests for relief from the sex offender registration requirement, provides in pertinent part that:

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30 year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.
>
> If the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed in the district where the person was convicted of the offense.

. . . .

(a1) The court may grant the relief if:

(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C.G.S. § 14-208.12A (2015). As a result, given that the trial court's findings of fact, which have not been challenged on appeal, establish that defendant "has not been arrested for any offense that would require registration" since completing his sentence and "is not a current or potential threat to public safety," the extent to which defendant is eligible to be removed from the sex offender registration program depends upon whether "[t]he requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State." *Id.* § 14-208.12A(a1)(2).

The currently effective federal statutory provisions governing the extent to which an individual required to register as a sex offender is entitled to have his or her registration obligation terminated are found in the Sex Offender Registration and Notification Act (SORNA), which is also known as the Adam Walsh Act.[3] Adam Walsh Child Protection and

3. The federal statutory provisions governing removal from a state's sex offender registry have been amended on a number of occasions. The relevant provisions were, as N.C.G.S. § 14-208.12A(a1)(2) suggests, originally contained in the Jacob Wetterling Act, 14 U.S.C. § 14071 (1994), which was amended by the "Pam Lychner Sexual Offender Tracking and Identification Act of 1996." *See* Pub. L. No. 104-236, §§ 1-2, 110 Stat. 3093, 3093-96. In 2006, portions of both the Lychner Act and the Wetterling Act were repealed following enactment of the Adam Walsh Child Protection and Safety Act, which currently

Safety Act of 2006, Pub. L. No. 109-248, Title I, §§ 102, 113, 120 Stat. 590, 593-94.[4] According to SORNA, sex offenders subject to a registration requirement are classified on the basis of three tier levels, *see* 42 U.S.C. § 16911(2)-(4) (2012), with sex offenders being treated differently based upon the exact tier to which they are assigned, *see id.* § 16915. Among other things, 42 U.S.C. § 16915 provides that "[a] sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under" 42 U.S.C. § 16915(b), with "[t]he full registration period" being "15 years, if the offender is a tier I sex offender," "25 years, if the offender is a tier II sex offender," and "the life of the offender, if the offender is a tier III sex offender." *Id.* § 16915(a). However, a Tier I sex offender may have his or her required registration period reduced to ten years, *id.* § 16915(b)(3)(A), and a Tier III offender may have his or her required registration period reduced to twenty-five years, *id.* § 16915(b)(3)(B), in the event that he or she is not "convicted of any offense for which imprisonment for more than 1 year may be imposed," is not "convicted of any sex offense," "successfully complete[s]any periods of supervised release, probation, and parole," and "successfully complete[s] . . . an appropriate sex offender treatment program," *id.* § 16915(b). As a result, defendant would not have been eligible to have his obligation to register as a sex offender terminated at the conclusion of a ten year registration period unless he satisfied the requirements for being a Tier I offender.

The exact contours of the tier system upon which 42 U.S.C. § 16915 depends are spelled out in 42 U.S.C. § 16911. 42 U.S.C. § 16911(1) defines a "sex offender" as "an individual who was convicted of a sex offense." *Id.* § 16911(1). According to 42 U.S.C. § 16911(2), a Tier I sex offender is "a sex offender other than a [T]ier II or [T]ier III sex offender." *Id.* § 16911(2). A Tier II sex offender is

> a sex offender other than a [T]ier III sex offender whose offense is punishable by imprisonment for more than 1 year and—
>
> (A) is comparable to or more severe than the following offenses, when committed against a minor, or

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governs removal from North Carolina's sex offender registry for purposes of N.C.G.S. § 14-208.12A(a1)(2).

4. SORNA is codified, for the most part, at 42 U.S.C. §§ 16901-16962 (2012).

an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18);

(ii) coercion and enticement (as described in section 2422(b) of title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)[ ] of title 18[)];

(iv) abusive sexual contact (as described in section 2244 of title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a [T]ier I sex offender.

Id. § 16911(3). Finally, a Tier III sex offender is

a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or

(ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a [T]ier II sex offender.

Id. § 16911(4). As a result of the fact that the State seeks to have defendant categorized as a Tier II offender on the grounds that his "offense" was "comparable to or more severe than" "abusive sexual contact" as defined in 18 U.S.C. § 2244, the extent to which defendant is or is not eligible to have his obligation to register as a sex offender terminated depends upon the extent, if any, to which his convictions for taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1 are comparable to or more severe than convictions for "abusive sexual contact" in violation of 18 U.S.C. § 2244.[5]

According to N.C.G.S. § 14-202.1,

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C.G.S. § 14-202.1(a) (2015). On the other hand, a defendant is guilty of abusive sexual contact in violation of 18 U.S.C. § 2244 if he or she "knowingly engages in or causes sexual contact with or by another person, if so to do would violate" 18 U.S.C. §§ 2241(a) or (b), 2242, 2243(a) or (b), or 2241(c), or if he or she "knowingly engages in sexual contact with another person without that other person's permission," 18 U.S.C. § 2244(a)-(b) (2012), with "sexual contact" for purposes of 18 U.S.C. § 2244 defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse

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5. As a result of the fact that the same analysis we have utilized to address the State's contention that defendant should be categorized as a Tier II offender would be appropriate in the event that the State were to contend that defendant should be categorized as a Tier III offender, our discussion of the merits of the contention that the State has actually made in this case suffices to permit an appropriate disposition in this case. We do not, however, wish for the discussion contained in the text of this opinion to be understood as limiting the extent to which the Superior Court, Catawba County, is entitled to classify defendant as a Tier I, a Tier II, or a Tier III offender on remand.

or gratify the sexual desire of any person," *id.* § 2246(3).[6] The extent to which the crime of taking indecent liberties with a child is comparable to or more severe than the crime of abusive sexual contact for purposes of 42 U.S.C. § 16911(3)(A)(iv) is, of course, a question of federal, rather than state, law.

The federal courts have described three approaches for making determinations like ascertaining the tier to which a defendant should be assigned for the purpose of determining whether he is eligible to have his sex offender registration obligation reduced pursuant to 42 U.S.C. § 16915(b): (1) the "categorical approach," (2) the "circumstance-specific approach," and (3) the "modified categorical approach."[7] *United States v. White*, 782 F.3d 1118, 1130 (10th Cir. 2015) (stating that "courts employ two main approaches, . . . the categorical approach and the circumstance-specific approach"); *see Descamps v. United States*, ___ U.S. ___, ___, ___, 186 L. Ed. 2d 438, 449, 451-53 (2013) (explaining that the "modified categorical approach" is solely a "variant" of the "categorical approach"); *see also United States v. Berry*, 814 F.3d 192, 195-96 (4th Cir. 2016); *United States v. Price*, 777 F.3d 700, 704-05 (4th Cir.), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 941 (2015). The applicability of each approach depends upon whether the statute under which a defendant

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6. A careful examination of 18 U.S.C. §§ 2241(a), 2241(b), 2242, 2243(a), 2243(b), and 2241(c) reveals that guilt of the offenses delineated in each of these statutory provisions requires proof that the offender "engage[d] in or cause[d] sexual contact with or by another person," 18 U.S.C. § 2244, in such a manner as to result in the commission of a "sexual act," which is defined as "contact between the penis and the vulva or the penis and the anus," with "contact involving the penis occur[ring] upon penetration, however slight;" "contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;" "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person;" or "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," *id.* § 2246(2)(A)-(D). However, given that the offense set out in 18 U.S.C. § 2244(b) does not require proof that the offender committed a "sexual act" and given that conviction for an offense "comparable to or more severe" than that defined in 18 U.S.C. § 2244(b) would suffice to render the person in question a Tier II offender even if that offense was not also "comparable to or more severe than" the offenses delineated in 18 U.S.C. § 2244(a), *see* 42 U.S.C. § 16911(3)(A)(iv), we need not address the extent, if any, to which defendant's conviction for taking indecent liberties with a child would be "comparable to or more severe than" a conviction for the offenses requiring proof of the commission of a "sexual act" delineated in 18 U.S.C. § 2244(a).

7. The "circumstance-specific approach" is also known as the "non-categorical approach." *See United States v. Price*, 777 F.3d 700, 705 (4th Cir.), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 941 (2015).

was convicted refers to a "generic crime" or to a "defendant's specific conduct." *White*, 782 F.3d at 1130. In the event that Congress intended for the relevant statutory provision to refer to a generic crime rather than a defendant's specific conduct, the "categorical approach," in which courts compare the elements of the offense for which the defendant was convicted with the "elements of the generic offense identified in the federal statute," is used in making the necessary comparison. *Price*, 777 F.3d at 704; *see White*, 782 F.3d at 1130-31; *see also Taylor v. United States*, 495 U.S. 575, 602, 109 L. Ed. 2d 607, 629 (1990). A defendant's state conviction is comparable to the relevant federal offense for purposes of the "categorical approach" when the elements composing the statute of conviction "are the same as, or narrower than, those of the generic offense." *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 449; *Price*, 777 F.3d at 704 (citing *Taylor*, 495 U.S. at 602, 109 L. Ed. 2d at 629). Accordingly, if a state statute "sweeps more broadly than the generic crime," there is no categorical match. *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 451 (stating that "[t]he key, we emphasize[ ], is elements, not facts.") In other words, if there is " 'a realistic probability . . . that the State would apply its statute to conduct that falls outside the generic definition of a crime,' there is no categorical match and the prior conviction cannot be for an offense under the federal statute." *Price*, 777 F.3d at 704 (quoting *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193, 166 L. Ed. 2d 683, 692-93 (2007)).

On the other hand, in the event that Congress intended to refer to a defendant's specific conduct instead of to the elements of the offense involved in the underlying criminal conviction, courts apply the "circumstance-specific approach." *Id.* at 705 (citing *Nijhawan v. Holder*, 557 U.S. 29, 34, 174 L. Ed. 2d 22, 27 (2009)). In applying the "circumstance-specific approach," the court is required to compare the actual conduct that led to the defendant's conviction for the relevant state offense with the elements of the offenses as defined in federal law. *Id.*; *see Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 456. In other words, when the facts underlying the defendant's prior conviction would support a conviction under the federal statute, the defendant's prior offense is comparable to the federal offense for categorization purposes. *Price*, 777 F.3d at 705 (citing *Nijhawan*, 557 U.S. at 34, 174 L. Ed. 2d at 27); *see Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 456. Thus, the "broader framework" made possible through the use of the "circumstance-specific approach" is available "when the federal statute refers 'to the specific way in which an offender committed the crime on a specific occasion,' rather than to the generic crime." *Price*, 777 F.3d at 705 (quoting *Nijhawan*, 557 U.S. at 34, 174 L. Ed. 2d at 27).

In the event that the court is required to address issues arising under a divisible statute, which exists when the relevant provision sets out multiple offenses rather than a single offense, a pure categorical approach cannot be utilized in any meaningful way. *See Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 449 (noting that the "modified categorical approach" applies "when a prior conviction is for violating a so-called 'divisible statute' "). In order to resolve cases involving divisible statutes, courts have developed the "modified categorical approach." Under that approach, "[g]eneral divisibility, however, is not enough" to permit a finding of comparability. *United States v. Montes–Flores*, 736 F.3d 357, 365 (4th Cir. 2013) (quoting *United States v. Cabrera–Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013)). Instead, the "modified categorical approach" only permits a finding of comparability in the event that the elements of at least one of the alternative offenses set out in the statute defining the offense of which the defendant was previously convicted categorically match the generic federal offense. *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 453 (stating that "[a]ll the modified [categorical] approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates 'several different . . . crimes' " on the theory that, "[i]f at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of" having committed) (ellipsis in original) (quoting *Nijhawan*, 557 U.S. at 41, 174 L. Ed. 2d at 32).[8] In using the "modified categorical approach," the court is permitted to examine a limited number of contemporaneously generated documents described in *Shepard v. United States*, 544 U.S. 13, 26, 161 L. Ed. 2d 205, 214 (2005), "such as the indictment, the plea agreement, and jury instructions, to 'determine which alternative formed the basis of the defendant's prior conviction.' " *Berry*, 814 F.3d at 196 (quoting *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 449). "The modified [categorical] approach does not authorize a . . . court to substitute such a facts-based inquiry for an elements-based one." *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at

8. The greater flexibility allowed through the use of the "modified categorical approach" is not available in the event that the relevant state statute specifies several alternative *means* of committing a crime, one of which would bring the statute of conviction within the definition of the generic crime, instead of setting out alternative offenses made up of differing *elements*. *Mathis v. United States*, 579 U.S. ___, ___, 195 L. Ed. 2d 604, 616-18 (2016); *see also id.* at ___, 195 L. Ed. 2d at 610 (defining "elements" as "the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction' " (quoting *Black's Law Dictionary* 634 (10th ed. 2014)) and defining "facts" as "mere real-world things—extraneous to the crime's legal requirements" that "need neither be found by a jury nor admitted by a defendant" (citing *Black's Law Dictionary* 709)).

462. Instead, the only reason that a court is allowed to consider certain extra-statutory information in the "modified categorical approach" is "to assess whether the plea was to the version of the crime" in the state statute that "correspond[s] to the generic offense." *Id.* at ___, 186 L. Ed. 2d at 452 (citing *Shepard*, 544 U.S. at 25-26, 161 L. Ed. 2d at 217 (plurality opinion)). If none of the alternative offenses set out in a "divisible" statute is determined to be comparable to the generic offense on the basis of a "categorical" analysis, no "match[ ]" exists and "[t]he modified [categorical] approach . . . has no role to play" in the analysis. *Id.* at___, 186 L. Ed. 2d at 453-54; *accord Montes–Flores*, 736 F.3d at 365 (stating that "[g]eneral divisibility, however, is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, *by its elements*, [the generic offense]" (quoting *Cabrera–Umanzor*, 728 F.3d at 352)). Thus, "[o]nce the elements of the offense of conviction have been identified, the examination of any *Shepard* documents ends, and the court proceeds with employing the categorical approach, comparing the elements of the offense of conviction with the elements of the offense identified in the federal statute." *Berry*, 814 F.3d at 196 (citing *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 449). As a result, we must now determine whether 42 U.S.C. § 16911, when properly construed, requires use of the "categorical approach," the "circumstance-specific approach," or the "modified-categorical approach."

Although the United States Supreme Court has pointed out that the word "offense" in statutes can refer to either a generic offense or specific conduct, *Nijhawan*, 557 U.S. at 34-35, 174 L. Ed. 2d at 27-28, an analysis of the language in which 42 U.S.C. § 16911(3)(A)(iv) is couched and various equitable and practical considerations persuade us that Congress intended for the required comparability analysis to focus on a generic offense rather than the defendant's individual conduct. As an initial matter, when taken in context, the references to "offense" contained throughout 42 U.S.C. § 16911 tend, for the most part, to refer to specific criminal offenses as defined in state law rather than to the specific conduct in which the defendant engaged. For example, as the Court of Appeals noted, the fact that a "sex offender" is defined as "an individual who was convicted of a sex offense," 42 U.S.C. § 16911(1), the fact that a Tier II offender is defined as a "sex offender whose offense is punishable by imprisonment for more than 1 year," *Moir*, 231 N.C. App. at 630, 753 S.E.2d at 196 (quoting 42 U.S.C. § 16911(3) (2006)), and the fact that the statute contains "lists of elements of the offense" tend to suggest that Congress was referring to the identity of the generic offense for

which a defendant was convicted rather than to a description of each individual defendant's conduct, *id.* at 631, 753 S.E.2d at 197. In addition, we note that 42 U.S.C. § 16911(3)(A) refers to offenses described in 18 U.S.C. §§ 1591, 2422(b), 2423(a), and 2244. 42 U.S.C. § 16911(3)(A); *White*, 782 F.3d at 1133 (citing 42 U.S.C. § 16911(3)(A)). As the United States Supreme Court has stated, cross-references to other federal statutory provisions tend to suggest that Congress intended to refer to a generic offense instead of the specific conduct in which the defendant engaged. *Nijhawan*, 557 U.S. at 36-38, 174 L. Ed. 2d at 28-30 (explaining that the references in the Armed Career Criminal Act to specific federal crimes support use of the "categorical approach"); c*f. United States v. Dodge*, 597 F.3d 1347, 1353-56 (11th Cir.) (en banc) (explaining that a "circumstance-specific approach" is appropriate as applied to the phrase "against a minor" as found in 42 U.S.C. § 16911(5)(A)(ii) and (7)(I) given that these phrases do not include a cross-reference to another federal penal section), *cert. denied*, 562 U.S. 961, 178 L. Ed. 2d 287 (2010)). Thus, our reading of the relevant statutory language tends to suggest that Congress intended to refer to a generic offense rather than to the defendant's underlying conduct in the relevant portion of 42 U.S.C. § 16911.

In addition, in making this determination, we must consider

> the practical difficulties and potential unfairness of applying a circumstance-specific approach, including the burden on the trial courts of sifting through records from prior cases, the impact of unresolved evidentiary issues, and the potential inequity of imposing consequences based on unproven factual allegations where the defendant has pleaded guilty to a lesser offense.

White, 782 F.3d at 1132 (citing *Taylor*, 495 U.S. at 601-02, 109 L. Ed. 2d at 628-29). In conducting that inquiry, we note that a trial judge required to make the necessary categorization determination long after the date of a defendant's conviction may lack access to relevant factual information concerning the defendant's conduct, particularly in cases involving convictions resulting from a guilty plea rather than a jury verdict. *See Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 457 (noting that the use of the "circumstance-specific approach" would require trial courts "to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense"; that "[t]he meaning of those documents will often be uncertain"; and that "the statements of fact in

them may be downright wrong"). In addition, use of the "circumstance-specific approach" would, in some instances, force trial courts to base their decisions on "unresolved evidentiary issues" and "unproven factual allegations," *White*, 782 F.3d at 1132, 1135 (citing *Taylor*, 495 U.S. at 600-02, 109 L. Ed. 2d at 628-29), and result in what amounts to a mini-trial concerning the exact nature of a defendant's earlier conduct in which the defendant might be unable to effectively defend himself or herself due to the passage of time and other factors. Thus, the interpretation of the literal statutory language that we believe to be appropriate has the added benefit of avoiding a number of practical and equitable problems that would arise from reliance upon the "circumstance-specific approach" for the purpose of determining whether defendant is a Tier I or a Tier II offender.

The reading of the relevant portion of 42 U.S.C. § 16911 that we believe to be appropriate is also consistent with the approach adopted by various federal courts and agencies in the course of resolving this issue. For example, the Fourth Circuit stated in *Berry* that "SORNA's text . . . suggests that the categorical approach should be used to determine whether a prior conviction is comparable to or more severe than the generic crimes listed in Section 16911(4)(A)." 814 F.3d at 197. The Tenth Circuit has reached the same conclusion. *White*, 782 F.3d at 1135 (concluding that "Congress intended courts to apply a categorical approach to sex offender tier classifications designated by reference to a specific criminal statute"). In fact, no federal circuit, to our knowledge, has construed the exact statutory provision at issue here differently than we do. Finally, the National Guidelines for Sex Offender Registration and Notification promulgated by the United States Department of Justice provide that, "in assessing whether the offense satisfies the criteria for tier II or tier III classification, jurisdictions generally may premise the determination on the elements of the offense, and are not required to look to underlying conduct that is not reflected in the offense of conviction." The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38053 (July 2, 2008). As a result, for all of these reasons, we conclude that, in determining whether defendant's convictions for taking indecent liberties with a child suffice to make him a Tier II offender as defined in 42 U.S.C. § 16911(3)(A)(iv), we are required to utilize the categorical approach, as supplemented by the "modified categorical approach" in the event that defendant was convicted of violating a divisible statute.[9]

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9. A number of courts that utilize the "categorical approach" for other purposes have adopted the "circumstance-specific" method for the purpose of applying the statutory

As we have already noted, N.C.G.S. § 14-202.1 prohibits "[w]illfully tak[ing] or attempt[ing] to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire," *id.* § 14-202.1(a)(1), and "[w]illfully commit[ting] or attempt[ing] to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years," *id.* § 14-202.1(a)(2). As of the present date, this Court has not had the opportunity to determine whether N.C.G.S. § 14-202.1(a) is or is not a divisible statute, particularly in the aftermath of the amendment to that statutory provision worked by Chapter 779 of the 1975 North Carolina Session Laws, which removed the requirement that the defendant act "with intent to commit an unnatural sexual act," N.C.G.S. § 14-202.1 (1969), from the crime of taking indecent liberties with children, and amended the remaining statutory language so as to create the two subdivisions, N.C.G.S. § 14-202.1(a)(1) and (a)(2), that have been contained in all versions of N.C.G.S. § 14-202.1(a) since the 1 October 1975 effective date of the amendment. Act of June 24, 1975, ch. 779, 1975 N.C. Sess. Laws 1105. Thus, given our willingness to authorize the use of the "modified categorical approach" in appropriate cases, a determination of whether N.C.G.S. § 14-202.1(a) is a divisible statute must be made in order to properly determine whether defendant is eligible to seek relief from the existing requirement that he register as a sex offender.

An analysis of the literal language of N.C.G.S. § 14-202.1(a) provides a basis for arguing that N.C.G.S. § 14-202.1 is a divisible statute, with

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reference to the commission of a crime "against a minor" contained in 42 U.S.C. § 16911(3). *See generally Berry*, 814 F.3d at 197 (stating that "the language of Section 16911(3)(A), like the language of Section 16911(4)(A), instructs courts to apply the categorical approach when comparing prior convictions with the generic offenses listed except when it comes to the specific circumstance of the victims' ages" (citations omitted)); *Gonzalez–Medina*, 757 F.3d at 429 (concluding "that Congress contemplated a non-categorical approach to the age-differential determination in the § 16911(5)(C) exception"); *Dodge*, 597 F.3d at 1356 ("hold[ing] that courts may employ a noncategorical approach to examine the underlying facts of a defendant's offense, to determine whether a defendant has committed a 'specified offense against a minor' and is thus a 'sex offender' subject to SORNA's registration requirement"); *United States v. Mi Kyung Byun*, 539 F.3d 982, 990-94 (9th Cir.) (determining that the phrase "a specified offense against a minor" contained in 42 U.S.C. § 16911(5)(A)(ii) and (7) allows for a "circumstance-specific approach"), *cert. denied*, 555 U.S. 1088, 172 L. Ed. 2d 761 (2008). We agree with the approach to age-related issues deemed appropriate in the cases and hold that North Carolina courts should use the noncategorical or "circumstance-specific approach" in addressing any age-related issues that may arise in the course of determining whether an individual seeking the termination of an existing sex offender registration requirement should be categorized as a Tier I, a Tier II, or a Tier III offender.

N.C.G.S. § 14-202.1(a)(1) and N.C.G.S. § 14-202.1(a)(2) being understood to state separate offenses. The Tenth Circuit read N.C.G.S. § 14-202.1(a) in just that manner. *White*, 782 F.3d at 1136. However, there is a reasonable and rational basis for taking the opposite position as well. For example, the Court of Appeals rejected a defendant's fatal variance claim even though the trial court instructed the jury concerning the issue of defendant's guilt of taking indecent liberties with a child by using the language "for the purpose of arousing or gratifying sexual desire" as found in N.C.G.S. § 14-202.1(a)(1) when the indictment was couched solely in terms of the "lewd and lascivious act" language contained in N.C.G.S. § 14-202.1(a)(2). *State v. Wilson*, 87 N.C. App. 399, 400-01, 361 S.E.2d 105, 106-07 (1987), *disc. rev. denied*, 321 N.C. 479, 364 S.E.2d 670 (1988). In addition, this Court and the Court of Appeals have upheld indecent liberties convictions under both subdivisions of N.C.G.S. § 14-202.1(a) based upon essentially identical conduct. *See*, *e.g.*, *State v. Banks*, 322 N.C. 753, 767, 370 S.E.2d 398, 407 (1988) (concluding that the act of inserting an adult's tongue into a child's mouth constituted an "immoral, improper, or indecent" act within the meaning of N.C.G.S. § 14-202.1(a)(1) and a "lewd or lascivious" act within the meaning of N.C.G.S. § 14-202.1(a)(2)); *State v. Hammett*, 182 N.C. App. 316, 323, 642 S.E.2d 454, 459 (concluding that masturbating in a child's presence constituted an offense punishable pursuant to N.C.G.S. 14-202.1(a)(2)), *appeal dismissed and disc. rev. denied*, 361 N.C. 572, 651 S.E.2d 227 (2007); *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981) (concluding that masturbating in a child's presence constituted an offense pursuant to N.C.G.S. § 14-202.1(a)(1)); *cf. State v. Jones*, 172 N.C. App. 308, 314-16, 616 S.E.2d 15, 19-20 (2005) (holding that a single act cannot support two convictions under both N.C.G.S. § 14-202.1(a)(1) and N.C.G.S. § 14-202.1(a)(2), respectively). In light of these decisions, at least four members of an en banc panel of the Fourth Circuit have determined that N.C.G.S. § 14-202.1(a) is not a divisible statute. *United States v. Vann*, 660 F.3d 771, 782-83 (4th Cir. 2011) (King, J., concurring, with Motz, Gregory, & Davis, JJ.). Thus, the extent to which N.C.G.S. § 14-202.1(a) is a divisible statute remains an open question about which reasonable minds can differ.

Assuming, without in any way deciding, that N.C.G.S. § 14-202.1(a) is a divisible statute, additional questions of North Carolina law must be resolved before defendant's eligibility to seek the termination of his obligation to continue to register as a sex offender can be determined. Although this Court has held that proof that a touching occurred is not necessary for a finding of guilt for purposes of N.C.G.S. § 14-202.1(a)(1), *see State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (stating that N.C.G.S. § 14-202.1(a)(1) does not require "the State [to] prove

that a touching occurred"), and while the Court of Appeals has held that proof of a touching is not necessary for a finding of guilt under N.C.G.S. § 14-202.1(a)(2), *see Hammett*, 182 N.C. App. at 323, 642 S.E.2d at 459 (holding that the defendant did not need to have physically touched the victim in order to be convicted of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(2)); *State v. Every*, 157 N.C. App. 200, 207, 578 S.E.2d 642, 648 (2003) (stating that "[i]t is not necessary that an actual touching of the victim by defendant occur in order for the defendant to be 'with' a child for purposes of taking indecent liberties under [N.C.G.S.] § 14-202.1(a)(1)" (citation omitted)), this Court has never addressed, much less decided, whether a physical touching of the victim is necessary for a defendant to be convicted of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(2). For that reason, this Court has also never determined whether any such physical touching requirement applicable to N.C.G.S. § 14-202.1(a)(2) is limited to an "intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person." 18 U.S.C. § 2246(3). As a result, our existing precedent simply does not permit the making of certain preliminary determinations required for a showing that defendant's conviction for taking indecent liberties with a child is "comparable to or more severe than" "abusive sexual contact," *Berry*, 814 F.3d at 200 (quoting 42 U.S.C. 42 U.S.C. § 16911(4)(A)), or, alternatively, whether there is "a realistic probability . . . that the State would apply [N.C.G.S. § 14-202.1(a)(2)] to conduct that falls outside the generic definition of" abusive sexual contact, *Price*, 777 F.3d at 704 (quoting *Duenas–Alvarez*, 549 U.S. at 193, 166 L. Ed. 2d at 693).

Even if N.C.G.S. § 14-202.1(a)(2) is interpreted in such a manner as to make it comparable to abusive sexual contact in violation of 18 U.S.C. § 2244, the present record does not permit us to determine, using the limited range of documents delineated in *Shepard*, whether defendant was convicted of the offense spelled out in N.C.G.S. § 14-202.1(a)(2) rather than the offense spelled out in N.C.G.S. § 14-202.1(a)(1). As an initial matter, we note that the indictments returned against defendant for the purpose of charging him with taking indecent liberties with a child allege, in conjunction with a citation to N.C.G.S. § 14-202.1, that:

> the defendant named above unlawfully, willfully, and feloniously did take and attempt to take immoral, improper, and indecent liberties with the child named below for the purpose of arousing and gratifying sexual desire and did commit and attempt to commit a lewd and lascivious act upon the body of the child named below. At the time of

> this offense, the child named below was under the age of 16 years and the defendant named above was over 16 years of age and at least five years older than the child.

Similarly, the transcript of plea indicates that defendant had agreed to plead guilty to "two counts of indecent liberties"; the Felony Judgment Findings of Aggravating and Mitigating Factors describe defendant's "offense" as "indecent liberties student"; and the trial court's judgment indicates that defendant had been convicted of "indecent liberties with a child," with an accompanying statutory reference to N.C.G.S. § 14-202.4(A).[10] As a result, the materials contained in the present record that the trial court is authorized to consider pursuant to *Shepard* simply do not permit a determination that defendant was convicted of committing the offense made punishable by N.C.G.S. § 14-202.1(a)(2) to the exclusion of the offense made punishable by N.C.G.S. § 14-202.1(a)(1) or to a generic offense made punishable by N.C.G.S. § 14-202.1.[11] *See Vann*, 660 F.3d at 773-76 (per curiam) (holding that an indictment like that returned against defendant in this case did not suffice to permit a court to determine, for purposes of the "modified categorical approach," that the defendant was convicted of the offense made punishable by N.C.G.S. § 14-202.1(a)(2)).

10. Although the State filed a motion seeking to have the statutory reference contained in the judgment changed from N.C.G.S. § 14-202.4(A) to N.C.G.S. § 14-202.1, the record contains no indication that this amendment request was ever approved.

11. As we noted earlier, the trial court did find that, "[p]rior to the court's sentencing of the defendant, the State gave a statement of facts in support of the plea during which it was stated that the defendant had engaged in improper touching of the defendant's daughter, a child of the age of 4 years, and that he had masturbated in the presence of the child," with this "improper touching [having] occurred in the vaginal area of the child." Although defendant did not challenge the sufficiency of the evidence to support this finding on appeal, the exact basis for this finding and the extent to which the trial court was entitled to consider the information upon which this finding was based pursuant to *Shepard* is unclear given that we have not been provided with a transcript of the hearing held before the trial court for the purpose of considering defendant's request for the termination of his obligation to register as a sex offender. However, the State did indicate in its brief before this Court that, "[t]hough no transcript from the formal plea proceedings was introduced as an exhibit, the State's description of its stated factual basis was not disputed by [defendant]" and was "corroborated by the testimony from [defendant's] witness." As a result, the trial court's finding concerning the conduct underlying defendant's conviction for taking indecent liberties with a child appears to rest, at most, upon a subsequent reconstruction of a factual basis statement offered in support of defendant's guilty plea rather than any sort of contemporaneously generated document of the type contemplated by *Shepard*. We need not determine whether the trial court was entitled to consider this information at this point given the disposition that we have deemed appropriate in this case and leave the determination of whether the information upon which the trial court relied in its initial order could be considered in determining defendant's eligibility to have his sex offender registration obligation terminated consistent with *Shepard* for consideration on remand.

Although this Court has the authority to make a number of the determinations listed above without the necessity for further proceedings in the trial court, we believe, after careful consideration, that we should refrain from doing so at this point. As the record clearly reflects, neither the Court of Appeals nor the trial court considered the extent, if any, to which the necessary categorization decision could be made using the "modified categorical approach." For that reason, we have not had the benefit of briefing and argument concerning the numerous legal questions of first impression which must be resolved in order to determine defendant's eligibility for removal from the sex offender registry. In light of its misapprehension of the applicable law, which was entirely understandable given that many of the decisions upon which we have relied in this opinion had not been handed down by the date upon which it entered its order, the trial court failed to determine whether N.C.G.S. § 14-202.1(a) constitutes a divisible statute, whether a conviction for the offense made punishable by N.C.G.S. § 14-202.1(a)(2) requires proof that the defendant "intentional[ly] touch[ed], either directly or through the clothing, . . . the [victim's] genitalia, anus, groin, breast, inner thigh, or buttocks," 18 U.S.C. § 2246(3), and the extent, if any, to which the information that could be appropriately considered under *Shepard* that was contained in the record tended to show that defendant's indecent liberties conviction rested solely upon a violation of N.C.G.S. § 14-202.1(a)(2). Consistent with the well-established legal principle that "[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light," *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973) (brackets in original) (quoting *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939), and citing *Davis v. Davis*, 269 N.C. 120, 127, 152 S.E.2d 306, 312 (1967); *Owens v. Voncannon*, 251 N.C. 351, 355, 111 S.E.2d 700, 703 (1959); and *In re Gibbons*, 247 N.C. 273, 283, 101 S.E.2d 16, 23-24 (1957)), we believe that the most appropriate manner in which to resolve the issues that remain to be addressed in this case is for this Court to affirm the Court of Appeals' decision that the trial court erred by applying the "circumstance-specific approach" in determining whether defendant should be deemed eligible to have the requirement that he register as a sex offender terminated. However, we modify the Court of Appeals' decision in order to require use of the "modified categorical approach" rather than the pure "categorical approach" in cases involving divisible statutes, and remand this case to the Superior Court, Catawba County, for further proceedings not inconsistent with this opinion. On remand, the trial court should consider whether N.C.G.S. § 14-202.1 is a divisible statute. If the trial court deems N.C.G.S. § 14-202.1 to be divisible,

it must then consider whether guilt of any separate offense set out in N.C.G.S. § 14-202.1(a)(2) requires proof of a physical touching and whether any such physical touching requirement necessitates proof that the defendant "intentional[ly] touch[ed], either directly or through the clothing, [ ] the genitalia, anus, groin, breast, inner thigh, or buttocks of" the victim. Finally, if guilt of any separate offense set out in N.C.G.S. § 14-202.1(a)(2) requires proof that defendant "intentional[ly] touch[ed], either directly or through the clothing, [ ] the genitalia, anus, groin, breast, inner thigh, or buttocks of" the victim, the trial court must determine whether any document that the trial court is authorized to consider under *Shepard* permits a determination that defendant was convicted of violating N.C.G.S. § 14-202.1(a)(2) rather than any specific offense set out in N.C.G.S. § 14-202.1(a)(1) or any generic offense made punishable pursuant to N.C.G.S. § 14-202.1(a). Finally, if necessary, the trial court should consider, in the exercise of its discretion, whether it should terminate defendant's obligation to register as a sex offender.

MODIFIED AND AFFIRMED, AND REMANDED.

STATE OF NORTH CAROLINA
v.
DOMINIQUE JEVON PERRY

No. 81A14

Filed 21 December 2016

Constitutional Law—cruel and unusual punishment—juvenile sentence—life without parole

A trial court order denying defendant's motion for appropriate relief was reversed where defendant had received a sentence of life without parole as a seventeen-year-old. The State's sole argument in defense of the denial of the motion was that *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), was not to be applied retroactively, but *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), held that *Miller* was entitled to retroactive application.

On writ of certiorari to review an order denying a motion for appropriate relief entered on 3 June 2013 by Judge R. Stuart Albright in Superior Court, Guilford County. On 29 July 2013, the Court of Appeals allowed defendant's petition for the issuance of a writ of certiorari authorizing

review of the trial court's order pursuant to N.C.G.S. § 7A-32(c). On 11 March 2014, the Supreme Court, on its own initiative, certified this case for review prior to determination in the Court of Appeals. Following oral argument on 6 May 2014, the Court ordered supplemental briefing on 28 January 2016. Heard in the Supreme Court on 12 October 2016.

Roy Cooper, Attorney General, by Robert C. Montgomery, Senior Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Barbara S. Blackman and Kathryn L. VandenBerg, Assistant Appellate Defenders, for defendant-appellant.

ERVIN, Justice

On 21 May 2007, the Guilford County grand jury returned bills of indictment charging defendant with robbery with a dangerous weapon and first-degree murder, with these charges having arisen from an incident that allegedly occurred on 18 April 2007, when defendant was seventeen years old. On 27 August 2008, the jury returned verdicts convicting defendant of robbery with a dangerous weapon and first-degree murder on the basis of malice, premeditation, and deliberation and on the basis of the felony murder rule. Based upon the jury's verdict, Judge Stafford G. Bullock[1] entered judgments sentencing defendant to a term of fifty-one to seventy-one months imprisonment based upon his conviction for robbery with a dangerous weapon and to a consecutive term of life imprisonment without parole based upon his conviction for first-degree murder. The Court of Appeals filed an opinion on 8 December 2009 finding no error in the proceedings that led to the entry of Judge Bullock's judgments. *State v. Perry*, 201 N.C. App. 448, 688 S.E.2d 551, 2009 WL 4576081 (2009) (unpublished).

On 12 April 2013, defendant filed a motion for appropriate relief in which he requested that the life without parole sentence that had been imposed upon him based upon his conviction for first-degree murder be vacated and that a constitutionally permissible sentence be imposed upon him instead. In support of this request, defendant pointed out that the United States Supreme Court had held in *Miller v. Alabama*, ___ U.S. ___, ___, 132 S. Ct. 2455, 2460, 183 L. Ed. 2d 407, 414-15 (2012), that the

1. Although the trial court's judgments indicate that they were entered by Judge Stanford G. Buliock, the statement of the entering judge's name appears to have been a clerical error arising from a misspelling of former Judge Bullock's name.

imposition of a mandatory sentence of life imprisonment without the possibility of parole upon a juvenile like defendant violates the Eighth Amendment prohibition against the imposition of cruel and unusual punishment and that the "rule" enunciated in *Miller* should be applied retroactively to defendant. On 28 May 2013, the State filed an answer to defendant's motion for appropriate relief in which the State asserted that the defendant was not entitled to have the life without parole sentence that had been imposed upon him based upon his conviction for first-degree murder vacated. In support of this contention, the State argued that *Miller* should not be retroactively applied in cases that had become final before the date upon which it had been decided because the prohibition against the imposition of life without parole sentences upon juveniles announced in *Miller* was a new rule that did not fall within the scope of either exception to the principle that such new rules were not entitled to retroactive application that was set out in *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 1075-76, 103 L. Ed. 2d 334, 356 (1989) (plurality opinion), and made applicable in North Carolina state postconviction proceedings in *State v. Zuniga*, 336 N.C. 508, 513-14, 444 S.E.2d 443, 446-47 (1994). On 3 June 2013, the trial court entered an order denying defendant's motion for appropriate relief, with this decision having been predicated on a determination that "Miller does not apply retroactively to [d]efendant's case."

On 12 July 2013, defendant filed a petition with the Court of Appeals seeking the issuance of a writ of certiorari authorizing review of the trial court's order denying his motion for appropriate relief. On 29 July 2013, the Court of Appeals entered an order allowing defendant's certiorari petition. After the filing of the parties' briefs, this Court entered an order on its own motion on 11 March 2014 certifying this case for review prior to determination by the Court of Appeals, with the parties being entitled to rely upon the briefs that had already been filed in the Court of Appeals in seeking to persuade this Court of the merits of their respective positions. Subsequently, we heard oral argument in this case on 6 May 2014. On 28 January 2016, this Court ordered supplemental briefing for the purpose of allowing the parties to address the effect of the decision in *Montgomery v. Lousiana*, ___ U.S. ___, ___, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599, 622 (2016), in which the United States Supreme Court held that *Miller* announced a substantive rule of law entitled to retroactive application in state postconviction proceedings, on the proper disposition of this case. After the filing of supplemental briefs by defendant and the State, this Court entered an order on 18 August 2016 providing for the holding of a consolidated supplemental oral argument in this case and the related cases of *State v. Seam* (No. 82A14), and *State v. Young*

(No. 80A14). Supplemental oral argument was heard in this case on 12 October 2016.

The State's sole argument in defense of the trial court's decision to deny defendant's motion for appropriate relief on appeal has been a contention that defendant was not entitled to have *Miller* retroactively applied in his case. As it candidly conceded in its supplemental brief, however, the State's non-retroactivity argument does not survive *Montgomery*. In light of that fact, the State concedes, and we agree, that defendant is entitled to be resentenced in the case in which he was convicted of first-degree murder pursuant to Part 2A of Article 81B of Chapter 15A of the North Carolina General Statutes. As a result, the trial court's order denying defendant's motion for appropriate relief is reversed and this case is remanded to the Superior Court, Guilford County, for further proceedings not inconsistent with this opinion, including the imposition of a new sentence in the case in which defendant was convicted of first-degree murder pursuant to N.C.G.S. §§ 15A-1340.19A to -1340.19D.

REVERSED AND REMANDED

STATE OF NORTH CAROLINA
v.
TERRANCE JAVARR ROSS

No. 297PA15

Filed 21 December 2016

1. Criminal Law—guilty pleas—voluntariness

The Court of Appeals erred by vacating defendant's guilty plea to possession of a firearm by a felon where defendant pleaded guilty knowingly and voluntarily. Considered in its entirety, the transcript of the plea hearing did not demonstrate that defendant believed his plea was conditioned on the right to seek review of any pretrial motion (defendant contended that the State violated N.C.G.S. § 15A-711).

2. Appeal and Error—writ of certiorari—issues not accepted

The Court of Appeals' decision to issue a writ of certiorari is discretionary and that Court may choose to grant such a writ to review some issues but not others. Two issues that defendant raised in his

petition for writ of certiorari did not survive that Court's decision to allow the writ for the limited purpose of considering the voluntariness of his guilty plea.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 776 S.E.2d 897 (2015), vacating a judgment entered on 5 August 2014 by Judge James W. Morgan in Superior Court, Cleveland County, and remanding for further proceedings. Heard in the Supreme Court on 17 May 2016 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

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

Peter Wood, *for defendant-appellee.*

BEASLEY, Justice.

We consider whether the Court of Appeals erred by vacating the judgment entered by the trial court—which was entered according to the terms of the parties' plea agreement—on grounds that defendant's plea was not entered knowingly and voluntarily. For the reasons stated herein, we reverse the decision of the Court of Appeals.

On 22 September 2008, a grand jury indicted defendant on two counts of possession of a firearm by a felon. Defendant alleges that on 14 October 2010, while he was incarcerated in another county on unrelated charges, he filed a motion under N.C.G.S. § 15A-711(c)[1] in Superior Court, Cleveland County, to proceed with the possession of firearms charges. Defendant also alleges that in April 2013 he filed a pretrial motion to dismiss due to the State's failure to request that defendant be produced for trial within the six months after defendant's motion to

1. Defendant filed this alleged motion pursuant to N.C.G.S. § 15A-711(c). Section 15A-711 delineates the procedures for securing attendance at hearings and trials of criminal defendants who are incarcerated in institutions within the State. Subsection 15A-711(c) provides that "[a] defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him" may file a written request "with the clerk of the court where the other charges are pending" to "require the prosecutor prosecuting such charges to proceed pursuant to this section." A copy of defendant's request must be served upon the prosecutor, and "[i]f the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed." N.C.G.S. § 15A-711(c) (2015).

proceed.[2] On 5 August 2014, the matter came on for hearing in Superior Court, Cleveland County. Defendant entered an *Alford* plea of guilty to two counts of possession of a firearm by a convicted felon. At that time, the State and defendant agreed to the following terms of the plea arrangement:

> In exchange for pleas of guilty to two counts of possession of a firearm by a convicted felon, the State agrees to consolidate the charges into one Class G felony for sentencing with the defendant receiving an active sentence of 24 - 29 months[.]
>
> The State further agrees to dismiss all remaining charges pending against the defendant in Cleveland County.
>
> The sentence in these cases will run at the expiration of any sentence being served.

After defendant tendered his guilty plea before the trial court, the following colloquy occurred among defendant, defense counsel, and the trial court:

> [DEFENSE COUNSEL]: . . . You can see from the transcript [defendant] has a lot of irons in the fire over here in Cleveland County, Your Honor. That's why we chose to go forward today. He feels that given all he has going on, even though there may be some holes in this case that would have benefited him at trial, the big picture he feels it's in his best interest to resolve these matters in this fashion even though he's serving a lengthy sentence, and this will add time to that. He's prepared to accept that responsibility to get the benefit of clearing all these cases up. We'd ask you to accept the plea based on that, Your Honor. . . .
>
> . . . .

2. The record does not contain any file stamped copy of defendant's alleged section 15A-711 motion or motion to dismiss, and thus it is unclear whether any pretrial motions were ever filed. The record does include two documents addressed to Mr. Rick Beam regarding defendant's purported motion to dismiss, which are dated 10 September 2013 and 16 September 2013, respectively. Neither document is file stamped by the Clerk of Superior Court's office and neither appears to have been filed. An internet search shows that Rick Beam is an attorney practicing in Gaston, Cleveland, and Lincoln Counties, North Carolina. The record does not indicate the nature of Mr. Beam's relationship with defendant.

THE DEFENDANT: Your Honor, I just want to go on record saying that I had previously filed a 15-7 -- 15A-711 request, and then I followed up with a motion that was never answered with the Court, and I feel like due to that fact, *it's in my best interest to plead guilty today*.

[DEFENSE COUNSEL]: The motion was never heard, Your Honor. I think that's what he's saying. Given the uncertainty of it, he feels it's in his best interest to go forward in this fashion, Your Honor.

THE COURT: So you're abandoning whatever was –

THE DEFENDANT: No. I just want to put on record that it was made for appeal purposes. They can't say that I abandoned the whole issue with the motion. I'm saying that I filed it previously, then I brought it up with the motion that was never answered by the Court.

THE COURT: What are you talking about? A speedy trial motion?

THE DEFENDANT: No. It's just a motion to proceed.

THE COURT: Oh, I see what you're saying.

THE DEFENDANT: Yes.

THE COURT: Okay.

THE DEFENDANT: I had filed them previously within 180 days, and they didn't comply so I filed a motion to dismiss which was never heard. So after it's been so long -- at this time, *that's my best option to just go on and plead-guilty*. I'll pursue that later on. I just want to leave that.

THE COURT: Well, I don't know for certain, but the fact that you're proceeding now, you may not be able to proceed on that issue.

THE DEFENDANT: *If that's the choice, I just want to have it on record. If that's the choice -- if I can't later on, I just wanted to put it on there just in case later on in the process, they don't say that I didn't bring it up before I was sentenced.*

THE COURT: Okay.

> [DEFENSE COUNSEL]: I explained that to him as well, Your Honor, take whatever, if anything happens, it happens. If it doesn't, it doesn't.
>
> THE COURT: Okay. All right. *With all that, it's still your choice to go ahead?*
>
> [THE DEFENDANT]: *Yes. Yes, sir.*
>
> THE COURT: All right. I just wanted to make sure that was clear.

(Emphases added). The trial court accepted defendant's guilty plea and sentenced him to twenty-four to twenty-nine months in prison. Defendant gave notice of appeal the same day he entered his guilty plea.[3]

On 15 August 2014, defendant filed a *pro se* motion for appropriate relief in the trial court arguing that the trial court lacked jurisdiction over defendant and the subject matter of the case. Specifically, defendant argued that because the State failed to proceed as required by N.C.G.S. § 15A-711(c) after his written request to do so, the charges against him should have been dismissed. In its 18 August 2014 written order, which was entered on 20 August 2014, the trial court denied defendant's motion for appropriate relief, concluding that defendant waived all claims he may have had under section 15A-711 when he entered his guilty plea; that it had jurisdiction over defendant; and that defendant's constitutional and statutory rights were not violated by the entry and acceptance of his guilty plea. The record does not indicate that defendant noted an appeal from the denial of his motion for appropriate relief.

On 27 February 2015, defendant petitioned for writ of certiorari to the Court of Appeals. In his petition defendant argued that: (1) there was an insufficient factual basis to support a plea of guilty on one of his charges; and (2) the trial court should have dismissed the charges on the basis that the State violated N.C.G.S. § 15A-711 and erred in its denial

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3. The State filed a Motion to Dismiss defendant's appeal. The Court of Appeals dismissed the appeal because defendant had no right of appeal from the trial court's acceptance of his guilty plea. *See* N.C.G.S. § 15A-1444 (2015) (enumerating the limited circumstances in which a defendant who pleads guilty has a right to appeal).

In support of his purported appeal as of right, defendant asserted before the Court of Appeals that the trial court committed prejudicial error when it accepted his guilty plea to two counts of possession of a firearm by a felon because the evidence only supported one conviction of possession of a firearm by a felon. Additionally, he asserted that the trial court committed prejudicial error when it failed to dismiss the charges against him after the State failed to writ him to Cleveland County within six months of his section 15A-711 motion.

of his post-conviction motion for appropriate relief based on the State's violation of section 15A-711.

The Court of Appeals allowed defendant's petition for writ of certiorari to review the question of whether defendant entered his guilty plea voluntarily and knowingly. *State v. Ross*, ___ N.C. App. ___, 776 S.E.2d 897, 2015 WL 4620517 (2015) (unpublished). Although the parties did not brief the issue of whether defendant's plea was entered knowingly and voluntarily, the Court of Appeals reasoned that it is proper to issue this extraordinary writ when the voluntariness of a defendant's plea is in question and the defendant made a motion for appropriate relief in an effort to preserve matters to be heard after trial.

[1] In its opinion the Court of Appeals cited its previous holding that "a guilty plea entered pursuant to a transcript of plea which purports to reserve the right to seek appellate review" of an issue not subject to review after the entry and acceptance of the plea "does not result in the entry of a plea which 'is a product of informed choice.' " *Ross*, 2015 WL 4620517, at *1 (quoting *State v. Tinney*, 229 N.C. App. 616, 624, 748 S.E.2d 730, 736 (2013) (quoting N.C.G.S. § 15A-1022(b))). The Court of Appeals further explained that "the entry of a plea conditioned on the appealability of non-appealable matters does not result in the entry of a voluntary plea." *Id.* (citing *State v. Demaio*, 216 N.C. App. 558, 562, 716 S.E.2d 863, 866 (2011)). After reviewing the plea hearing transcript, the Court of Appeals held that defendant conditioned his plea on the appealability of the failure to grant his section 15A-711 motion; therefore, the plea "was not entered knowingly and voluntarily." *Id.* at 2. The Court of Appeals, accordingly, vacated the trial court's judgment and remanded for further proceedings. *Id.* This Court allowed discretionary review on 28 January 2016.

In its brief to this Court, the State requested that we review whether the Court of Appeals erred when it vacated the trial court's judgment on the grounds that defendant's plea was not entered knowingly and voluntarily. This Court reviews the decision of the Court of Appeals to determine whether the decision contains any error of law. *E.g.*, *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994) (citations omitted).

The exchange among defendant, defense counsel, and the trial court during the plea colloquy—a portion of which is set out above—does not indicate that defendant's guilty plea was conditionally entered so as to preserve the right for pretrial motions to be heard at a later time. When considered in its entirety, the transcript of the plea hearing does not demonstrate that defendant believed his plea was conditioned on the

right to seek review of any pretrial motion. Defendant pleaded guilty understanding that the right to appeal any claims he may have raised before the trial court was not preserved and was therefore waived. The trial court warned defendant that he "may not be able to proceed on [the motions]," thereby waiving certain rights by entering his guilty plea. Defendant indicated multiple times that he understood the trial court's explanation regarding the waiver of certain rights. Defendant also signed the transcript of plea form, which indicated that there were limitations on his right to appeal. *See State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007) ("Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary."); *see also State v. Reynolds*, 298 N.C. 380, 395, 259 S.E.2d 843, 852 (1979) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." (quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 243 (1973))), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980).

Furthermore, defendant acknowledged that the plea arrangement as set forth in the transcript of plea was his "full plea arrangement." Unlike *Demaio*, on which the Court of Appeals relied, the terms and conditions of the parties' plea agreement in this case did not attempt to preserve the right to appellate review of a non-appealable matter. In *Demaio* the defendant's plea agreement expressly provided that he preserved the right to appeal the denial of certain pretrial motions. 216 N.C. App. at 560-61, 716 S.E.2d at 865. But the defendant had no appeal as of right as a result of his guilty plea and waived the right to seek review of these claims at a later time by pleading guilty. Thus, the defendant had no means to take advantage of the plea arrangement to which he agreed. *Id.* at 561-65, 716 S.E.2d at 865-68. In that case the Court of Appeals explained that because the defendant entered a guilty plea on the condition that he preserved the right to appeal a non-appealable matter, his plea was not voluntary. *Id.* at 564-65, 716 S.E.2d at 867-68. Here, however, defendant's plea agreement was not conditioned on the right to appeal a non-appealable matter. The only terms and conditions set forth in the parties' plea agreement are the following:

> In exchange for pleas of guilty to two counts of possession of a firearm by a convicted felon, the State agrees to consolidate the charges into one Class G felony for sentencing with the defendant receiving an active sentence of 24 - 29 months[.]

> The State further agrees to dismiss all remaining charges pending against the defendant in Cleveland County.
>
> The sentence in these cases will run at the expiration of any sentence being served.

Defendant's plea agreement was not conditioned on anything else. Additionally, unlike *Demaio*, in which the defendant was never advised that a provision in his plea agreement was invalid, the trial court here informed defendant that he may not be able to seek appellate review of any failure to grant certain pretrial motions, and defendant indicated to the trial court that he understood he waived his rights. *See Tinney*, 229 N.C. App. at 622, 748 S.E.2d at 735 (holding that the defendant was "not entitled to relief from the trial court's judgment on the basis of the principle enunciated in *Demaio*" because the defendant "had ample notice" that if he proceeded with the guilty plea it was not likely that he could obtain review of an order transferring his case from district court to superior court). Defendant does not allege that he conditioned his guilty plea on the right to appeal the failure to grant his section 15A-711 motion, and at the hearing defendant and defense counsel specifically told the trial court that defendant wanted to move forward with the plea agreement because it was in defendant's best interest. Accordingly, we hold that defendant entered his guilty plea knowingly and voluntarily.

[2] Further, the Court of Appeals found it appropriate to grant defendant's petition for writ of certiorari only on the issue of whether defendant's plea was knowing and voluntary, and not on the two issues raised by defendant in his petition for writ of certiorari. The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause. *See Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927) ("*Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." (citations omitted)). As such, the two issues that defendant raised in his petition for writ of certiorari to the Court of Appeals have not survived that court's decision to allow the writ for the limited purpose of considering the voluntariness of his guilty plea. Specifically, defendant did not appeal the trial court's denial of his motion for appropriate relief; he is not entitled to appeal his guilty plea; if he did file a section 15A-711 motion, any challenge to the failure to grant it did not survive his guilty plea; and defendant cannot now challenge the sufficiency of the factual basis for his plea deal.

Because we conclude that defendant pleaded guilty knowingly and voluntarily, we therefore reverse the decision of the Court of Appeals vacating defendant's guilty plea and the resulting judgment.

REVERSED.

STATE OF NORTH CAROLINA
v.
FELIX RICARDO SALDIERNA

No. 271PA15

Filed 21 December 2016

1. Juveniles—breaking and entering investigation—interview—request for parent—ambiguous

In a prosecution for felonious breaking and entering and other charges in which a sixteen-and-one-half-year-old defendant was interviewed by investigators, his statement, "Um, can I call my mom?" was not a clear and unambiguous invocation of his right to have his parent or guardian present during questioning. Defendant never gave any indication that he wanted to have his mother present for his interrogation, did not condition his interview on first speaking with her, and had just signed the juvenile rights form expressing his desire to proceed on this own. The purpose of the call was never established and law enforcement officers had no duty to ask clarifying questions or to cease questioning. Defendant's statutory juvenile rights, which included the equivalent of the *Miranda* warnings, were not violated.

2. Juveniles—confession—two-pronged review

A breaking and entering case involving a sixteen-and-one-half-year-old defendant was remanded where defendant asked during an interview with an investigator if he could call his mom, did so, and confessed after the conversation with the investigator resumed. The admissibility of a juvenile defendant's confession is a two-pronged inquiry. Even though defendant's N.C.G.S. § 7B-2101(a)(3) right was not violated, defendant's confession is not admissible unless he knowingly, willingly, and understandingly waived his rights. The Court of Appeals did not reach this question.

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. ___, 775 S.E.2d 326 (2015), reversing an order denying defendant's motion to suppress entered on 20 February 2014 by Judge Forrest D. Bridges, vacating a judgment entered on 4 June 2014 by Judge Jesse B. Caldwell, both in Superior Court, Mecklenburg County, and remanding the case for further proceedings. Heard in the Supreme Court on 16 February 2016.

Roy Cooper, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellant.*

Goodman Carr, *PLLC*, *by W. Rob Heroy*, *for defendant-appellee.*

EDMUNDS, Justice.

Defendant, a juvenile, asked to telephone his mother while undergoing custodial questioning by police investigators. The call was allowed, after which the interrogation continued. The trial court denied defendant's motion to suppress the statements he made following the call. We conclude that defendant's request to call his mother was not a clear invocation of his right to consult a parent or guardian before proceeding with the questioning. Accordingly, we reverse the decision of the Court of Appeals that reversed the trial court's order denying the motion to suppress.

After several homes around Charlotte were broken into on 17 and 18 December 2012, Charlotte-Mecklenburg Police arrested defendant on 9 January 2013. At the time, defendant was sixteen and one-half years old. The arresting officers took defendant to a local police station where Detective Kelly (Kelly) interrogated him. Before beginning her interrogation, Kelly provided defendant with both English and Spanish versions of the Juvenile Waiver of Rights Form routinely used by the Charlotte-Mecklenburg Police Department to explain the protections afforded juveniles under N.C.G.S. § 7B-2101. These forms advised defendant that he had the right to remain silent; that anything he said could be used against him; that he had the right to have a parent, guardian, or custodian present during the interview; that he had the right to speak to a lawyer and to have a lawyer present to help him during questioning; and that a lawyer would be provided at no cost prior to questioning if he so desired. Kelly also read these rights in English to defendant, pausing after each to ask if defendant understood. Defendant

initialed the English form beside each enumerated right and the section that noted:

> I am 14 years old or more and I understand my rights as explained by Officer/Detective Kely [sic]. I DO wish to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below.

The words "I DO wish to answer questions now" on the form are circled. Only after defendant signed the form did Detective Kelly begin the interrogation.

Kelly had gone no further than noting the time and date for the audio recording when defendant asked, "Um, can I call my mom?" Detective Kelly offered her cellular telephone to defendant and allowed him to step out of the booking room to make the call. Detective Kelly could hear defendant but was not sure if he placed one call or two. Defendant did not reach his mother but did speak to someone else. However, because defendant spoke Spanish while on the phone, Kelly could not provide any details concerning the nature of the conversation. Upon defendant's return to the booking area, Kelly resumed her questioning. Defendant did not object and made no further request to contact anyone. During the ensuing interview, defendant confessed that he had been involved in the break-ins.

Defendant was indicted, *inter alia*, for two counts of felony breaking and entering, conspiracy to commit breaking and entering, and conspiracy to commit common law larceny after breaking and entering. On 9 October 2013, defendant moved to suppress his confession, arguing that it was illegally obtained in violation both of his rights as a juvenile under N.C.G.S. § 7B-2101 and of his rights under the United States Constitution. After conducting an evidentiary hearing, the trial court denied the motion in an order entered on 20 February 2014, finding as facts that defendant was advised of his juvenile rights and, after receiving forms setting out these rights both in English and Spanish and having the rights read to him in English by Kelly, indicated that he understood them. In addition, the trial court found that defendant informed Kelly that he wished to waive his juvenile rights and signed the form memorializing that wish. Although defendant then unsuccessfully sought to contact his mother, the court found:

17. That Defendant did not at that time or any other time indicate that he changed his mind regarding his desire to speak to Detective Kelly. That Defendant did not at that time or any other time indicate that he revoked his waiver.

18. That Defendant only asked to speak to his mother.

19. That Defendant did not make his interview conditional on having his mother present or conditional on speaking to his mother.

20. That Defendant did not ask to have his mother present at the interview site.

21. That, upon review of the totality of the circumstances, the Court finds that Defendant's request to speak to his mother was at best an ambiguous request to speak to his mother.

22. That at no time did Defendant make an unambiguous request to have his mother present during questioning.

23. That Defendant never indicated that his mother was on the way or could be present during questioning.

24. That Defendant made no request for a delay of questioning.

Based on those findings, the trial court determined that the interview was conducted in a manner consistent with N.C.G.S. § 7B-2101 and did not violate any of defendant's state or federal rights. The court concluded as a matter of law that the State met its burden of establishing by a preponderance of the evidence that defendant "knowingly, willingly, and understandingly waived his juvenile rights."

On 4 June 2014, defendant entered pleas of guilty to two counts of felony breaking and entering and two counts of conspiracy to commit breaking and entering, while reserving his right to appeal from the denial of his motion to suppress. The court sentenced defendant to a term of six to seventeen months, suspended for thirty-six months subject to supervised probation.

The Court of Appeals reversed the trial court's order denying defendant's motion to suppress, vacated the judgments entered upon defendant's guilty pleas, and remanded the case to the trial court for further proceedings. *State v. Saldierna*, ___ N.C. App. ___, ___, 775 S.E.2d

326, 334 (2015). The Court of Appeals recognized that the trial court correctly found that defendant's statement asking to telephone his mother was ambiguous at best. *Id.* at ___, 775 S.E.2d at 331. However, it went on to conclude that, unlike the invocation of *Miranda* rights by an adult, a juvenile need not make a clear and unequivocal request in order to exercise his or her right to have a parent present during questioning. *Id.* at ___, 775 S.E.2d at 333-34. Instead, the Court of Appeals held that when a juvenile between the ages of fourteen and eighteen[1] makes an ambiguous statement that potentially pertains to the right to have a parent present, an interviewing officer must clarify the juvenile's meaning before proceeding with questioning. *Id.* at ___, 775 S.E.2d at 334. The Court of Appeals based this distinction on the fact that *Miranda* rights are rooted in the United States Constitution, while the right to have a parent present during custodial interrogations is an additional statutory protection for juveniles who, by virtue of their age, lack the life experience and judgment of an adult. *Id.* at ___, 775 S.E.2d at 333.

This Court granted the State's petition for discretionary review. We review an opinion of the Court of Appeals for errors of law. N.C. R. App. P. (16)(a). "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). Findings of fact are binding on appeal if supported by competent evidence, *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted), while conclusions of law are reviewed de novo, *State v. Ortiz–Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013) (citing *Biber*, 365 N.C. at 168, 712 S.E.2d at 878), *cert. denied*, ___ U.S. ___, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014).

[1] In evaluating whether the trial court correctly denied defendant's motion to suppress, we first must consider the threshold question of whether defendant invoked his right to have his mother present during the custodial interview. We must also consider whether defendant knowingly and voluntarily waived his rights under section 7B-2101 of the

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1. Before 2015, the pertinent part of the statute read: "When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." N.C.G.S. § 7B-2101(b) (2013). In 2015, the General Assembly amended subsection 7B-2101(b) to raise the relevant age limit to "less than 16 years of age." Act of May 26, 2015, ch. 58, sec. 1.1, 2015 N.C. Sess. Laws 126, 126.

North Carolina General Statutes and under the constitutions of North Carolina and the United States, thus making his confession admissible. We begin with the former inquiry.

The State argues that defendant's request to call his mother was not an invocation of his right to have a parent present under N.C.G.S. § 7B-2101(a)(3). The State points out that defendant simply asked to call his mother, which the detective readily permitted. He never requested his mother's presence or indicated that he wished to suspend the interview until he could reach her. The State contends that when a juvenile's statement is ambiguous, law enforcement officers have no additional duty to ascertain whether the juvenile is invoking his statutory rights or whether they may continue questioning the minor.

In response, defendant argues that, according to the plain language of N.C.G.S. § 7B-2101, the interview should have ceased until defendant spoke with his mother or indicated his desire to proceed without her, even though the precise import of his question to the detective was unclear. Should we disagree with this statutory interpretation, defendant makes an argument under the United States Constitution that we should extend the rationale in *J.D.B. v. North Carolina*, 564 U.S. 261, 264-65, 131 S. Ct. 2394, 2398-99, 180 L. Ed. 2d 310, 318-19 (2011), which held that the age of a juvenile is a factor in determining whether he or she was in police custody for purposes of *Miranda*, and hold that reviewing courts must take into account the juvenile's age and maturity level when determining the admissibility of juvenile confessions.

As to defendant's statutory argument, N.C.G.S. § 7B-2101(a) establishes that juveniles must be advised of certain rights prior to a custodial interrogation. The statute codifies the juvenile's *Miranda* rights and adds the additional protection that the juvenile has the right to have a parent, guardian, or custodian present during questioning. N.C.G.S. § 7B-2101(a) (2015). A statement made during custodial interrogation is admissible only if the juvenile knowingly, willingly, and understandingly has waived his constitutional and statutory rights. *Id.* § 7B-2101(d) (2015).

This Court has recognized that a juvenile's statutory right to have a parent present during custodial interrogation is analogous to the constitutional right to counsel and therefore is entitled to the same protection. *State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986), *abrogated in part on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). In *Smith*, we noted that the Supreme Court of the United States held in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), that after a defendant expresses a desire to deal with

police only through counsel, he or she may not be questioned further until counsel is present or the defendant reinitiates communication with law enforcement. 317 N.C. at 106, 343 S.E.2d at 521. This Court in *Smith* applied that same principle in the context of juvenile law to hold that, when a juvenile unambiguously requested that his mother be brought to the police station, officers were required to cease all questioning until the mother arrived or the juvenile reinitiated discussions. *Id.* at 107, 343 S.E.2d at 522. These cases leave no doubt that a juvenile's constitutional rights under *Miranda* and statutory rights under N.C.G.S. § 7B-2101(a) are of equal weight and given equal consideration.

Nevertheless, the Supreme Court of the United States also has held that, when an individual under interrogation mentions an attorney with such vagueness that law enforcement investigators are left unsure whether the comment is an invocation of the right to counsel, police have no duty to ask clarifying questions and may continue with the interrogation. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362, 371 (1994) (holding that invocation of the right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney" (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209, 115 L. Ed. 2d 158, 169 (1991))). In other words, the objective test set out in *Davis* considers whether a reasonable officer under the circumstances would have understood the defendant's statement to be an invocation of his or her right to have an attorney present. *Davis*, *id.* at 459, 114 S. Ct. at 2355, 129 L. Ed. 2d at 371.

This Court has adopted the analytical framework found in *Davis* when determining whether a defendant has invoked his or her constitutional rights. For instance, in *State v. Boggess*, 358 N.C. 676, 600 S.E.2d 453 (2004), we held that the defendant's statement to police that "[i]f y'all going to treat me this way, then I probably would want a lawyer" did not constitute an invocation of the defendant's right to an attorney. *Id.* at 687, 600 S.E.2d at 460; *see also State v. Hyatt*, 355 N.C. 642, 655-56, 566 S.E.2d 61, 70-71 (2002) (holding that the defendant did not invoke his right to counsel when a nearby officer "could have heard" the defendant whisper to his father that "I want you to get me a lawyer"), *cert. denied*, 537 U.S. 1133, 123 S. Ct. 916, 154 L. Ed. 2d 823 (2003). Similarly, in *State v. Waring*, 364 N.C. 443, 701 S.E.2d 615 (2010), *cert. denied*, 565 U.S. 832, 132 S. Ct. 132, 181 L. Ed. 2d 53 (2011), we held that the defendant's statement that he "was not going to snitch" when questioned about his accomplice's name was not an unambiguous invocation of his right to remain silent. *Id.* at 473, 701 S.E.2d at 635.

We have also applied *Davis* when the suspect under interrogation is a juvenile. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001). In *Golphin*, the juvenile defendant was apprehended after he and his brother committed an armed robbery, stole a vehicle, and murdered two police officers. *Id.* at 380, 386-87, 533 S.E.2d at 183, 187. After he was detained, the defendant waived his juvenile rights under section 7B-2101 and gave a statement to an agent of the State Bureau of Investigation. *Id.* at 449, 533 S.E.2d at 224. When the agent specifically asked the defendant whether he was aware of an incident involving a Jeep, the defendant responded that "he didn't want to say anything about the [J]eep. He did not know who it was or he would have told us." *Id.* at 451, 533 S.E.2d at 225. Upon further questioning, however, the defendant admitted that his brother shot at a Jeep that was following them. *Id.* at 387, 449, 533 S.E.2d at 187, 224.

On appeal, the defendant argued that the agent violated his constitutional right to silence by continuing to question him after he requested not to discuss the Jeep. *Id.* at 448-49, 533 S.E.2d at 224. In rejecting the defendant's argument, we applied the *Davis* analysis and concluded that the defendant's statement was not an unambiguous request to remain silent. *Id.* at 450-51, 533 S.E.2d at 225. Instead, the statement appeared to be an acknowledgment that, had he known who was involved, the defendant would have shared that information freely. *Id.* at 451, 533 S.E.2d at 225. As a result, it was reasonable for the agent to continue the questioning because the defendant failed clearly to invoke any of his rights. *Id.* at 451-52, 533 S.E.2d at 225. In reaching this conclusion, we confirmed both that the *Davis* analysis applies when evaluating whether a juvenile defendant has invoked his or her juvenile rights during a custodial interrogation and that law enforcement officers are not required to seek clarification of ambiguous statements made by juvenile defendants under interrogation. *See id.* at 451, 533 S.E.2d at 225.

Because a juvenile's statutory right to have a parent or guardian present during questioning is entitled to the same protection as the constitutional right to counsel, we must apply *Davis* in determining whether defendant's statement—"Um, can I call my mom?"—was a clear and unambiguous invocation of his right to have his parent or guardian present during questioning. We conclude that it was not.

Although defendant asked to call his mother, he never gave any indication that he wanted to have her present for his interrogation, nor did he condition his interview on first speaking with her. Instead, defendant simply asked to call her. When the request was made, Kelly immediately

loaned defendant her personal cellular telephone so that he could make the call. Defendant's purpose for making the call was never established. Whatever his reasons, defendant did not "articulate his desire to have [a parent] present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for [a parent]," especially in light of the fact that defendant had just signed the portion of the juvenile rights form expressing his desire to proceed on his own. *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355, 129 L. Ed. 2d at 371. As the trial court pointed out, defendant's statement was at best an ambiguous invocation of his right to have his mother present. As in *Davis*, without an unambiguous, unequivocal invocation of defendant's right under N.C.G.S. § 7B-2101(a)(3), law enforcement officers had no duty to ask clarifying questions or to cease questioning. Because defendant's juvenile statutory rights were not violated, we reverse the decision of the Court of Appeals to the contrary.

[2] Nevertheless, the admissibility of defendant's confession is a two-pronged inquiry, as noted above. Even though we have determined that defendant's N.C.G.S. § 7B-2101(a)(3) right was not violated, defendant's confession is not admissible unless he knowingly, willingly, and understandingly waived his rights. N.C.G.S. § 7B-2101(d). The Court of Appeals did not reach this question and instead erroneously resolved the case upon the first prong. *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 334. Because we have concluded that defendant's right under subdivision 7B-2101(a)(3) was not violated, we remand this case to the Court of Appeals for consideration of the validity of defendant's waiver of his statutory and constitutional rights.

REVERSED AND REMANDED.

Justice BEASLEY dissenting.

I disagree with the majority and would hold that defendant's statement, "Um, Can I call my mom?" was an unambiguous invocation of his statutory right to have a parent present during custodial interrogation. Assuming *arguendo* that defendant's statement was ambiguous, I also disagree with the majority's conclusion that because defendant's request was ambiguous his statutory rights under N.C.G.S. § 7B-2101 were not violated. Because I would affirm the Court of Appeals' holding that law enforcement officers are required to ask questions to clarify the desire and intent of a juvenile who makes an ambiguous statement relating to his statutory right to have a parent present, I respectfully dissent.

Subsection 7B-2101(a) of the North Carolina General Statutes provides that juveniles must be advised of certain enumerated rights before being subjected to custodial interrogation. As explained by the majority, "The statute codifies the juvenile's *Miranda* rights and adds the additional protection that the juvenile has the right to have a parent, guardian, or custodian present during questioning." *See* N.C.G.S. § 7B-2101(a) (2015).[1] As such, the right to have a parent, guardian, or custodian present, *id.* § 7B-2101(a)(3), "is *not* the codification of a federal constitutional right, but rather our General Assembly's grant to the juveniles of North Carolina of a purely statutory protection *in addition* to those identified in *Miranda*." *State v. Saldierna*, ___ N.C. App. ___, ___, 775 S.E.2d 326, 332 (2015) (citing, *inter alia*, *State v. Fincher*, 309 N.C. 1, 12, 305 S.E.2d 685, 692 (1983) (stating, for purposes of determining the appropriate prejudice standard, that "[t]he failure to advise [a juvenile] defendant of his right to have a parent, custodian or guardian present during questioning is not an error of constitutional magnitude because this privilege is statutory in origin and does not emanate from the Constitution")). The statute also establishes that a juvenile's statement cannot be admitted into evidence unless the court "find[s] that the juvenile knowingly, willingly, and understandingly waived" his constitutional and statutory rights. N.C.G.S. § 7B-2101(d) (2015).

As the Court of Appeals stated, "[W]ith regard to a defendant's *Miranda* rights to remain silent and to have an attorney present during a custodial interrogation, the law is clear." *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 332. A defendant must unambiguously invoke his or her *Miranda* rights, and law enforcement officers have no obligation to clarify a defendant's ambiguous statements. *See Davis v. United States*, 512 U.S. 452, 459, 461-62, 114 S. Ct. 2350, 2355-56 (1994) ("[T]he suspect

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1. Subsection 7B-2101(a) states that prior to being questioned "[a]ny juvenile in custody must be advised":

> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C.G.S. § 7B-2101(a) (2015).

must unambiguously request counsel," and law enforcement officers are not required to ask clarifying questions when a suspect's statement regarding counsel is ambiguous); *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885 (1981) (holding that law enforcement officers must immediately cease questioning upon a suspect's unambiguous request for counsel and cannot reinitiate interrogation until counsel arrives or the suspect "initiates further communication"). In *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379 (2001), this Court extended this rule to juveniles, holding that a juvenile defendant's right to remain silent must be unambiguously invoked.[2] *Id.* at 451-52, 533 S.E.2d at 225.

To determine whether a defendant unambiguously invoked his *Miranda* rights, this Court applies the standard set forth in *Davis*: "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' " *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209 (1991)). The Court goes on to say that the inquiry is based on what a "reasonable officer in light of the circumstances" would believe the statement to mean. *Id.* at 459, 114 S. Ct. at 2355 (citations omitted). Here defendant asked to speak to his mother prior to questioning.[3] I agree with the Court of Appeals that Detective Kelly's question, "You want to call her *now before we talk*?" is telling. *See Saldierna*, ___ N.C. App. at ___ n.6, 775 S.E.2d at 334 n.6 ("Kelly's question indicates that she believed [defendant] *might be* asking to delay the interview, at least until he had a chance to speak to his mother."). Implicit in the protections afforded by subdivision 7B-2101(a)(3) is that law enforcement officers understand whether a juvenile intends to invoke the statutory rights. The

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2. *Golphin* did not address a juvenile defendant's right to have a parent present under N.C.G.S. § 7B-2101(a)(3).

3. The following conversation occurred after Detective Kelly advised defendant of his rights:

> [Defendant]: Um, Can I call my mom?
>
> [Det. Kelly]: Call your mom *now*?
>
> [Defendant]: She's on her um. I think she is on her lunch now.
>
> [Det. Kelly]: *You want to call her now before we talk*?
>
> [Det. Kelly to other officers]: He wants to call his mom.

(Emphases added.)

majority states that defendant "never gave any indication that he wanted to have [his mom] present for his interrogation . . . . Instead, defendant simply asked to call her." Thus, according to the majority, "Defendant's purpose for making the call was never established." Despite the majority's contention, the reasonable conclusion under the circumstances is that defendant wanted his mother present. Why else would defendant want to call his mom "now before [he] talked" if not to seek her advice and protection? The majority and the Court of Appeals agree that defendant's statement was not an unambiguous invocation of his statutory right to have a parent present.[4] However, defendant's statement was "sufficiently clear[ ] that a reasonable police officer in the circumstances would understand the statement to be a request" to have his mother present before questioning. *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355. In light of this unambiguous request, all questions should have immediately ceased until defendant's mother was present or defendant reinitiated the conversation. *See Edwards*, 451 U.S. at 484-85, 101 S. Ct. at 1885.

The cases discussed above only address a defendant's constitutional *Miranda* rights, not his statutory rights. In regard to a juvenile's statutory right to have a parent present, this Court has only addressed a juvenile's *unambiguous* invocation of the right. *See State v. Smith*, 317 N.C. 100, 343 S.E.2d 518 (1986), *abrogated in part on other grounds by State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001). In *Smith* this Court stated that law enforcement officers must cease questioning when a juvenile unambiguously invokes his statutory right to have a parent present. *Id.* at 108, 343 S.E.2d at 522; *see State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002). This Court has not, however, "considered the implications of a juvenile's *ambiguous* reference" to his statutory right to have a parent present. *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 333. The legislature intended to afford juveniles greater

4. Under the law as it currently stands, I understand how the majority and the Court of Appeals reached the conclusion that defendant's statement was ambiguous. *See State v. Branham*, 153 N.C. App. 91, 98-99, 569 S.E.2d 24, 28-29 (2002) (concluding that the juvenile defendant unambiguously invoked his right when he had officers write on the juvenile rights form that he wanted his mother present before questioning); *see also State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986) (finding that the juvenile defendant unambiguously invoked his right when he requested that his mom be brought to the station), *abrogated in part on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). *But see State v. Oglesby*, 361 N.C. 550, 558-59, 648 S.E.2d 819, 824 (2007) (Timmons-Goodson, J., dissenting) (stating, in regards to a juvenile defendant's request to call his aunt, that "it is uncontested that . . . the juvenile's confession in this case would be inadmissible if the individual requested had fallen into the requisite category"). For the reasons stated more thoroughly below, however, juvenile defendants are provided greater protections than their adult counterparts, especially in regards to a juvenile's statutory right and protection to have a parent present.

protection in subdivision (a)(3) than those afforded by a juvenile's constitutional *Miranda* rights codified in N.C.G.S. § 7B-2101(a)(1), (2), and (4). *See The Final Report of the Juvenile Code Revision Committee* 183 (Jan. 1979) (commenting that the Committee added "[subdivision] (3) . . . to assure that the juvenile may have his parent present during questioning if he desires and [stating that subdivision (3)] is an addition to case law requirements" found in N.C.G.S. § 7B-2101(a)(1), (2), and (4)). Moreover, when viewed in its entirety, section 7B-2101 demonstrates our General Assembly's acknowledgement that juveniles are especially vulnerable when subjected to custodial interrogation. *See* N.C.G.S. § 7B-2101(b) (providing that, in essence, a juvenile under the age of sixteen cannot waive his right to have a parent or attorney present); *see also* Act of May 26, 2015, ch. 58, sec. 1.1, 2015 N.C. Sess. Laws 126, 126 (increasing the age of juveniles protected by subsection (b) from less than fourteen to less than sixteen years).

According to the majority, this Court's decision in *Smith*—applying the *Miranda* framework set forth in *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355, to a juvenile's *unambiguous* invocation of his right to have a parent present—indicates that a juvenile's statutory right under subdivision (a)(3) can only be afforded as much protection as a juvenile's constitutional *Miranda* rights. As such, the majority concludes that the *Miranda* rules also apply to juveniles who make *ambiguous* statements regarding their right to have a parent present. I disagree. I agree with the Court of Appeals that by enacting N.C.G.S. § 7B-2101(a)(3), the legislature demonstrated its intent to afford a juvenile greater protection when attempting to invoke his or her right to have a parent present than when attempting to invoke his or her *Miranda* rights. *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 333 ("[R]eview of the provisions of section 7B-2101 reveals an understanding by our General Assembly that the special right guaranteed by subsection (a)(3) is different from those rights discussed in *Miranda* and, in turn, reflects the legislature's intent that law enforcement officers proceed with great caution in determining whether a juvenile is attempting to invoke this right.").

Although this Court has held that a "juvenile's right . . . to have a parent present during custodial interrogation[ ] is entitled to similar protection [as an adult's right to have an attorney present]," *Smith*, 317 N.C. at 106, 343 S.E.2d at 521, it does not follow that the protections afforded to juveniles under subdivision 7B-2101(a)(3) are capped at, and therefore cannot exceed, those provided under *Miranda*. As previously discussed, *Smith* involved a situation in which a juvenile defendant unambiguously requested that his mother be brought to the police station before he was

questioned. *Id.* at 102, 343 S.E.2d at 519. This Court held that in such circumstances, the *Miranda* framework of *Davis* applied and required law enforcement officers to immediately cease questioning. *Id.* at 106-07, 343 S.E.2d at 521-22. This Court applied principles established under the Fifth and Sixth Amendments to the "resumption of custodial interrogation" under section 7B-2101.[5] *Id.* at 106, 343 S.E.2d at 521 (noting that the *Miranda* cases "are not controlling"). The "resumption of custodial interrogation" principles apply in the context of an unambiguous invocation of rights. *See Davis*, 512 U.S. at 459-61, 114 S. Ct. at 2355-56 (holding that law enforcement officers must cease questioning after an unambiguous invocation of the right to counsel and *cannot resume questioning* until counsel is present or the defendant reinitiates communication). This Court did not address ambiguous statements, nor did it affirmatively hold that the protections afforded by subdivision (a)(3) are capped at those afforded to adults under *Miranda*. Therefore, I agree with the Court of Appeals' conclusion that the "case law regarding invocation of the *Miranda* rights guaranteed by the federal Constitution and codified in subsections 7B-2101(a)(1), (2), and (4) does not control our analysis of a juvenile's ambiguous statement possibly invoking the purely statutory right granted by our State's General Assembly in section 7B-2101(a)(3)." *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 332.

It is well established that juveniles differ from adults in significant ways and that these differences are especially relevant in the context of custodial interrogation. *See*, *e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 2699 (1988) (plurality opinion) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."); *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S. Ct. 1209, 1212 (1962) (stating that juveniles are "not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and . . . [are] unable to know how to protect [their] own interests or *how to get the benefits of [their] constitutional rights*" (emphasis added)); *Haley v. Ohio*, 332 U.S. 596, 599-600, 68 S. Ct. 302, 304 (1948) (plurality opinion) ("[W]e cannot believe that a lad of tender years is a match for the police in such a contest [as custodial

5. *Smith* discussed a juvenile's rights under to N.C.G.S. § 7A-595, which is the original codification of the rights afforded to juveniles in section 7B-2101. Section 7A-595 was repealed in 1999 and recodified as part of the Juvenile Code. *See* Act of Oct. 22, 1998, ch. 202, secs. 5, 6, 1997 N.C. Sess. Laws (Reg. Sess. 1998) 695, 742, 809. The two sections are substantively the same.

interrogation]. . . . He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him."). As discussed by the United States Supreme Court

> [a] child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.
>
> Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, that they are more vulnerable or susceptible to . . . outside pressures than adults, and so on. Addressing the specific context of police interrogation, we have observed that events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. Describing no one child in particular, these observations restate what any parent knows—indeed, what any person knows—about children generally.
>
> Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.

J.D.B. v. North Carolina, 564 U.S. 261, 272-73, 131 S. Ct. 2394, 2403 (2011) (citations and internal quotation marks omitted).

North Carolina courts have also acknowledged that "[j]uveniles are awarded special consideration in light of their youth and limited life experience." *State v. Oglesby*, 361 N.C. 550, 557, 648 S.E.2d 819, 823 (2007) (Timmons-Goodson, J., dissenting) (citing *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting)); *see In re K.D.L.*, 207 N.C. App. 453, 459, 700 S.E.2d 766, 771 (2010) ("[W]e cannot forget that police interrogation is inherently coercive—particularly for young people." (citations omitted)), *disc. rev. denied*, 365 N.C. 90, 706 S.E.2d 478 (2011). As discussed by Justice Harry C. Martin in his dissent to this Court's decision in *In re Stallings*, "Juveniles are not, after all miniature adults. Our criminal justice system recognizes that

their immaturity and vulnerability sometimes warrant protections well beyond those afforded adults. It is primarily for that reason that a separate juvenile code with separate juvenile procedures exists." 318 N.C. at 576, 350 S.E.2d at 333 (Martin, J., dissenting). Justice H. Martin goes on to explain that the Juvenile Code demonstrates "legislative intent to provide broader protections to juveniles." *See id.* at 577, 350 S.E.2d at 333. Furthermore, "at least two empirical studies show that 'the vast majority of juveniles are simply incapable of understanding their *Miranda* rights and the meaning of waiving those rights.' " *Oglesby*, 361 N.C. at 559 n.3, 648 S.E.2d at 824 n.3 (citation omitted); *see* Cara A. Gardner, Recent Developments, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile's Right to a Parent, Guardian, or Custodian During a Police Interrogation after* State v. Oglesby, 86 N.C. L. Rev. 1685, 1698-99 (2008) [hereinafter *Failing to Serve and Protect*] ("[R]esearch has revealed that only 20.9% of juveniles understand the standard Miranda warnings . . . . [and] many d[o] not understand that [their right to an attorney means that] the attorney could actually be present during police questioning rather than at some later time. . . . This may indicate that juveniles in North Carolina also have difficulty understanding that they have the right to have a parent . . . present during an interrogation rather than at some later time." (footnotes omitted)). Therefore, it is reasonable to believe that juveniles should be afforded greater protections when seeking to have a parent present. *See Failing to Serve and Protect* at 1695 ("The reason a juvenile in a custodial interrogation has a right to the presence of a parent, guardian, or custodian is presumably so that the adult may assist in protecting the juvenile's rights.").

For these reasons, I would hold that when a juvenile makes an ambiguous statement relating to his or her statutory right to have a parent present during a custodial interrogation, law enforcement officers are required to ask clarifying questions to determine whether the juvenile desires to have his or her parent present before the juvenile answers any questions. Specifically, *Miranda* precedent is not binding on a juvenile's statutory rights under N.C.G.S. § 7B-2101(a)(3), and I believe that a juvenile can be afforded greater protection than that afforded under *Miranda* when attempting to invoke his or her statutory right. Additionally, as discussed above, juveniles are not able to fully understand the consequences of their actions and are more likely to submit to pressure. Most adults are nervous and apprehensive when stopped by a uniformed officer even in relatively trivial situations such as routine traffic stops. Imagine then the apprehension, fear, and confusion of a teenager who finds himself under the power and authority of a law enforcement officer. Faced with this pressure, it stands to

reason that many juveniles will be unable to unequivocally and unambiguously articulate their desire to have a parent present before police interrogation begins and will certainly lack the ability to appreciate the legal significance of this statutory protection. According to the majority, defendant "never gave any indication that he wanted to have [his mother] present for his interrogation, *nor did he condition his interview on first speaking with her*. Instead, defendant simply asked to call her." This standard expects far too much of the typical juvenile being held in police custody and does not comport with our legislature's intent to protect juveniles' rights.

I also disagree with the State's argument that requiring law enforcement officers to ask clarifying questions would place an unreasonable burden on them. The burden, if any, would be slight. In this case, Detective Kelly could have asked a simple question to clarify defendant's intent when he said, "Um, Can I call my mom?" or to ascertain his desire after he was unable to contact her, such as "Do you want your mother present before I ask you any questions?" Defendant's response of "no" would leave the detective free to continue the custodial interrogation, whereas the response of "yes" would be considered an unambiguous invocation of his right, and the interrogation must therefore immediately cease. Regardless, "the structure of the juvenile code" is "persuasive evidence . . . that the legislature intended to favor juvenile protections *over law enforcement expediency*." *In re Stallings*, 318 N.C. at 576, 350 S.E.2d at 333 (emphasis added). Thus, because the majority's holding fails to take into account the significant differences between juveniles and adults and improperly caps the protection of juveniles' statutory rights under section 7B-2101, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
SETHY TONY SEAM

No. 82A14

Filed 21 December 2016

On writ of certiorari to review an order on a motion for appropriate relief entered on 8 August 2013 by Judge Theodore S. Royster, Jr. in Superior Court, Davidson County. On 4 September 2013, the Court of Appeals allowed the State's petition for writ of certiorari to review the order pursuant to N.C.G.S. § 7A-32(c). On 11 March 2014, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Following oral argument on 6 May 2014, the Court on 28 January 2016 ordered supplemental briefing. Heard in the Supreme Court on 12 October 2016.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Senior Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Barbara S. Blackman and Kathryn L. VandenBerg*, *Assistant Appellate Defenders*, *for defendant-appellee.*

PER CURIAM.

For the reasons stated in *State v. Young*, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016) (No. 80A14), the trial court's order is affirmed, and this case is remanded for resentencing.

AFFIRMED; REMANDED FOR RESENTENCING.

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

TURNER v. THOMAS

[369 N.C. 419 (2016)]

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

No. 319PA14

Filed 21 December 2016

1. Malicious Prosecution—first-degree murder—SBI blood analyst—acts after indictment

The trial court properly concluded that plaintiff's malicious prosecution claim against defendants should be dismissed under Rule 12(b)(6) because plaintiff failed to state a claim upon which relief could be granted. Based on the facts known to the investigators at the time of the grand jury proceedings, a reasonable and prudent person would believe there was probable cause sufficient to prosecute plaintiff for first-degree murder. The continuation theory was not before the Supreme Court on this appeal.

2. Emotional Distress—first-degree murder prosecution—extreme and outrageous conduct

Plaintiff sufficiently alleged extreme and outrageous conduct in an intentional infliction of emotional distress action against an SBI blood analyst following plaintiff's first-degree murder acquittal where his allegations painted a picture of law enforcement officials deliberately abusing their authority as public officials to manipulate evidence and distort a case for the purpose of reaching a foreordained conclusion of guilt.

3. Emotional Distress—intent—first-degree murder prosecution

In a an intentional infliction of emotional distress action, plaintiff sufficiently alleged intent to inflict emotional distress. While standing trial for first-degree murder is unquestionably stressful for anyone, plaintiff's complaint did not allege that defendants were merely negligent or that their investigation was inadequate; instead, the complaint alleged sinister motives and conduct by defendants specifically aimed toward the improper purpose of wrongfully convicting plaintiff of murder.

4. Emotional Distress—allegations of severe distress—sufficiency of allegations

The plaintiff in an intentional infliction of emotional distress action sufficiently alleged severe emotional distress where the complaint stated that plaintiff's severe emotional distress manifested itself in diagnosable form, including depression, anxiety, loss of sleep, loss of appetite, lack of concentration, difficulty remembering things, feelings of alienation from loved ones, shame, and loss of respect with the community and co-workers, and damages "in excess of $10,000.00."

Justice ERVIN concurring, in part, and concurring in the result, in part.

Justice HUDSON concurring in part, and dissenting in part.

Justice BEASLEY joins in this opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 235 N.C. App. 520, 762 S.E.2d 252 (2014), affirming in part and reversing in part an order entered on 11 April 2013 by Judge Stuart Albright in Superior Court, Forsyth County. Heard in the Supreme Court on 18 May 2015.

Morrow Porter Vermitsky Fowler & Taylor, PLLC, by John C. Vermitsky, for plaintiff-appellee.

Roy Cooper, Attorney General, by Tammera Hill and J. Joy Strickland, Assistant Attorneys General, for defendant-appellants Thomas and Deaver.

EDMUNDS, Justice.

In this case, we consider the tort liability of law enforcement agents when their criminal investigation went awry. Defendants Thomas and Deaver are or were at the time of the events in question agents of the State Bureau of Investigation (SBI) who participated in the investigation and prosecution of plaintiff for the murder of his wife. The remaining defendants are or were SBI policymakers responsible for supervising SBI agents, including Thomas and Deaver. After plaintiff was acquitted on grounds of self-defense, he filed a civil complaint against defendants alleging numerous claims, including malicious prosecution and

intentional infliction of emotional distress. The trial court granted motions to dismiss filed by all defendants pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, but the Court of Appeals reversed as to these two claims against Thomas and Deaver, reinstating the claims. We conclude that, because probable cause existed for the State to indict plaintiff for first-degree murder, plaintiff's suit for malicious prosecution necessarily would have failed. Accordingly, we reverse the holding of the Court of Appeals as to this claim. However, we agree with the Court of Appeals that, taken in the light most favorable to plaintiff, the complaint alleges elements of intentional infliction of emotional distress sufficient to withstand a motion to dismiss. Consequently, we affirm the holding of the Court of Appeals as to this claim.

On 12 September 2007, Kirk Alan Turner (plaintiff) and his friend Gregory Adam Smithson (Smithson) met at plaintiff's marital residence so Smithson could retrieve some property stored there. While at the home, plaintiff discussed personal matters with his wife Jennifer. During the conversation, Jennifer attacked plaintiff with a large spear, stabbing him multiple times in the thigh and groin area. In reaction, plaintiff pulled a pocketknife from his right front pocket and cut Jennifer twice in the neck, inflicting fatal injuries.

Smithson called 911 and performed CPR on Jennifer until emergency personnel arrived. The Davie County Sheriff's Office responded to the call and requested the assistance of the SBI. SBI Special Agent E.R. Wall arrived and notified SBI Assistant Special Agent in Charge K.A. Cline that a blood spatter expert would be needed to analyze the scene. Several hours later, Agent Wall called Agent Cline again to suggest that a blood spatter expert might not be needed after all because closer examination indicated that the blood spatter most likely was caused by arterial spurting from Jennifer's throat wound.

Two days later, Special Agent Gerald R. Thomas (defendant Thomas) arrived at plaintiff's home to conduct a blood spatter analysis of the scene. Later that day, he conducted a bloodstain analysis of various articles of clothing collected during the course of the investigation, including a gray T-shirt worn by plaintiff during the incident. Before beginning his examinations, defendant Thomas was informed by SBI Special Agent D.J. Smith that Jennifer apparently stabbed plaintiff with a spear and, in response, plaintiff cut her throat with a pocketknife. Defendant Thomas completed his examinations that same day and about two weeks later presented a written report documenting his findings. The report stated that a large bloodstain on plaintiff's gray T-shirt "was consistent with a transfer bloodstain pattern" resulting from a bloody hand being wiped

on the shirt. The report further noted several smaller bloodstains that were consistent with blood dripping onto the shirt.

On 13 December 2007, plaintiff was indicted for the first-degree murder of Jennifer. He was initially denied bond and detained for one month before being released on a bond of one million dollars. Plaintiff had to borrow money from family and friends to post his bond and retain defense counsel.

The following allegations are taken from plaintiff's complaint. After plaintiff was indicted, defendant Thomas met on 15 January 2008 with SBI Special Agent Duane Deaver (defendant Deaver); Captain Jerry Hartman, lead investigator for the Davie County Sheriff's Office; a lawyer from the district attorney's office; and another individual identified in the pleadings only as "Mr. Marks" to discuss both the feasibility of plaintiff's version of the events and their own theory of the case. During this meeting, defendants Thomas and Deaver and their colleagues theorized that plaintiff killed Jennifer for the purpose of carrying out a scheme to avoid a divorce and subsequent equitable distribution proceeding. They additionally theorized that plaintiff stabbed himself with the spear and staged the scene to make the killing look like self-defense.

Plaintiff further alleged that, to prove their theory, defendants Thomas and Deaver needed to show that the bloodstain on plaintiff's T-shirt was not a mirror image stain from plaintiff's hand but was instead a transfer pattern consistent with plaintiff having wiped a knife on the shirt. With the alleged approval of defendant Pendergraft, their supervisor, defendants Thomas and Deaver conducted tests for the purpose of "shor[ing] up" this new theory. Defendant Thomas again took samples from various evidentiary items for a second examination but failed properly to label his work in such a way that someone reviewing the evidence would be able to determine the source of each sample. Defendant Thomas also failed to make any record of the new theory. Defendants Thomas and Deaver videotaped their numerous attempts to duplicate with a knife the blood smear on the plaintiff's T-shirt. After a success, defendant Deaver can be heard on the video saying: "Oh, even better! Holy cow, that was a good one!" and "Beautiful! That's a wrap, baby!"

Plaintiff further alleged that, following the knife smear test and a second review of the evidence, defendant Thomas created a second written report that altered his initial report by replacing the words "consistent with a bloody hand being wiped on the shirt" with "consistent with a pointed object being wiped on the shirt." This second report purported to convey results of the "examination of clothing for bloodstain

patterns on Friday, September 14, 2007," even though the true date of the second examination was 15 January 2008. Defendant Thomas's second report failed to indicate either that it was based on a second review of the evidence or that it was not the original report. Plaintiff alleged that defendants Thomas and Deaver conducted these tests not only to prove their theory that plaintiff did not act in self-defense, but "to maintain the appearance of probable cause where none existed and to obtain a first-degree murder conviction of [plaintiff] despite evidence to the contrary."

In his report, defendant Thomas stated that Captain Hartman told him "he was present when emergency services cut the gray T-shirt from Mr. Turner's body and that the question [sic] blood stain was observed present in its current condition on the shirt." The report further stated that "Hartman said that he took the shirt from Emergency Medical Services and placed it in a secure area [an adjacent room], laying flat on the floor to dry."[1]

At plaintiff's trial for Jennifer's murder, defendant Thomas gave testimony about plaintiff's T-shirt that was consistent with his report. However, Captain Hartman testified that he did not arrive at the crime scene until two hours after plaintiff was taken to the hospital and that he was not present when plaintiff's T-shirt was removed, contradicting defendant Thomas's account. In addition, crime scene photographs showed plaintiff's T-shirt "crumpled on the floor, inside out." Plaintiff's defense expert Stuart James disagreed with defendants' bloodstain analysis, giving opinion testimony that the bloodstain was most likely a "mirror stain" created either when the shirt was folded as emergency medical service technicians cut off the shirt or when they tossed it onto the floor. On 21 August 2009, the jury found plaintiff not guilty of the first-degree murder of his wife, by reason of self-defense.

On 14 November 2011, plaintiff filed his original complaint in Superior Court, Forsyth County. On 4 April 2012, plaintiff voluntarily dismissed that complaint and immediately refiled a complaint making the same substantive allegations against the same defendants. In addition to defendants Thomas and Deaver, plaintiff named former SBI Director Robin Pendergraft and SBI supervisors John and Jane Doe as defendants in their individual and official capacities. Plaintiff's complaint alleged four causes of action against defendants Thomas and Deaver in their individual capacities: (1) intentional infliction of emotional distress, (2) abuse of process, (3) malicious prosecution, and

1. The complaint does not specify whether defendant Thomas included this information in his initial report or added it following his second examination of the evidence.

(4) false imprisonment. The complaint also alleged negligence claims against defendants Pendergraft and John and Jane Doe. Finally, plaintiff alleged federal constitutional claims under 42 U.S.C. § 1983 against all defendants in their individual and official capacities, and claims under the North Carolina Constitution against all defendants in their official capacities.

In response, all defendants filed motions to dismiss all charges. At a hearing on the motions, plaintiff conceded that dismissal was appropriate for the section 1983 claims against all defendants in their official capacities, for the negligence claims, and for all claims against supervisors John and Jane Doe. On 11 April 2013, the trial court granted defendants' motions to dismiss plaintiff's remaining claims pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.[2]

Plaintiff appealed to the Court of Appeals, which affirmed the trial court's dismissal of all claims against defendants Pendergraft and John and Jane Doe. *Turner v. Thomas*, 235 N.C. App. 520, 524, 762 S.E.2d 252, 257-58 (2014). In addition, that court affirmed the trial court's dismissal of all claims against defendants Thomas and Deaver except for the claims for malicious prosecution, *id.* at 530, 762 S.E.2d at 261, and intentional infliction of emotional distress, *id.* at 537, 762 S.E.2d at 265. The Court of Appeals held that the trial court erred in dismissing these two claims, concluding plaintiff had alleged sufficient elements of both torts to survive a motion to dismiss. *Id.* at 540, 762 S.E.2d at 267. On 22 January 2015, we allowed petitions for discretionary review filed by defendants Thomas and Deaver (hereinafter, defendants).

In determining whether the trial court properly dismissed plaintiff's claims against defendants for malicious prosecution and intentional infliction of emotional distress, we consider "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)). "This Court treats factual allegations in a complaint as true when reviewing a dismissal under Rule 12(b)(6)." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010)

2. It appears from the record that the citation to Rule 12(b)(1), lack of subject matter jurisdiction, refers to constitutional claims brought against defendants. None of those constitutional claims are before us now and the parties have made no arguments relating to jurisdiction. Accordingly, we will address the trial court's Rule 12(b)(6) rulings only.

(citing *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006)).

[1] To establish malicious prosecution, a plaintiff must show that the defendant (1) initiated or participated in the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff. *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) (citations omitted). Defendants contend that the Court of Appeals correctly identified the elements of a malicious prosecution claim but erred in concluding that plaintiff's complaint sufficiently alleged that probable cause was lacking to pursue a first-degree murder case against him. Defendants do not challenge the sufficiency of the evidence as to the other elements of malicious prosecution. Accordingly, we begin by considering plaintiff's allegations that defendants did not have probable cause to initiate criminal proceedings against plaintiff.

"Where the claim is one for malicious prosecution, '[p]robable cause . . . has been properly defined as the existence of such facts and circumstances, known to [the defendant] at the *time*, as would induce a reasonable man *to commence* a prosecution.' " *Best v. Duke Univ.*, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994) (alterations in original) (emphasis added) (quoting *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966)). We have consistently held that whether or not probable cause exists is determined at the time prosecution begins. *Williams v. Boylan–Pearce, Inc.*, 69 N.C. App. 315, 318-19, 317 S.E.2d 17, 19 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985); *see also Cook*, 267 N.C. at 170, 147 S.E.2d at 914 ("In order to give a cause of action for malicious prosecution, such prosecution must have been maliciously instituted." (citing *Wingate v. Causey*, 196 N.C. 71, 144 S.E. 530 (1928)); *Taylor v. Hodge*, 229 N.C. 558, 560, 50 S.E. 307, 309 (1948) (establishing that malicious prosecution claims hinge on whether a defendant "laid the charge" regardless of facts that should have convinced him of plaintiff's innocence); *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907) ("Probable cause, in cases of this kind, has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." (citation omitted)). The subsequent acquittal of a defendant does not, as a matter of law, automatically negate the existence of probable cause at the time prosecution was commenced. *Bell v. Pearcy*, 33 N.C. (11 Ired.) 233, 234 (1850).

The grand jury indicted plaintiff for first-degree murder on 13 December 2007. Plaintiff argues correctly that a grand jury's action

in returning an indictment is only prima facie evidence of probable cause and that, as a result, the return of an indictment does not as a matter of law bar a later claim for malicious prosecution. *See*, *e.g.*, *Taylor v. Hodge*, 229 N.C. 558, 50 S.E.2d 307 (1948) (holding that even though a magistrate initially found probable cause, the defendant in a malicious prosecution suit was not entitled to dismissal as a matter of law after the suit concluded in the plaintiff's favor). However, cases cited to us by both parties and referenced in the opinion of the Court of Appeals involve conduct by defendants that occurred *before* the return of an indictment. *See Williams v. Kuppenheimer Mfg. Co.*, 105 N.C. App. 198, 201, 412 S.E.2d 897, 900 (1992) (concluding that criminal prosecution of the plaintiff would have been unlikely if the defendant had not provided virtually all the evidence to investigators prior to indictment); *see also Jones v. Gwynne*, 312 N.C. 393, 403, 323 S.E.2d 9, 15 (1984) (noting that the malicious prosecution claim was based on the issuance of arrest warrants that the prosecutor voluntarily dismissed, not on subsequent grand jury indictments that initiated new proceedings against the defendant); *Stanford v. Grocery Co.*, 143 N.C. 419, 425, 55 S.E. 815, 817 (1906) (explaining that the action triggering the malicious prosecution claim was "taking out the warrant and causing the plaintiff's arrest"). Here, in contrast, plaintiff's suit focuses on actions defendants took *after* the grand jury returned indictments against him. Accordingly, to determine whether probable cause existed, we must consider the evidence that was available to the investigators and presented to the grand jury in December 2007.

That evidence indicated that plaintiff inflicted two lethal slashes to his wife's neck, resulting in her death. This evidence was supported by defendants' original forensic report, which stated that the bloodstain on plaintiff's T-shirt was consistent with a bloody hand being wiped on the shirt. Based on this and other evidence, the grand jury returned an indictment for first-degree murder. This independent determination by the grand jury established prima facie the existence of probable cause. *See Stanford*, 143 N.C. at 426, 55 S.E. at 817. Although plaintiff was subsequently acquitted on the basis of self-defense, that defense was presented at trial and does not necessarily negate the existence of probable cause at the time the case was brought to the grand jury. Plaintiff's complaint alleges that defendants failed to investigate the incident properly and generated incorrect and inaccurate information for presentation to the grand jury. However, the critical actions complained of took place after the indictment was returned. Based on the facts known to the investigators at the time of the grand jury proceedings, we are satisfied

that a reasonable and prudent person would believe there was probable cause sufficient to prosecute plaintiff for first-degree murder.

The concurring opinions argue that this Court should recognize that a malicious prosecution case can arise after a magistrate or grand jury finds probable cause if that probable cause later evaporates but the prosecution nevertheless continues in bad faith (the "continuation theory"). We need not address that theory here for, assuming arguendo that this Court would adopt it under the proper circumstances, it is not before us now. Plaintiff's complaint is not that the original probable cause dissipated. Instead, the gravamen of plaintiff's argument is that probable cause never existed and that defendants' investigation following indictment was corrupt and shoddy. However, we have determined that the grand jury correctly found probable cause, and nothing in the subsequent investigation revealed facts that disproved that probable cause. As a result, we are not faced with facts that invoke the continuation theory.

Therefore, the trial court properly concluded that plaintiff's malicious prosecution claim against defendants should be dismissed under Rule 12(b)(6) because plaintiff failed to state a claim upon which relief may be granted. We reverse the holding of the Court of Appeals to the contrary.

We next address plaintiff's claim of intentional infliction of emotional distress. Elements of this tort are "(1) extreme and outrageous conduct [by the defendant], (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). The tort also may be established when a "defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Id.* at 452, 276 S.E.2d at 335. Conduct constituting this cause of action may be found in "an abuse by the actor of a position . . . which gives him . . . power to affect" the interests of another. Restatement (Second) of Torts § 46 cmt. e (Am. Law Inst. 1965). We have held that extreme and outrageous conduct is that which "exceeds all bounds of decency tolerated by society." *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988) (citing *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), *abrogated in part by Dickens*, 302 N.C. 437, 276 S.E.2d 325), and is "regarded as atrocious, and utterly intolerable in a civilized community," *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311 (1985). Our state has set a "high threshold" to satisfy this element. *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000). Foreseeability of injury, while not an

element of the tort, is a factor to consider in assessing the outrageousness of a defendant's conduct. *West*, 321 N.C. at 705, 365 S.E.2d at 625 (citing *Dickens*, 302 N.C. 437, 276 S.E.2d 325).

[2] We begin by considering the first element of the tort, whether defendants' conduct as alleged was extreme and outrageous. According to plaintiff, defendants concocted a motive for plaintiff to murder his wife and a theory to explain how that murder was carried out. Defendants then made a calculated decision to conduct and repeat experiments until they achieved a bloodstain pattern that supported their theory. When they achieved results they deemed satisfactory, defendant Thomas then rewrote the conclusion of his earlier blood spatter and bloodstain report without stating that he was presenting a new or amended version of the original report. To the contrary, defendant Thomas's report indicated the conclusion reached resulted from the original analysis of the evidence conducted on 14 September 2007.

Plaintiff's allegations do not portray agents vigorously pursuing an investigation with a determination to find the truth, a practice law-abiding citizens not only endorse but expect. Instead, plaintiff's allegations paint a picture of law enforcement officials deliberately abusing their authority as public officials to manipulate evidence and distort a case for the purpose of reaching a foreordained conclusion of guilt. We do not doubt that plaintiff's complaint alleged extreme and outrageous conduct by these defendants sufficient to withstand a Rule 12(b)(6) motion to dismiss.

[3] As to the second element of the tort, plaintiff alleged that defendants acted with intent to inflict emotional distress. While standing trial for first-degree murder is unquestionably stressful for anyone, plaintiff's complaint does not allege that defendants were merely negligent or that their investigation was inadequate. Instead, the complaint alleges sinister motives and conduct by defendants specifically aimed toward the improper purpose of wrongfully convicting plaintiff of murder. *See Needham v. Price*, ___ N.C. ___, 780 S.E.2d 549, 551 (2015) (holding that the "defendant's conduct did not rise to the level of willful and malicious conduct" in the context of parent-child immunity because the evidence did not show the defendant's "conduct was directed towards the [injured children]"). Specifically, the complaint, which we read in the light most favorable to plaintiff, alleges that defendants "wantonly and maliciously conducted unscientific tests to 'shore up' " their theory of the case, "wantonly failed to label [their] work properly," altered and manipulated evidence, and acted "to maintain the appearance of probable cause where none existed and to obtain a first-degree murder conviction of

[plaintiff] despite evidence to the contrary." These allegations do not describe an investigation that was incompetent or incomplete, or one that skeptically explored the validity of plaintiff's self-defense claim. Instead, the complaint contends that defendants knew the results they wanted before they began and disregarded all evidence to the contrary. That plaintiff would suffer mental anguish as a result of defendants' conduct is readily foreseeable. Moreover, plaintiff's allegations indicated that defendants were recklessly indifferent to the consequences of their actions. Accordingly, plaintiff's allegation of the intent element of his claim is sufficient to survive a Rule 12(b)(6) motion to dismiss.

[4] Finally, we consider whether plaintiff has sufficiently alleged that he suffered severe emotional distress. The complaint states, among other things, that severe emotional distress manifested itself "in diagnosable form . . . including, *inter alia*: a. Depression; b. Anxiety; c. Loss of sleep; d. Loss of appetite; e. Lack of concentration; f. Difficulty remembering things; g. Feeling alienated from loved ones; h. Shame; and i. Loss of respect with the community and co-workers." Plaintiff further alleged that defendants' conduct caused him damages "in excess of $10,000.00." We find that these are sufficient allegations of severe emotional distress.

Taking all of plaintiff's allegations in the light most favorable to him, as we must at the pleading stage, we hold plaintiff has alleged elements of intentional infliction of emotional distress sufficient to withstand a motion to dismiss made pursuant to Rule 12(b)(6). As this case moves forward to summary judgment or trial, plaintiff will have to prove that his allegations are true, including that defendants' conduct amounted to more than substandard police work and was, instead, directed at plaintiff for an improper purpose. Accordingly, we affirm the decision of the Court of Appeals holding the trial court erred in dismissing this claim. This case is remanded to the Court of Appeals for further remand to the trial court for additional proceedings consistent with this opinion.

REVERSED IN PART; AFFIRMED IN PART AND REMANDED.

Justice ERVIN concurring, in part, and concurring in the result, in part.

Although I concur in the Court's decision with respect to plaintiff's intentional infliction of emotional distress claim and in the Court's determination that plaintiff has failed to sufficiently state a malicious prosecution claim in his complaint, I am unable to agree with the logic that the Court has employed in upholding the dismissal of plaintiff's malicious

prosecution claim. As a result, I concur in the Court's opinion, in part, and concur in the result reached by the Court, in part.

In determining that plaintiff's complaint fails to state a malicious prosecution claim, the Court begins by stating that "[w]hether or not probable cause exists is determined at the time prosecution begins."[1] After noting that "plaintiff's suit focuses on actions defendants took *after* the grand jury returned indictments against him" and stating that, "to determine whether probable cause existed, we must consider the evidence that was available to the investigators and presented to the grand jury in December 2007," the Court points out that the fact that the Davie County grand jury returned a bill of indictment charging plaintiff with first-degree murder in connection with the death of his wife "established prima facie the existence of probable cause." In addition, after acknowledging that plaintiff has alleged "that defendants failed to investigate the incident properly and generated incorrect and inaccurate information for presentation to the grand jury," the Court notes that "the critical actions complained of took place after the indictment was returned" and holds that, "[b]ased on the facts known to the investigators at the time of the grand jury proceedings," "a reasonable and prudent person would believe there was probable cause sufficient to prosecute plaintiff for first-degree murder."

The Court's focus upon the necessity for plaintiff to establish the absence of probable cause at the time that criminal charges were initially lodged against him takes an unduly narrow view of the scope of the malicious prosecution claim that plaintiff has attempted to assert in his complaint. Simply put, the Court reads plaintiff's malicious prosecution claim as being focused entirely upon the fact that he was indicted for murdering his wife. I do not, however, believe that plaintiff's claim is limited in the manner described by the Court.[2] A significant component

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1. Although the majority relies on *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 318-19, 317 S.E.2d 17, 19 (1984), *aff'd per curiam on other grounds*, 313 N.C. 321, 327 S.E.2d 870 (1985), in support of this proposition, I do not view the opinion in that case as holding that the issue of probable cause in a malicious prosecution case must be resolved based solely upon an analysis of the facts in existence during a window of time between the commission of the underlying criminal act and the point at which the prosecution of the plaintiff began. Moreover, the only issue before this Court in that matter, which came to us by way of a partial dissenting opinion, related to the availability of punitive damages rather than the sufficiency of the plaintiff's showing of a want of probable cause. *Id.* at 322-23, 317 S.E.2d at 21-22 (Johnson, J., concurring in part and dissenting in part).

2. In fact, a careful study of the brief that plaintiff filed before this Court causes me to question the extent to which plaintiff attempted to state a malicious prosecution claim against either defendant arising from the Davie County grand jury's initial decision to charge him with murdering his wife. However, I do not believe that we need to make a

of plaintiff's allegations against defendants[3] consists of a description of their conduct in concocting and performing a supplemental blood smear "test" for the purpose of producing results that validated the State's decision to proceed against plaintiff. According to plaintiff's complaint, "[t]his evidence was crucial to maintain probable cause for a first-degree murder charge," with the underlying "test" having been conducted in order "to maintain the appearance of probable cause where none existed." In addition, plaintiff has alleged that both defendants should be found liable to plaintiff for malicious prosecution on the grounds that they "participated in and caused the institution of criminal proceedings against" plaintiff, with their misconduct having included, among other things, a failure "to properly investigate the circumstances of" the death of plaintiff's wife and plaintiff's "claim of self-defense"; the inclusion of "false and misleading information in investigative reports"; and a failure to "remain fair, neutral and truthful prior to and after the institution of criminal proceedings against" plaintiff. As a result, I am inclined to believe that plaintiff seeks to obtain a malicious prosecution recovery from defendants based upon claims that criminal charges were both initially instituted against him and continued against him without probable cause and cannot, for that reason, agree with the Court's decision to limit its analysis to a determination of the sufficiency of the allegations that defendants participated in the institution of criminal charges against plaintiff despite the absence of probable cause to believe that he was guilty of the offense with which he was charged and conclude, for that reason, that we must evaluate the validity of plaintiff's effort to plead a "continuation" claim in order to fully resolve the issues that have been properly presented for our consideration in this case.

"To make out a case of malicious prosecution [based upon a prior criminal prosecution,] the plaintiff must allege and prove that the defendant instituted, or procured, or participated in, a criminal prosecution against him maliciously, without probable cause, which ended in

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definitive determination of the exact nature of the malicious prosecution claim that plaintiff has attempted to state in his complaint given his failure to allege a viable malicious prosecution claim against defendants on the basis of either of the two theories discussed in the text of this separate opinion.

3. Special Agent Deaver did not become involved in the prosecution of plaintiff until sometime after the Davie County grand jury charged plaintiff with murdering his wife. For that reason, the fact that plaintiff sought to obtain a malicious prosecution recovery against Special Agent Deaver clearly indicates that plaintiff's claim rested upon more than an assertion that he was initially indicted for murdering his wife in the absence of probable cause.

failure." *Cook v. Lanier*, 267 N.C. 166, 169, 147 S.E.2d 910, 913 (1966) (citing *Greer v. Skyway Broad. Co.*, 256 N.C. 382, 124 S.E.2d 98 (1962); *Carson v. Doggett*, 231 N.C. 629, 58 S.E.2d 609 (1950); and *Dickerson v. Atl. Ref. Co.*, 201 N.C. 90, 159 S.E. 446 (1931)). Consistently with this Court's reference to the possibility of malicious prosecution liability for "participation" in a wrong prosecution, a divided panel of the Court of Appeals upheld the sufficiency of the evidence to support a trial court judgment awarding the plaintiff $12,500 in damages in a malicious prosecution case in which the defendant continued to pursue a criminal citation charging the plaintiff with shoplifting several packs of cigarettes despite the fact that the plaintiff, on the day after the issuance of the shoplifting citation, presented the defendant with a receipt indicating that he had purchased the cigarettes that he had been charged with concealing. *Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 252-55, 352 S.E.2d 256, 256-58 (1987). Although then-Judge Parker dissented from the court's decision on the grounds that, "[a]t the critical time, i.e., the moment at which [the] plaintiff was apprehended in [the] defendant's store, the undisputed evidence" tended to support a determination that the plaintiff had shoplifted the cigarettes in question, *id.* at 256, 352 S.E.2d at 258 (Parker, J., dissenting), and that "[t]he pertinent inquiry is not whether [the] defendant's store manager should have believed [the] plaintiff, but rather whether under the circumstances existing at the time the criminal action was instituted, the store manager acted as a person of reasonable prudence in concluding that the crime charged had been committed," *id.* at 256, 352 S.E.2d at 259, this Court was apparently never asked to examine the correctness of the majority's decision. As a result, the Court of Appeals' determination that a malicious prosecution action could properly be maintained in the event that the plaintiff demonstrated, based upon events occurring after the institution of the underlying criminal case, that the defendant persisted in pursuing a prosecution that had become groundless, has been an established and unquestioned part of North Carolina malicious prosecution jurisprudence since 1987.[4] *See* 2 N.C.P.I. – Civ. 801.00 (gen. civ. vol. June 2014) ("Malicious Prosecution–Criminal Proceeding"), at 1 & n.2 (allowing a finding of liability in the event that the jury determines, among other things, that

4. Before the trial court, plaintiff's counsel argued that defendants lacked "a very good answer" for *Allison*, which he described as holding that "[m]alicious prosecution is either the initiation of a criminal proceeding without probable cause or the continuation of a proceeding when it is discovered that probable case no longer exists," and stated that plaintiff's complaint "clearly alleged" a claim stemming from defendants' involvement in the continuation of the criminal charges that had earlier been lodged against plaintiff in the absence of the necessary probable cause.

the defendant "[caused a criminal proceeding to be continued] against the plaintiff without probable cause" (citing *Allison*, 84 N.C. App. at 254, 352 S.E.2d at 257) (majority opinion)));[5] *see also* Charles E. Day & Mark W. Morris, *North Carolina Law of Torts* § 9.40, at 105 (3d ed. 2012) (stating that, in light of *Allison*, "it can be suggested that a continuation of prosecution after probable cause is known not to exist may be a basis for a malicious prosecution action, notwithstanding that probable cause might have existed when the prosecution was initiated"); 1 William S. Haynes, *North Carolina Tort Law* § 14-3(A), at 513-14 (1989) (stating that "[t]he gist of an action for malicious prosecution is the wrongful initiation, encouragement or continuation, of a prior valid process or proceeding" (citation omitted), and that "[a] defendant may also be found liable for the tort of malicious prosecution, notwithstanding the fact that he initially had probable cause to instigate a criminal prosecution, if he afterwards secures knowledge that the charge is not well founded and thereafter fails to intervene for the purpose of having the criminal prosecution discontinued or to do all that is reasonably possible to do to sever his connection with the prosecution").

Aside from the well-established nature of the "continuation" theory for purposes of North Carolina law, the logic underlying that theory has been consistently recognized by leading encyclopedias and treatises addressing American tort law. *See* Restatement (Second) of Torts § 655 (Am. Law. Inst. 1977) (stating that "[a] private person who takes an active part in continuing or procuring the continuation of criminal proceedings initiated by himself or by another is subject to the same liability for malicious prosecution as if he had then initiated the proceedings"); *id.* § 655 cmt. b (pointing out that "[t]he rule stated in this Section applies when the defendant has himself initiated criminal proceedings against another or procured their institution, upon probable cause and for a proper purpose, and thereafter takes an active part in pressing the proceedings after he has discovered that there is no probable cause for them," and "applies also when the proceedings are initiated by a third person, and the defendant, knowing that there is no probable cause for them, thereafter takes an active part in procuring their continuation"); 52 Am. Jur. 2d *Malicious Prosecution* § 21, at 207-08 (2011) (stating that a malicious prosecution action can be maintained in the event that "the

5. Although the "Pattern Jury Instructions are not binding on this Court," *Stark v. Ford Motor Co.*, 365 N.C. 468, 478, 723 S.E.2d 753, 760 (2012) (citation omitted), they do express " 'the long-standing, published understanding' of . . . case law and statutes," *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014) (quoting *Stark*, 365 N.C. at 478, 723 S.E.2d at 760).

defendant instigated or encouraged, commenced or continued, initiated or procured, or caused or assisted in causing the prosecution complained of, or advised, aided, cooperated, or assisted in the prosecution of the case" and that "[a] person who had no part in the commencement of the action, but who participated in it at a later time, may be held liable for malicious prosecution" (footnotes omitted)); *id.* § 26, at 211-12 (stating that "[a] person who plays an active role in continuing an unfounded criminal proceeding is liable for malicious prosecution, and even if there was probable cause for the commencement of an action, if the person afterwards acquires the means of asserting the charge was not well founded, his or her failure to intervene and have the prosecution discontinued or to sever his or her connection with it subjects that person to malicious prosecution liability" (footnotes omitted)); *id.* § 54, at 236 (stating that, although "the critical time" in some jurisdictions "for determining whether probable cause existed . . . is when the prosecution was initiated or began," in other jurisdictions, "liability for malicious prosecution may arise, even though the lawsuit was commenced with probable cause, if the suit is prosecuted after it later appears there is no probable cause" (citations omitted)); 54 C.J.S. *Malicious Prosecution* § 13, at 747 (2010) (stating that "[a] cause of action for malicious prosecution is not limited to the situation where the present defendant initiated the prior proceeding, and one who plays an active role in continuing an unfounded criminal proceeding when otherwise it would have been terminated may be liable for malicious prosecution" (footnotes omitted)); *id.* § 18, at 751 (stating that, even if "the defendant is granted immunity for complying with a statute governing disclosure of information to a prosecutorial officer, the defendant may nevertheless be liable for malicious prosecution where he or she fails to request termination of the proceeding after learning facts regarding [the] accused's innocence subsequent to swearing out a complaint leading to the accused's arrest" (citation omitted)); *id.* § 29, at 762 (stating that "[c]ontinuation of a prosecution in the face of facts that undermine probable cause can support a malicious prosecution claim" (citation omitted)); 3 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 587, at 389 (2d ed. 2011) (stating that "[m]alicious prosecution can be established only if [ ] the defendant has instigated or continued to pursue a criminal proceeding"); *id.* § 588, at 396 (stating that, "[w]hen liability is based upon continuance rather than initiation of the prosecution, probable cause must be judged on appearances at the time the accuser acts to continue the prosecution, as where he refuses to withdraw his complaint even after he has learned of the accused's innocence" (citation omitted)); 1 Fowler V. Harper et al., *Harper, James and Gray on Torts* § 4.3, at 467-68 (3d ed.

2006) (stating that "continuing to prosecute [criminal] proceedings maliciously after learning of their groundless nature will result in liability, although they had been begun in good faith and with probable cause," since "it is as much a wrong against the victim, and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such proceedings in the first place" (citations omitted)); *id.* § 4.5, at 481 (stating that "only facts known at the time the defendant initiated the prosecution or wrongfully continued an action are pertinent" in the probable cause determination (citations omitted)); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 872 (5th ed. 1984) (stating that "[t]he defendant may be liable either for initiating or for continuing a criminal prosecution without probable cause" (footnote omitted)).[6] As a result, a wide variety of recognized secondary authorities in the field of tort law uphold the validity of the "continuation" theory adopted in *Allison*.

An analysis of the reported decisions concerning this issue clearly indicates that the vast majority of American jurisdictions that have considered the viability of the "continuation" theory have recognized its existence. As the Supreme Court of California stated in *Zamos v. Stroud*, 32 Cal. 4th 958, 87 P.3d 802 (2004), "the rule in every other state that ha[d] addressed the question [at the time the Supreme Court of California rendered its decision was], and in many states has long been, that the tort of malicious prosecution *does* include continuing to prosecute a lawsuit discovered to lack probable cause," *id.* at 966, 87 P.3d at 807, that "[t]he Restatement's position on this question has been adopted or was anticipated by the courts of a substantial number of states," *id.* at 967, 87 P.3d at 808 (citations omitted), and that the defendants had not presented, nor had the Court as of that point found, "a single state that has declined to adopt the Restatement's view in this regard," *id.* at 967, 87 P.3d at 808. The states noted in *Zamos* include Alabama, *Laney v. Glidden Co.*, 239 Ala. 396, 399, 194 So. 849, 851 (1940) (stating that "[a] suit for malicious prosecution may lie, not only for the commencement of the original proceeding, but for its continuance as well" (citations omitted)); Arizona, *Smith v. Lucia*, 173 Ariz. 290, 294, 295, 842 P.2d 1303,

6. To be sure, the authors of the same treatise also state that "[p]robable cause is judged by appearances to the defendant at the time he initiates prosecution, not by facts discovered later," with such subsequently discovered facts being "relevant only to show the entirely different defense based on the accused's guilt in fact." *Id.* § 119, at 876 (footnote omitted). However, I do not believe that this statement undercuts the argument advanced in the text of this separate opinion given that, when read literally, it only applies to situations involving the initiation of the underlying criminal proceeding rather than to its continuation.

1307, 1308 (Ct. App. 1992) (defining the tort of malicious prosecution without making any reference to the continuation rule, noting that "comment c to Restatement [Second of Torts] section 674 recognizes that an attorney who has properly commenced a civil action may be liable for continuing it without probable cause" and stating that "that rule is not applicable here" for the reasons stated in the court's opinion); Arkansas, *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 368, 922 S.W.2d 327, 331 (1996) (stating that "the essential elements of malicious prosecution are: '(1) [a] proceeding instituted or continued by the defendant against the plaintiff[;] (2) [t]ermination of the proceeding in favor of the plaintiff[;] (3) [a]bsence of probable cause for the proceedings[;] (4) [m]alice on the part of the defendant[;] (5) [d]amages' " (alterations in original) (quoting *Farm Serv. Coop. v. Goshen Farms*, 267 Ark. 324, 331-32, 590 S.W.2d 861, 865 (1979))); Colorado, *Slee v. Simpson*, 91 Colo. 461, 465, 15 P.2d 1084, 1085 (1932) (stating that "one of the essential elements of a malicious prosecution is the commencement or continuance of an original criminal or civil judicial proceeding" (citations omitted)); Idaho, *Badell v. Beeks*, 115 Idaho 101, 102-04, 765 P.2d 126, 127-29 (1988) (defining the tort of malicious prosecution without making any reference to the continuation rule, noting that "the Restatement [Second of Torts] speaks in terms of initiating *or continuing* the proceeding" and "affirm[ing] the trial court's ruling that [the defendant] possessed probable cause, as a matter of law, to initiate and carry forward the malpractice action against" the plaintiff (citation omitted)); Iowa, *Wilson v. Hayes*, 464 N.W.2d 250, 259-61, 264 (Iowa 1990) (defining the tort of malicious prosecution without making any reference to the continuation rule, and stating that, "[t]o subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based" (quoting Restatement (Second) of Torts § 676); that "under the Restatement rule as expressed in comment d [to section 674], an attorney would only be liable if the attorney knowingly initiated or continued a suit for a clearly improper purpose"; and that "[e]ven though a lawsuit is commenced with probable cause, if the suit is prosecuted after it later appears there is in fact no probable cause, liability may arise" (citation omitted)); Kansas, *Nelson v. Miller*, 227 Kan. 271, 276, 607 P.2d 438, 443 (1980) (stating that "[t]o maintain an action for malicious prosecution of a civil action the plaintiff must prove," among other things, "[t]hat the defendant initiated, continued, or procured civil [proceedings] against the plaintiff," with it being "sufficient if it is shown that the defendant continued or procured the filing of the action" on the grounds that "[a]

person may also be held liable for the wrongful continuance of the original proceeding" (citations omitted)); Mississippi, *Benjamin v. Hooper Elec. Supply Co.*, 568 So. 2d 1182, 1188, 1189 n.6 (Miss. 1990) (stating that the tort of malicious prosecution requires proof, among other things, of the "institution [or continuation] of a criminal proceeding" since, "[w]ithout doubt, it is as much a wrong against the victim and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such proceedings in the first place" (first alteration in original) (citations omitted)); New York, *Broughton v. State*, 37 N.Y.2d 451, 457, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 94 (stating that "[t]he elements of the tort of malicious prosecution" include "the commencement or continuation of a criminal proceeding by the defendant against the plaintiff" (citation omitted)), *cert. denied*, 423 U.S. 929, 46 L. Ed. 2d 257 (1975); Ohio, *Siegel v. O.M. Scott & Sons Co.*, 73 Ohio App. 347, 351, 56 N.E.2d 345, 346-47 (1943) (stating that "[t]he general rule is that to maintain an action for malicious prosecution," the plaintiff must show, among other things, "[t]he institution or continuation of original judicial proceedings, either civil or criminal," with "the continuation of an original judicial proceeding . . . after acquiring means of ascertaining that the charge is not well founded" being sufficient to support a finding of liability (citations omitted)); Oregon, *Wroten v. Lenske*, 114 Or. App. 305, 308-09, 835 P.2d 931, 933-34 (defining the tort of malicious prosecution without making any reference to the continuation rule and holding that the trial court had erred by directing a verdict in favor of the defendant on the grounds that "there is evidence that *continuation* of the action was without probable cause" given that, after "plaintiff's counsel wrote to defendant and informed him that plaintiff's letter had not been published, a question was raised whether a reasonable person would have investigated to verify the accuracy of that statement" (footnote omitted) and that "[t]here is an issue of fact regarding whether defendant should have investigated before continuing with the action" (citing *Lampos v. Bazar, Inc.*, 270 Or. 256, 268, 527 P.2d 376, 381-82 (1974) (en banc), and Restatement (Second) of Torts § 674 cmt. c (1977))), *rev. denied*, 314 Or. 574, 840 P.2d 1296 (1992); Pennsylvania, *Wenger v. Phillips*, 195 Pa. 214, 219, 45 A. 927, 927 (Pa. 1900) (stating that the fact "[t]hat the binding over was after the prosecution was barred by the statute of limitations did not make the defendant liable unless it appeared that he had persisted in the prosecution after he knew it was barred"); and Washington, *Banks v. Nordstrom, Inc.*, 57 Wash. App. 251, 255, 787 P.2d 953, 956 (stating that "to maintain an action for malicious prosecution, the plaintiff must establish," among other things, " 'that the prosecution claimed to have

been malicious was instituted or continued by the defendant' " (quoting *Peasley v. Puget Sound Tug & Barge Co.* 13 Wash. 2d 485, 497, 125 P.2d 681, 687 (1942))), *rev. denied*, 115 Wash. 2d 1008, 797 P.2d 511 (1990). In addition to the decisions from the thirteen states referenced in *Zamos*, the continuation rule also appears to have been recognized in Alaska, *Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007) (stating that "[t]he following elements are required to maintain a cause of action for the tort of malicious prosecution" and include, but are not limited to, " 'a criminal proceeding instituted or continued by the defendant against the plaintiff' " (citations omitted)); Florida, *Fischer v. Debrincat*, 169 So. 3d 1204, 1206 (Fla. Dist. Ct. App. 2015) (stating that "[t]o prevail in a malicious prosecution action, a plaintiff must establish," among other things, that " 'an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued' " (quoting *Alamo Rent–A–Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1355 (Fla. 1994)));[7] Georgia, *Horne v. J.H. Harvey Co.*, 274 Ga. App. 444, 446, 448, 617 S.E.2d 648, 650, 652 (2005) (defining the tort of malicious prosecution without making any reference to the continuation rule, stating that "even if a defendant has probable cause to initiate a criminal proceeding, if afterward, the defendant 'acquired knowledge, or the reasonable means of knowledge, that the charge was not well founded, his continuation of the prosecution is evidence of the want of probable cause, requiring that the question be submitted to the jury' " (quoting *Fuller v. Jennings*, 213 Ga. App. 773, 776-77, 445 S.E.2d 796, 799, *cert. denied*, Ga. LEXIS 1114 (Ga. Oct. 17, 1994)), and holding that while the defendant "could have formed a reasonable belief that probable cause existed to initiate the prosecution . . . an issue arises as to whether [the defendant] could reasonably believe that probable cause existed to pursue the prosecution"); Hawaii, *Arquette v. State*, 128 Haw. 423, 433, 290 P.3d 493, 503 (2012) (holding that "the tort of the continuation of a malicious prosecution is not an unwarranted enlargement of the current doctrine but, rather, logically stems from the policies underlying the tort"); Illinois, *Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, ¶ 11, 20 N.E.3d 775, 780 (2014) (stating that "[t]he elements of a cause of action for malicious prosecution" include "the commencement or continuance by the defendant of an original judicial proceeding against the plaintiff" (citing *Miller v. Rosenberg*, 196 Ill. 2d 50, 58, 749 N.E.2d 946, 952 (2001))); Maine, *Trask v. Devlin*, 2002 ME 10, ¶ 11, 788 A.2d 179, 182 (2002) (stating that "[t]o prevail in a malicious prosecution action, a plaintiff must prove, by a preponderance

7. The Supreme Court of Florida has "accepted jurisdiction" over *Debrincat*, but has not yet decided it. 182 So. 3d 631 (2015).

of the evidence, that," among other things, "[t]he defendant initiated, procured or continued a criminal action without probable cause" (citations omitted)); Maryland, *Safeway Stores, Inc. v. Barrack*, 210 Md. 168, 173, 122 A.2d 457, 460 (1956) (stating that "[t]he necessary elements of a case for malicious prosecution of a criminal charge are well established" and include, among other things, that there was "a criminal proceeding instituted or continued by the defendant against the plaintiff" (citations omitted)), *abrogated on other grounds by Montgomery Ward v. Wilson*, 339 Md. 701, 732-36, 664 A.2d 916, 931-33 (1995); Michigan, *Fort Wayne Mortg. Co. v. Carletos*, 95 Mich. App. 752, 757, 291 N.W.2d 193, 195 (1980) (stating that "[t]he elements of malicious prosecution are," among other things, " 'a criminal proceeding instituted or continued by the defendant against the plaintiff' " (quoting *Wilson v. Yono*, 65 Mich. App. 441, 443, 237 N.W.2d 494, 496 (1975))); Montana, *Plouffe v. Mont. Dep't of Pub. Health & Human Servs.*, 2002 MT 64, ¶ 16, 309 Mont. 184, 190, 45 P.3d 10, 14 (2002) (stating that, "[i]n a civil action for malicious prosecution, the plaintiff's burden at trial is to introduce proof sufficient to allow reasonable jurors to find each of the six following elements," including that "a judicial proceeding was commenced and prosecuted against the plaintiff" and that "the defendant was responsible for instigating, prosecuting or continuing such proceeding" (citations omitted)); Nebraska, *McKinney v. Okoye*, 287 Neb. 261, 271-72, 842 N.W.2d 581, 591 (2014) (stating that "[i]n a malicious prosecution case, the conjunctive elements for the plaintiff to establish" include, among other things, "the commencement or prosecution of the proceeding against the plaintiff" (citation omitted)); Nevada, *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879-80 (2002) (stating that "[a] malicious prosecution claim requires that the defendant initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against the plaintiff" (citations omitted)); New Jersey, *LoBiondo v. Schwartz*, 199 N.J. 62, 89, 90, 970 A.2d 1007, 1022 (2009) (stating that "[m]alicious prosecution provides a remedy for harm caused by the institution or continuation of a criminal action that is baseless" before stating the elements of the tort without mentioning the continuation rule (citation omitted));[8] North Dakota, *Richmond v. Haney*, 480 N.W.2d 751, 755 (N.D. 1992) (stating

8. In its earlier decision in *Lind v. Schmid*, the New Jersey Supreme Court defined the tort of malicious prosecution without making any mention of the continuation rule. 67 N.J. 255, 262, 337 A.2d 365, 368 (1975). Aside from the fact that *Lind* preceded *LoBiondo*, nothing in *Lind* expressly rejects the validity of the continuation rule and some of the Court's language may tend to show its validity. *Lind*, 67 N.J. at 263, 337 A.2d at 368 (stating that "[t]he fallacy of this rationale is that it fails to recognize that the concept of probable cause in malicious prosecution is not fixed from one frame of reference"). As a result, it appears to me that New Jersey does, in fact, accept the validity of the continuation rule.

that "[i]n order to maintain an action for malicious prosecution one must establish," among other things, that " '[a] criminal proceeding [was] instituted or continued by the defendant against the plaintiff' " (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 871 (5th ed. 1984))); Oklahoma, *Empire Oil & Ref. Co. v. Williams*, 1938 OK 654, ¶ 5, 184 Okla. 172, 173, 86 P.2d 291, 292 (1938) (stating that "[t]he essential elements in a cause of action for malicious prosecution" include, but are not limited to, "[t]he commencement or continuance of an original criminal or civil proceeding" (citing *Sawyer v. Shick*, 1911 OK 475, ¶ 4, 30 Okla. 353, 354, 120 P. 581, 582 (1911)));[9] South Carolina, *Eaves v. Broad River Elec. Coop.*, 277 S.C. 475, 477, 289 S.E.2d 414, 415 (1982) (stating that "[t]o maintain an action for malicious prosecution, a plaintiff must establish," among other things, "the institution or continuation of original judicial proceedings . . . by or at the instance of the defendant" (citation omitted)); Tennessee, *Pera v. Kroger Co.*, 674 S.W.2d 715, 722 (Tenn. 1984) (stating that "[i]t is well settled in the law of torts that even though one has probable cause to initiate criminal charges, there can be liability for the malicious continuation of a criminal proceeding");[10] Texas, *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203,

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9. In two decisions, the Oklahoma Supreme Court omitted any reference to the continuation rule in stating the elements of the tort of malicious prosecution. *Greenberg v. Wolfberg*, 1994 OK 147, ¶¶ 13-15, 890 P.2d 895, 901-92 (1994); *Imo Oil & Gas Co. v. Knox*, 1931 OK 440, ¶ 9, 154 Okla. 100, 102, 6 P.2d 1062, 1064 (1931). I do not believe that a failure to expressly incorporate the continuation rule into the definition of the tort of malicious prosecution in those cases can be understood as a refusal to recognize the existence of the continuation rule. *Greenberg*, 1994 OK 147, ¶ 14 n.22, 890 P.2d at 902 n.22, expressly relies upon *Sawyer v. Shick*, in which the continuation rule is expressly recognized, 1911 OK 475, ¶ 4, 30 Okla. 353, 354, 120 P. 581, 582 (1911). Similarly, the omission of any reference to the continuation rule in *Imo Oil*, 1931 OK 440, ¶ 9, 154 Okla. at 102, 6 P.2d at 1064, appears to be an anomaly given that one of the two cases cited in support of the definition of malicious prosecution utilized in that decision incorporates the continuation rule, *Sawyer*, 1911 OK 475, ¶ 4, 30 Okla. at 354, 120 P. at 582, and the other case does not define the elements of the tort of malicious prosecution at all, *Robberson v. Gibson*, 1917 OK 131, 62 Okla. 306, 162 P. 1120 (1917).

10. To be sure, there is no reference to the continuation rule in the definition of the tort of malicious prosecution set out in *Roberts v. Federal Express Corp.*, 842 S.W.2d 246, 247-48 (Tenn. 1992). However, the fact that *Roberts* does not question *Pera* and the fact that the Tennessee Court of Appeals has reiterated the validity of the continuation rule in reliance upon *Pera* within the past five years, *Bovat v. Nissan N. Am.*, No. M2013-00592-COA-R3-CV, 2013 WL 6021458, at *3 (Tenn. Ct. App. Nov. 8, 2013) (stating that, despite the absence of any reference to the continuation rule in the definition of malicious prosecution set out in *Roberts*, 842 S.W.2d at 248, and *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992), and "even though one has probable cause to initiate criminal charges, there can be liability for the malicious continuation of a criminal proceeding" (quoting *Pera*, 674 S.W.2d at 722)), I believe that Tennessee recognizes the viability of the continuation rule.

207 (Tex. 1996) (stating that "[t]o prevail in a suit alleging malicious prosecution of a civil claim, the plaintiff must establish," among other things, "the institution or continuation of civil proceedings against the plaintiff" (citation omitted));[11] Utah, *Cline v. State*, 2005 UT App 498, ¶ 30, 142 P.3d 127, 137 (2005) (stating that the first element of a malicious prosecution claim "requires a plaintiff to establish that there is '[a] criminal proceeding instituted or continued by the defendant against the plaintiff' " (alteration in original) (quoting *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 959 (Utah Ct. App. 1989)), *cert. denied*, 133 P.3d 437 (Utah 2006);[12] Wisconsin, *Elmer v. Chicago & Nw. Ry. Co.*, 257 Wis. 228, 231, 43 N.W.2d 244, 246 (1950) (stating that "[t]he six essential elements in an action for malicious prosecution" include, but are not limited to, "a prior institution or continuation of some regular judicial proceedings against the plaintiff" (citations omitted)); and Wyoming, *Toltec Watershed Improvement Dist. v. Johnston*, 717 P.2d 808, 811 (Wyo. 1986) (stating that "the following elements [are] necessary to sustain a cause of action for malicious prosecution," including " '[t]he institution or continuation of original judicial proceedings, either criminal or civil' " (quoting *Consumers Filling Station Co. v. Durante*, 79 Wyo. 237, 248, 333 P.2d 691, 694 (1958))). Admittedly, a number of states have defined the tort of malicious prosecution without making reference to the continuation doctrine. *See Bhatia v. Debek*, 287 Conn. 397, 404, 948 A.2d 1009, 1017 (2008);[13] *Crosson v. Berry*, 829 N.E.2d 184, 189 (Ind. Ct. App. 2005); *Williamson v. Gueuntzel*, 584 N.W.2d 20, 23 (Minn. Ct. App. 1998); *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 17, 124 N.M. 512, 518, 953 P.2d 277, 283 (1997), *overruled in part by Durham v. Gues*t, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 701, 204 P.3d 19, 26

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11. In *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997), the tort of malicious prosecution was defined without reference to the continuation rule. However, since *Richey* did not overrule *Texas Beef Cattle* and focused upon an issue other than the viability of the continuation rule, I do not believe that *Richey* can properly be understood as holding that Texas has rejected the validity of the continuation rule.

12. The Utah Supreme Court made no mention of the continuation rule in reciting the elements of the tort of malicious prosecution in *Neff v. Neff*, 2011 UT 6, ¶ 52, 247 P.3d 380, 394 (2011), but did not overrule either *Cline* or *Schettler*.

13. The Connecticut Court of Appeals did hold in *Diamond 67, LLC v. Oatis*, 167 Conn. App. 659, 681, 144 A.3d 1055, 1069 (2016), that the related tort of vexatious litigation permitted a finding of liability predicated on a defendant's "initiation, continuation, and/or procurement" of a prior civil action, while suggesting that the continuation rule did not apply in malicious prosecution cases, *id.* at 683, 144 A.3d at 1070-71, which, in Connecticut, are limited to claims for relief based upon the initiation of baseless criminal charges, *see Bhatia*, 287 Conn. at 404-05, 948 A.2d at 1017.

(2009);[14] *Henshaw v. Doherty*, 881 A.2d 909, 915 (R.I. 2005); *Czechorowski v. State*, 2005 VT 40, ¶ 30, 178 Vt. 524, 533, 872 A.2d 883, 895 (2005); *Hudson v. Lanier*, 255 Va. 330, 333, 497 S.E.2d 471, 473 (1998); *Norfolk S. Ry. Co. v. Higginbotham*, 228 W. Va. 522, 526-27, 721 S.E.2d 541, 545-46 (2011). However, I am not convinced that the failure of these decisions to mention the continuation rule in the course of defining the tort of malicious prosecution necessarily means that the courts in question would refuse to recognize the continuation rule in the event that the issue of its viability was squarely presented to them, as is evidenced by the fact that the continuation rule was recognized in *Smith*, 173 Ariz. at 294-95, 842 P.2d at 1308; *Badell*, 115 Idaho at 102-04, 765 P.2d at 127-29; *Wilson*, 464 N.W.2d at 259-64; and *Wroten*, 114 Or. App. at 308-09, 835 P.2d at 933-34, despite the fact that the tort of malicious prosecution was defined in each of those cases without making any reference to the continuation rule and the fact that two other courts have refused to decide whether to accept or reject the continuation rule given the absence of any need to do so in order to resolve the case under consideration, *Maynard v. 84 Lumber Co.*, 657 N.E.2d 406, 408 (Ind. Ct. App. 1995); *Williamson*, 584 N.W.2d at 24-25[15] As far as I have been able to

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14. The New Mexico Supreme Court has consolidated what are, in most jurisdictions, the separate torts of malicious prosecution and abuse of process into the tort of malicious abuse of process. *Durham*, 2009-NMSC-007, ¶ 18, 145 N.M. at 698, 204 P.3d at 23. Although the New Mexico Supreme Court initially held in *DeVaney* that the elements of the tort of malicious abuse of process of process are "the initiation of judicial proceedings against the plaintiff by the defendant," "an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim," "a primary motive by the defendant in misusing the process to accomplish an illegitimate end," and " damages," 1998-NMSC-001, ¶ 17, 124 N.M. at 518, 953 P.2d at 283, that court subsequently overruled its prior decision in *DeVaney* and modified the definition of the first element of the consolidated tort so as to delete the requirement that "the defendant . . . have initiated a judicial proceeding against the plaintiff," *Durham*, 2009-NMSC-007, ¶ 29, 145 N.M. at 701, 204 P.3d at 26, and to replace it with "the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge," with this improper use of process consisting of either the "filing [of] a complaint without probable cause," or " 'an irregularity or impropriety suggesting extortion, delay, or harassment' or other conduct formerly actionable under the tort of abuse of process," *id.* at ¶ 29, 145 N.M. at 701, 204 P.3d at 26 (quoting *Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-NMSC-047, ¶ 12, 142 N.M. 150, 154, 164 P.3d 31, 35 (2007)). Although one could argue that this restatement of the elements of the tort of malicious abuse of process suffices to recognize something akin to the continuation rule for malicious abuse of process claims, the validity of that argument has not, to my knowledge, been tested.

15. I do not wish to be understood as making any claim that the discussion of the decisions made by other jurisdictions with respect to the validity of the continuation rule set out in the text of this separate opinion is complete. I merely offer it in support of my general belief that the validity of the continuation rule is well recognized across the United States.

determine, only Delaware appears to have explicitly rejected the "continuation" theory. *See Blue Hen Mech., Inc. v. Christian Bros. Risk Pooling Tr.*, 117 A.3d 549, 557 (Del. 2015) (rejecting a request for recognition of a claim for malicious prosecution "based on the wrongful continuation of proceedings after probable cause no longer exists" because the Court could see "no reason to extend the tort of malicious prosecution beyond the limited scope given to it by long-standing Delaware case law, and many reasons" for declining to do so (footnote omitted)). At an absolute minimum, these decisions make it clear to me that the overwhelming majority of American jurisdictions recognize the viability of the continuation rule in malicious prosecution cases.

In spite of the well-established nature of the "continuation" theory both nationally and in North Carolina, the Court refrains from commenting upon its viability on the grounds that, since "[p]laintiff's complaint is not that the original probable cause dissipated" and focuses, instead, upon a claim that "probable cause never existed," "[w]e need not address [the viability of] that theory in this jurisdiction. I am not, given my belief that plaintiff has, in fact, attempted to assert a valid "continuation" claim; the breadth of the authorities that recognize the validity of the "continuation" theory; the fact that neither party has openly questioned the validity of that theory in their briefs or during oral argument; and the fact that the logic underlying the "continuation" theory strikes me as fully consistent with this Court's malicious prosecution jurisprudence, comfortable with such a result, which seems to cast the validity of the "continuation" theory in North Carolina into unnecessary doubt. As a result, in light of my understanding of the allegations set forth in plaintiff's complaint, I believe that our analysis of the "lack of probable cause" allegations contained in plaintiff's complaint must necessarily focus upon both the allegations concerning the time at which plaintiff was originally charged with the murder of his estranged wife by the Davie County grand jury and the time at which the decision was made to continue proceeding against plaintiff on the charge of murdering his wife following the additional blood smear "tests" conducted by defendants.

According to well-established North Carolina law,

> [a] pleading complies with [N.C. R. Civ. P. Rule 8(a)(1)] if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

Sutton v. Duke, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970). Although notice pleading pursuant to Rule 8(a)(1) of the North Carolina Rules of Civil Procedure does not require "detailed fact-pleading," *id.* at 104, 176 S.E.2d at 167, it does "manifest the legislative intent to require a more specific statement, or notice in more detail, than Federal Rule 8(a)(2) requires," *id.* at 100, 176 S.E.2d at 164, so that "no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim or of his defense," *id.* at 105, 176 S.E.2d at 167 (quoting William C. Myers & James E. Humphreys, Jr., *Pleadings and Motions*, 5 Wake Forest Intramural L. Rev. 70, 73 (1969)). As a result, our precedent suggests that at least some allegations supplying a factual basis for a malicious prosecution claim are necessary to preclude dismissal for failure to state a claim for which relief can be granted. *See Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (stating that "a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim" to preclude dismissal for failure to state a claim for which relief can be granted), *disapproved on other grounds by Dickens v. Puryear*, 302 N.C. 437, 447-48, 276 S.E.2d 325, 331-32 (1981). In view of the fact that "the well-pleaded material allegations of the complaint are taken as admitted" while the "conclusions of law or unwarranted deductions of fact[ ] are not admitted," *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) (quoting *Sutton*, 277 N.C. at 98, 176 S.E.2d at 163), "it is our task to determine whether" plaintiff's factual "allegations as a matter of law demonstrate the adequacy, or lack thereof, of" plaintiff's claim" *id.* at 427, 251 S.E.2d at 851. Thus,

> [d]ismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford County, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)). When considered in light of the applicable legal standard, I believe plaintiff's complaint fails to allege a valid claim for malicious prosecution against defendants arising from either the initiation of criminal charges against plaintiff or the decision to continue prosecuting him following the performance of the unscientific blood smear "tests."

"It is certainly the general rule, applicable to [malicious prosecution cases], that when a committing magistrate has bound the party over or a grand jury has found a true bill against him, such action *prima facie* makes out a case of probable cause, and the jury should be directed to consider the evidence as affected by this principle." *Stanford v. Grocery Co.*, 143 N.C. 419, 426, 55 S.E. 815, 817 (1906) (citations omitted). In view of plaintiff's acknowledgement that the Davie County grand jury returned a bill of indictment charging him with murder, he has, in effect, pleaded a fact that serves to defeat his malicious prosecution claim in the absence of an allegation providing some basis for overcoming the prima facie case of probable cause that he has set out in his complaint. Although plaintiff asserts that he acted in self-defense at the time that he killed his wife and that defendants "fail[ed] to properly investigate the circumstances of [Mrs.] Turner's death" and plaintiff's "claim of self-defense," these conclusory allegations provide no support for the legal conclusion stated in his complaint to the effect that "there was a lack of probable cause to sustain an indictment on first-degree murder and but for the malicious, intentional acts of [defendants, plaintiff] would not have been indicted and tried for first-degree murder." *See Carson*, 231 N.C. at 633, 58 S.E.2d at 612 (stating that, "when the facts are admitted or established, the question of probable cause is one of law for the court" (citing *Rawls v. Bennett*, 221 N.C. 127, 130, 19 S.E.2d 126, 128 (1942); *Morgan v. Stewart*, 144 N.C. 424, 425, 57 S.E. 149, 149 (1907)). For example, plaintiff failed to allege that defendants unreasonably declined to believe his protestations of innocence, that he did nothing to provoke the attack that he claimed that his wife had made upon him, or that defendants had no basis whatsoever for failing to accept plaintiff's assertion that he acted in perfect self-defense. As a result, given that plaintiff has failed to allege any factual support for his assertion that, despite the grand jury's decision to charge him with murdering his wife, there was no probable cause to believe that he was guilty of murder, plaintiff's complaint fails to give defendants sufficient notice of the events or transactions which produced the claim so as to enable defendants to understand the nature of plaintiff's claim and the basis for it, and consequently, plaintiff's complaint must be deemed fatally defective.

Similarly, I do not believe that plaintiff has stated a malicious prosecution claim against defendants arising from the unlawful continuation of the underlying murder prosecution without probable cause stemming from the actions taken in the aftermath of the 15 January 2008 meeting. In essence, plaintiff alleges that, following this meeting, defendants "wantonly and maliciously conducted unscientific tests to 'shore up' the new theory that [plaintiff's] wounds were self-inflicted and therefore,

not a result of self-defense." Although the allegations set forth in plaintiff's complaint clearly describe a highly unethical attempt to manufacture evidence in support of the State's attempt to convict plaintiff of first-degree murder, the complaint provides no indication whatsoever that the machinations in which defendants allegedly engaged had any effect beyond bolstering the State's existing case against plaintiff. Put another way, the existence of additional, albeit manufactured, evidence, while certainly enhancing the likelihood that plaintiff would be wrongly convicted of murdering his wife, could not have done anything to detract from the existing evidence that had resulted in the Davie County grand jury's decision to charge plaintiff with murder.[16] Thus, I do not believe that plaintiff has stated a claim for relief sounding in malicious prosecution arising from the additional "unscientific" blood smear testing that defendants performed in early 2008.

In summary, while I am unable to agree with the manner in which the Court has analyzed the sufficiency of plaintiff's complaint to allege a malicious prosecution claim against defendants, I do agree that plaintiff failed to state a malicious prosecution claim against them in his complaint. Despite the presence of an allegation that makes out a prima facie showing that probable cause was not lacking, plaintiff has completely failed to provide any factual support for his conclusory allegation that plaintiff's prosecution was initiated and continued in the absence of the requisite probable cause. As a result, I concur in the Court's opinion with respect to the sufficiency of plaintiff's complaint to state a claim for intentional infliction of emotional distress and concur in the result that the Court has reached with respect to the sufficiency of plaintiff's complaint to state a malicious prosecution claim against defendants.

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16. Although plaintiff has argued that he had alleged that defendants had "a collateral purpose in initiating or continuing the proceedings" against him and that this fact provides "prima facie evidence of a lack of probable cause," citing *Taylor v. Hodge*, 229 N.C. 558, 50 S.E.2d 307 (1948) and *Wilson v. Pearce*, 105 N.C. App. 107, 412 S.E.2d 148, *disc. rev. denied*, 331 N.C. 291, 417 S.E.2d 72 (1992), that logic does not suffice to resuscitate plaintiff's malicious prosecution claim in this case given that defendants' desire "to secure a conviction [in] a high publicity murder case regardless of guilt to further [defendants'] careers" and "to assist the District Attorney in winning a very public case for political purposes" does not seem to me to rise to the level of personal malice and effort to obtain personal gain present in the cases upon which plaintiff relies.

Justice HUDSON concurring in part, and dissenting in part.

I agree with the majority's disposition of the claims for intentional infliction of emotional distress, which affirms the Court of Appeals' reversal of the dismissal of these claims as to defendants Thomas and Deaver. I disagree with the majority's analytical framework for malicious prosecution claims; therefore, I agree with Justice Ervin's analysis in his concurring opinion, which recognizes that North Carolina has long allowed malicious prosecution claims under a "continuation theory." Even under the majority's theory of malicious prosecution, in my view, plaintiff has sufficiently stated claims for malicious prosecution to survive dismissal under Civil Procedure Rule 12(b)(6) and proceed with his claim against Thomas. I also conclude that under the law previous to this opinion, as well as under the framework explained by Justice Ervin, the complaint sufficiently states a claim for malicious prosecution against Deaver as well. Therefore, as to the malicious prosecution claims against Thomas and Deaver, I respectfully dissent.

As the majority states, a claim for malicious prosecution requires a showing that "the defendant (1) initiated or *participated in* the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff." (Emphasis added.) Furthermore, I agree with the majority's discussion of the applicable principles regarding a motion to dismiss under Rule 12(b)(6). The relevant inquiry is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)).

As noted in the concurring opinion, North Carolina adopted notice pleading many years ago. Civil Procedure Rule 8(a)(1) does not require "detailed fact-pleading," but rather requires only that a pleading give "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970); *see Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988) ("Through [Rule 8(a)(1) of the North Carolina Rules of Civil Procedure], the General Assembly of North Carolina adopted the concept of notice pleading.") Although there is some precedent for requiring that allegations supply a factual basis for extreme conduct in a claim of intentional infliction of emotional distress, *see Chidnese v. Chidnese*, 210 N.C. App. 299, 317, 708 S.E.2d 725, 738 (2011) ("Plaintiff's complaint

and brief simply state that defendants' previously discussed behavior was extreme and outrageous, without providing any support or case for this assertion. However, 'this Court has set a high threshold for a finding that conduct meets the standard' of extreme and outrageous conduct." (quoting *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000)), a claim of malicious prosecution must satisfy only the basic requirements of notice pleading. To the extent that the majority goes beyond treating the allegations as true and analyzing evidence of probable cause, I conclude it has gone too far.

The majority also states that "plaintiff's suit focuses on actions defendants took *after*" the grand jury indicted him. I do not accept this characterization because a number of specific allegations against Thomas address what he knew and did before plaintiff was indicted. As to Deaver, specific allegations address his "participation" in the continuing prosecution after plaintiff's indictment.[1]

Turning to the complaint, the allegations that in my view adequately state a claim for malicious prosecution include the following:

> 14. Acting in self-defense, Dr. Kirk Turner grabbed a pocketknife from his right front pocket and made two cuts in rapid succession to Jennifer Turner's neck area which resulted in her death.
>
> . . . .
>
> 26. Prior to examining any evidence for bloodstains or bloodstain patterns, SA Thomas was informed by Special Agent D. J. Smith that Jennifer Turner had apparently stabbed Dr. Kirk Turner with the spear and in response Dr. Kirk Turner reached into his right front pocket of his pants and retrieved a knife which Dr. Kirk Turner used to cut Jennifer Turner causing her death.

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1. Although the majority correctly states that a claim for malicious prosecution may be based on participation in a proceeding, it then (improperly, as noted in the concurring opinion) limits that participation to pre-indictment activities. Defendant Deaver's alleged involvement in these events, which began after the indictment, nonetheless can constitute malicious prosecution by participation, both under existing law and as discussed in the concurring opinion.

. . . .

43. Upon information and belief, SA Thomas and SA Deaver conducted these additional tests in an effort to prove the new theory that Dr. Kirk Turner had planned the murder of Jennifer Turner, to maintain the appearance of probable cause where none existed and to obtain a first-degree murder conviction of Dr. Kirk Turner despite evidence to the contrary.

. . . .

67. SA Thomas and SA Deaver, acting in their individual capacities, participated in and caused the institution of criminal proceedings against Dr. Kirk Turner for the murder of his wife Jennifer Turner by, *inter alia*:

    a. Failing to properly investigate the circumstances of Jennifer Turner's death;

    b. Failing to properly investigate Dr. Kirk Turner's claim of self-defense;

    c. Hiding and/or attempting to hide pertinent information about evidence collected at the scene;

    d. Failing to adhere to the administrative practices of SBI report writing;

    e. Including false and misleading information in investigative reports; and

    f. Otherwise failing to remain fair, neutral and truthful prior to and after the institution of criminal proceedings against Dr. Kirk Turner.

68. In an effort to secure a first-degree murder indictment and conviction, SA Thomas and SA Deaver intentionally, maliciously, and without just cause, failed to take the appropriate measures described above.

69. At all times relevant to the investigation and prosecution of Dr. Kirk Turner, there was a lack of probable cause to sustain an indictment on first-degree murder and but for the malicious, intentional acts of SA Thomas and SA Deaver, Dr. Kirk Turner would not have been indicted and tried for first-degree murder.

In my view, these allegations are sufficient to state claims for malicious prosecution against Thomas and Deaver under existing North Carolina law. The allegations set forth in the last two paragraphs, when taken together with the complaint as a whole and particularly those in paragraph 67(a)-(e), allege a lack of probable cause and knowledge of the same on the part of defendants, and also provide "sufficient notice of the events or transactions which produced the claim." *Sutton*, 277 N.C. at 104, 176 S.E.2d at 167.

The majority asserts that it "must *consider the evidence* that was available to the investigators and presented to the grand jury in December 2007" and concludes, "*[b]ased on the facts known to the investigators* at the time of the grand jury proceedings, we are satisfied that a reasonable and prudent person would believe there was probable cause." (Emphases added.) The majority further states that the grand jury properly found probable cause and that "nothing in the subsequent investigation revealed facts that disproved that." Again, the focus of our review should be on the allegations in the complaint, taken as true. In considering whether the complaint has adequately stated claims for malicious prosecution, I do not think we need to consider the evidence or subsequent investigation at all. Instead, we must look at the allegations of the complaint and, taking them as true, determine if they have stated the elements of the claims. I express no opinion concerning the sufficiency of the evidence or the potential merits of plaintiff's claims at trial. Rather, looking solely at the allegations in the complaint, and taking them as true, I conclude that plaintiff has sufficiently stated claims for malicious prosecution against Thomas and Deaver. Accordingly, I would affirm the Court of Appeals' holding reversing dismissal under Rule 12(b)(6) of these claims, as well as the claims for intentional infliction of emotional distress. I would allow plaintiff's claims for malicious prosecution to proceed as to Thomas and Deaver.

As such, I respectfully dissent as to these two claims but concur in the majority's decision regarding plaintiff's claims for intentional infliction of emotional distress.

Justice BEASLEY joins in this opinion.

KING v. BRYANT

[369 N.C. 451 (2017)]

ROBERT E. KING AND WIFE, JO ANN O'NEAL
v.
MICHAEL S. BRYANT, M.D. AND VILLAGE SURGICAL ASSOCIATES, P.A.

No. 294PA14

Filed 27 January 2017

Arbitration and Mediation—doctor's form—handed to patient with other forms—fiduciary relationship

An arbitration agreement between a doctor (Dr. Bryant) and patient (Mr. King) that was obtained as the result of a breach of fiduciary duty from which defendants benefitted was not enforceable. The agreement was one of several forms given to Mr. King to sign when he first arrived at Dr. Bryant's office. Mr. King reposed trust and confidence in Dr. Bryant and provided confidential information even before seeing Dr. Bryant, so that a fiduciary relationship existed at the time that Mr. King signed the arbitration agreement. Defendants violated their fiduciary duty to Mr. King by failing to make full disclosure of the nature and import of the arbitration agreement at or before the time that it was presented for Mr. King's signature.

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

Chief Justice MARTIN dissenting.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 235 N.C. App. 218, 763 S.E.2d 338 (2014), affirming an order entered on 10 May 2013 by Judge Lucy N. Inman in Superior Court, Cumberland County. After hearing oral argument on 18 May 2015 and receiving additional findings of fact following the entry of a remand order on 19 February 2016, the Court ordered the parties to submit supplemental briefs. Additional issues raised in the supplemental briefs heard on 31 August 2016.

Beaver, Courie, Sternlicht, Hearp & Broadfoot, P.A., by Mark A. Sternlicht, for plaintiff-appellees.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Robert D. Walker, Jr., O. Drew Grice, Jr., and Alexandra L. Couch, for defendant-appellants.

Zaytoun Law Firm, PLLC, by Matthew D. Ballew, and Patterson Harkavy LLP, by Burton Craige, for North Carolina Advocates for Justice, amicus curiae.

ERVIN, Justice.

This case arises out of a medical malpractice action that plaintiffs, Robert E. King and his wife, Jo Ann O'Neal, brought against defendants, Michael S. Bryant, M.D., and Village Surgical Associates, P.A. According to the allegations contained in plaintiffs' complaint, Mr. King was scheduled to undergo a bilateral inguinal hernia repair to be performed by Dr. Bryant at the Fayetteville Ambulatory Surgery Center on 14 May 2009. At the time of his initial appointment with Dr. Bryant, Mr. King was presented with an Agreement to Alternative Dispute Resolution (arbitration agreement) that defendants routinely presented to new patients along with other documents prior to the first occasion on which a patient met with a physician. The arbitration agreement provided that:

> **In accordance with the terms of the Federal Arbitration Act, 9 USC 1-16, I agree that any dispute arising out of or related to the provision of health-care services by me, by Village Surgical Associates, PA, or its employees, physician members, and agents shall be subject to final and binding resolution through private arbitration.**
>
> The parties to this Agreement shall agree upon three Arbitrators and at least one arbitrator of the three shall be a physician licensed to practice medicine and shall be board certified in the same specialty as the physician party. The remaining Arbitrators either shall be licensed to practice law in NC or licensed to practice medicine in NC. The parties shall agree upon all rules that shall govern the arbitration, but may be guided by the Health Care Claim Settlement Procedures of the American Arbitration Association, a copy of which is available to me upon request. I understand that this agreement includes all health care [sic] services which previously have been or will in the future be provided to me, and that this

> agreement is not restricted to those health care [sic] services rendered in connection with any particular treatment, office or hospital admission. I understand that this agreement is also binding on any individual or entity and not a precondition to receiving health care [sic] services.

Mr. King, a witness, and Dr. Bryant each signed the arbitration agreement on 29 April 2009.

According to the unchallenged findings of fact, a front desk employee at Village Surgical Associates provided Mr. King with several intake forms to complete and sign while he waited to meet Dr. Bryant. The initial intake forms asked Mr. King to provide personal and medical history information and to sign the signature lines on all of the forms, including the arbitration agreement. Mr. King stated in his affidavit that he was then provided with a second set of documents, which addressed insurance and payment-related issues, after he had met with Dr. Bryant. Mr. King acknowledged that he did not read any of the documents that he signed after his initial meeting with Dr. Bryant and stated that he had believed them to be "just a formality." Mr. King denied having received a copy of the arbitration agreement on the day that it was signed and asserted that the contents of the agreement were not clear to him even after he had read it. Mr. King contended that, "[i]f the agreement had been brought to my attention and I had been told signing it was optional, I would not have signed it."[1]

In the course of the performance of the hernia repair procedure, Dr. Bryant injured Mr. King's distal abdominal aorta, resulting in abdominal bleeding. Although Dr. Bryant was able to repair Mr. King's injury, the necessary remedial procedures led to occlusion of an artery, a thromboembolism to Mr. King's right lower leg, and acute ischemia in Mr. King's right foot. After undergoing the performance of an immediate revascularization at Cape Fear Valley Health Systems for the purpose of salvaging his right leg, Mr. King remained hospitalized until 26 May 2009. At the time of his discharge, Mr. King continued to suffer from complications related to his abdominal aortic injury and needed additional treatment. As a result of the injury that he sustained during the hernia repair procedure, Mr. King incurred unexpected medical expenses, abdominal scarring, lost wages, numbness, and a limited ability to use his right leg and foot.

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1. Plaintiffs have not complained about, much less challenged the validity of, any of the other documents that Mr. King signed during his visit to the Village Surgical Center on 29 April 2009. The identity and contents of these documents are not clear from the record.

On 28 September 2011, plaintiffs filed a complaint against defendants in the Superior Court, Cumberland County, seeking damages for medical malpractice. On 7 November 2011, defendants filed a motion seeking to have further litigation in this action stayed and the arbitration agreement that had been entered into between Mr. King and defendants enforced and an answer in which defendants denied the material allegations of plaintiffs' complaint. Plaintiffs responded to defendants' motion to stay and enforce the arbitration agreement by arguing that:

> [T]he purported agreement is not enforceable for reasons that include but are not limited to the undue, prohibitive financial burden that enforcement of the agreement would have on plaintiffs by requiring the hiring of three arbitrators, one who must be a board certified physician in the same specialty as the defendant, Michael S. Bryant, M.D., and two who must be attorneys or physicians licensed in North Carolina; the inherent unfairness of requiring one arbitrator be a member of the same profession and medical specialty as the defendant, . . . especially in light of the absence of any comparable requirement for an arbitrator to be similarly affiliated with the plaintiffs . . . .

On 13 February 2012, defendants filed a motion seeking the entry of an order compelling arbitration. On 23 March 2012, the trial court entered an order denying defendants' motion to enforce the arbitration agreement on the basis of conclusions that:

> 4. The Agreement to Alternative Dispute Resolution leaves material portions open to future agreements by providing, *inter alia*, that the parties shall agree upon three arbitrators and that the parties shall agree upon all rules that shall govern the arbitration.
>
> 5. At most, the Agreement to Alternative Dispute Resolution is an "agreement to agree" that is indefinite and depends on one or more future agreements. *Seawell v. Continental Cas. Co.*, 84 N.C. App. 277, 281, 352 S.E.2d 263, 265 (1987).
>
> 6. The Agreement to Alternative Dispute Resolution is not a binding contract and is not enforceable.

Defendants noted an appeal to the Court of Appeals from the trial court's order.

On 5 February 2013, the Court of Appeals filed an opinion reversing the March 2012 order and remanding this case for further proceedings, *King v. Bryant*, 225 N.C. App. 340, 737 S.E.2d 802 (2013) (*King I*), on the grounds "that the trial court erred in concluding the Agreement between the parties was too indefinite to be enforced," *id.* at 345, 737 S.E.2d at 807. According to the Court of Appeals, "there was clearly an offer to arbitrate any dispute which arose out of Defendants' provision of medical care, as well as an acceptance of that offer by Mr. King." *Id.* at 346, 737 S.E.2d at 807. Although plaintiffs had argued before the trial court and the Court of Appeals that the arbitration agreement was unenforceable on unconscionability grounds, the Court of Appeals declined to address that issue given that the trial judge in the March 2012 order had not made the necessary factual findings. *Id.* at 347, 737 S.E.2d at 808. According to the Court of Appeals, "the trial court is the appropriate body to determine whether the agreement is unconscionable," *id.* at 347-48, 737 S.E.2d at 808 (citation omitted), with the needed unconscionability analysis to "be undertaken with an understanding of the unique nature of the physician/patient relationship," *id.* at 348, 737 S.E.2d at 808. In addition, the Court of Appeals noted that, "[u]nder North Carolina law, fiduciary relationships create a rebuttable presumption that the plaintiff put his trust and confidence in the defendant as a matter of law." *Id.* at 349, 737 S.E.2d at 809. As a result, the Court of Appeals required that these issues be addressed on remand. *Id.* at 350, 737 S.E.2d at 809.

On 10 May 2013, the trial court entered an order on remand determining that, given the nature of the fiduciary relationship that existed between Mr. King and defendants, defendant Bryant "had a fiduciary duty to disclose to his patient all facts material to their transaction." More specifically, the trial court's May 2013 order found as a fact that:

> 2. Mr. King, now 68, has no educational degree beyond high school and his job requires little reading. He has minimal experience reading legal documents.
>
> 3. Defendant Village Surgical Associates, P.A. ("Village Surgical") has experience in managing patient complaints, responding to claims of medical negligence made by patients, and resolving disputes through arbitration.
>
> 4. On April 29, 2009, Plaintiffs visited Defendant's office for the first time to consult with Defendant Bryant about performing laparoscopic surgery on Plaintiff King

to repair a hernia. Plaintiff King had been referred to Defendants by his primary care physician.

5. While Plaintiffs were waiting to meet Defendant Bryant and consult with him about performing surgery, Defendant's receptionist provided Plaintiff King with several intake forms to complete and sign. Plaintiff King considered the forms to be a formality.

6. Neither the receptionist, nor Defendant Bryant, nor any agent of Defendants called to Plaintiff King's attention the fact that one of the forms he was asked to sign, the Agreement, differed from all of the other forms because it did not concern medical information, insurance information, or payment for the surgery, all routine for a new patient. Nor did anyone disclose to Plaintiff King that the Agreement sought to foreclose his access to the judicial process in the event that any dispute arose out of or related to the surgery to be performed by Defendant Bryant.

. . . .

8. The Agreement does not provide that by signing it, the patient waives his or her right to a trial. The Agreement does not include the word "jury" or "judge" or "trial." The Agreement does not provide that the patient can consult an attorney before signing it.

9. There is no evidence that the physician or any agent of Defendants discussed with the patient, Plaintiff King, any provision of the Agreement.

. . . .

11. At the time Plaintiff King signed the Agreement and provided his medical information on intake forms, even though he had not yet met Defendant Bryant, he was already placing his confidence and trust in Defendants, as demonstrated by his willingness to share his confidential medical information.

. . . .

14. The first, bold-faced paragraph of the Agreement is poorly drafted, confusing, and nonsensical. For

example, it refers to the "provision of healthcare services by me," suggesting that "me" refers to the physician rather than the patient.

15. The Agreement repeatedly refers to arbitration without defining the term. The Agreement includes no mention whatsoever of the judicial process, a trial, or a jury. The Agreement does not disclose Defendants' intent for Plaintiff King to waive his rights to the judicial process, including his right to a jury trial, in the event of any claim arising from or related to the surgery. A person of Plaintiff King's education and experience should not reasonably have been expected to know from the language of the Agreement, or from any information provided to him by Defendants, that he had a right to a jury trial to resolve any potential dispute with his surgeon. Nor should he have been expected to understand from the language of the Agreement or other information provided to him by Defendants that by signing the Agreement, he would waive his right to a jury trial.

16. The last sentence of the second paragraph in the Agreement starts with complex but complete clauses . . . and ends with an incomplete clause . . . . A person of Plaintiff King's education and experience should not reasonably be expected to understand the last, tacked on, incomplete clause to mean that he did not need to sign the Agreement in order for Defendant Bryant to perform the surgery.

17. Plaintiff King read the Agreement after a copy was provided to him by his attorney, and he still did not understand its contents or the intended consequence of signing it.

18. Unlike arbitration agreements which have been upheld and enforced in medical negligence cases, the Agreement includes no provision allowing or recommending that the patient consult with an attorney regarding the Agreement prior to signing it.

19. Defendants sought Plaintiff's signature on the Agreement to benefit themselves.

> 20. The Agreement's provision requiring at least one physician arbitrator, and its provision allowing all three arbitration panelists to be a physician, confers a benefit to Defendants and detriment to Plaintiffs.
>
> . . . .
>
> 23. Ms. Ramos, a receptionist at Defendant Village Surgical, states in a sworn affidavit that the form arbitration agreement is included in "registration paperwork" presented to each new patient when he or she visits the practice for an initial appointment, prior to meeting with a physician. . . . It is reasonable to infer from Ms. Ramos' sworn statement that, in fact, it is the practice of Defendants to obscure the form arbitration agreement by presenting it among a pile of other documents without pointing it out or explaining its contents.

Based upon these findings of fact, the trial court concluded as a matter of law in the May 2013 order that:

> 3. Defendants were fiduciaries of Plaintiff King as the result of the physician-patient relationship.
>
> 4. Defendant Bryant and other agents of Defendants breached their fiduciary duties to Plaintiff King by failing to disclose to him all material terms of the Agreement and failing to deal with him openly, fairly, honestly, and without imposition, oppression, or fraud in procuring his signature on the Agreement.
>
> . . . .
>
> 6. The Agreement is the product of constructive fraud and is therefore unenforceable.
>
> 7. The Agreement is unconscionable and is therefore unenforceable.

Defendants noted an appeal to the Court of Appeals from the trial court's May 2013 remand order declining to enforce the arbitration agreement.

On 15 July 2014, the Court of Appeals filed an unpublished opinion affirming the May 2013 remand order on unconscionability grounds. *King v. Bryant*, 235 N.C. App. 218, 763 S.E.2d 338, 2014 WL 3510481 (2014) (unpublished) (*King II*). Although defendants had argued on appeal that the arbitration agreement was "not a product of constructive

fraud and not unconscionable" and that the trial court had "erred by denying their motion to compel arbitration," *King II*, 2014 WL 3510481 at *2, the Court of Appeals noted that "[d]efendants do not argue that the trial court's findings of fact are not based on competent evidence," *id.* at *6, making the trial court's findings "binding on appeal," *id.* at *6 n.1. In addition, the Court of Appeals declined to address defendants' contention that "a fiduciary relationship did not exist at the time that Mr. King signed the arbitration agreement because [Dr. Bryant] had not yet accepted King as a patient," *id.* at *6, given that the Court had already decided in *King I* "that a fiduciary relationship existed between the parties and directed the trial court to consider that fact on remand," *id.* (citing *N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631 (1983) (concluding that, "once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case")).

Upon reaching the unconscionability issue, the Court of Appeals noted this Court's holding in *Tillman v. Commercial Credit Loans, Inc.*, to the effect that, although

> [a]rbitration is favored in North Carolina. . . . "equity may require invalidation of an arbitration agreement that is unconscionable." A court will find a contract to be unconscionable "only when the inequity of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other."

362 N.C. 93, 101-02, 655 S.E.2d 362, 369-70 (2008) (internal citations omitted) (quoting *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 302 (4th Cir. 2002), and *Brenner v. Little Red Sch. House Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981)). "A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability." *Id.* at 102, 655 S.E.2d at 370 (citations omitted). However,

> [s]ince *Tillman*, the United States Supreme Court has issued two important opinions on the use of state law to set aside an arbitration agreement when that agreement is governed by the FAA: *AT&T Mobility v. Concepcion*, ___ U.S. ___, 179 L.Ed.2d 742 (2011) (determining that the FAA preempted California's judicial rule prohibiting class

> waivers in consumer arbitration agreements contained within contracts of adhesion) and *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 186 L.Ed.2d 417 (2013) (holding that the FAA does not permit courts to invalidate an arbitration agreement on the grounds that it does not permit class arbitration).

King II, 2014 WL 3510481, at *8. The Court of Appeals had addressed the impact of *Concepcion* and *Italian Colors* on *Tillman* in *Torrence v. Nationwide Budget Finance*, 232 N.C. App. 306, 753 S.E.2d 802, *disc. rev. denied and cert. denied*, 367 N.C. 505, 759 S.E.2d 88 (2014), and stated that, "[w]hile both *Concepcion* and *Italian Colors* dealt with class action waivers, underlying those decisions was a broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated." *Torrence*, 232 N.C. App. at 321, 753 S.E.2d at 811 (citation omitted). As a result, in *Torrence*, the Court of Appeals held that "(1) the 'prohibitively high' cost factor is no longer applicable to an unconscionability analysis; (2) an agreement's lack of mutuality, alone, is not sufficient to justify a finding of substantive unconscionability; and (3) the prohibition of joinder of claims and class actions does not render an arbitration agreement unconscionable." *King II*, 2014 WL 3510481 *8 (citing *Torrence*, 232 N.C. App. at 322, 753 S.E.2d at 811-12).

In spite of the limitations on the use of state law to preclude enforcement of arbitration agreements noted in *Torrence*, the Court of Appeals concluded that "the trial court correctly determined that the arbitration agreement here is unconscionable," *id.*, given defendant's failure to take "any *active* steps, in accordance with their fiduciary duty, to make a full, open disclosure of material facts to King before he signed the arbitration agreement," *id.* at *9 (internal quotations marks omitted). The Court of Appeals concluded that the arbitration agreement is procedurally unconscionable because,

> [g]iven (1) the fact that we analyze the agreement here in the context of the fiduciary duty Defendants owed King, (2) the disparate levels of sophistication between the parties, (3) the nature of the delivery of the agreement, and (4) *Defendants' burden* because of their fiduciary duty to King to provide full and open disclosure of the material facts surrounding the transaction between the parties, we hold that the arbitration agreement suffered from significant procedural unconscionability. King did not have a

> meaningful choice between whether to sign the agreement or not. Accordingly, Defendants' argument is overruled.

Id. at *10. Similarly, the Court of Appeals found the arbitration agreement to be substantively unconscionable because it is "a harsh, one-sided and oppressive instrument." *Id.* As a result, after concluding that "this agreement is unconscionable because of Defendants' failure to properly prepare and present the arbitration agreement to King in the context of their confidential, physician-patient, fiduciary relationship," *id.* at *11, the Court of Appeals affirmed the remand order, *id.*

On 18 August 2014, defendants filed a petition for discretionary review requesting this Court to grant further review of the Court of Appeals' decision in *King II*. On 18 December 2014, this Court granted defendants' discretionary review petition. After briefing and oral argument, this Court entered an order on 21 August 2015 remanding this case to the Superior Court, Cumberland County, for the making of further findings of fact relating to the issue of whether a physician-patient relationship existed at the time that Mr. King signed the arbitration agreement on the grounds that both the trial court's May 2013 remand order and the Court of Appeals decision in *King II* had "assumed the existence of such a relationship" and that the record was devoid of sufficient findings to permit the proper resolution of this case in the absence of such findings.

On 6 November 2015, Judge Mary Ann Tally entered an order on remand making the factual findings requested in this Court's remand order. In the November 2015 order, the trial court found as fact that:

> 5. When Mr. King completed the forms by providing his confidential medical history, symptoms, personal identifying information, and health insurance [ ] information, and signing the arbitration agreement, he trusted Dr. Bryant as his doctor, Dr. Bryant's practice, and its employees, particularly because of the referral from his family doctor. Mr. King would not have provided private and confidential information and signed the documents, including the arbitration agreement, if he had not considered Dr. Bryant to be his doctor and trusted him.
>
> 6. Patient trust is fundamental to the physician-patient relationship. The requirements of that relationship include adequate communication between the physician and patient; there be no conflict of interest

between the patient and the physician; personal details of the patient[']s life shared with the physician be held in confidence; there be respect for the patient's autonomy; patient primacy; and selflessness. These requirements are described in the North Carolina Medical Board Position Statement, *The physician-patient relationship*. Each of these requirements applied to the relationship between defendants and Mr. King.

7. Each of those requirements arose because a physician-patient relationship existed between defendants and Mr. King. . . . [A] physician-patient relationship can exist before a physician meets a patient, particularly when the physician delegates to others certain duties that are involved in the relationship, even though this may "not fit traditional notions of the doctor-patient relationship." *Mozingo v. Pitt Cnty. Mem. Hosp., Inc.*, 331 N.C. 182, 188, 415 S.E.2d 341, 344-45 (1992). These cases support the fact that a physician-patient relationship can exist when a physician has fewer than all of the duties that attach to the relationship after the duty to treat arises or when a physician, in today's modern health care environment, relies on others to participate in activities necessary for patient care.

8. By analogy, the [a]ttorney-client privilege protects "not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390, 394 (1981).

9. The physician-patient relationship began before Mr. King signed the arbitration agreement and was in existence at the time he signed the arbitration agreement.

After receiving these additional findings of fact concerning the physician-patient relationship issue, this Court ordered supplemental briefing and argument. In their supplemental brief, defendants urge us to "disregard the findings of fact entered by the trial court, find that no physician-patient relationship existed at the time Mr. King signed the arbitration agreement, and reverse the decision of the Court of Appeals affirming the trial court's order on the grounds that the arbitration agreement is unconscionable." Plaintiffs, on the other hand, argue that the findings contained in the November 2015 order establish that a physician-patient

relationship existed when Mr. King signed the arbitration agreement, so that "this Court should affirm the holdings that the Agreement is unenforceable due to constructive fraud and unconscionability."

Although they have vigorously challenged the legal effect of the factual findings contained in the May 2013 and November 2015 orders, defendants have not challenged the sufficiency of the evidence to support any of those findings. According to well-established North Carolina law, "[w]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing, *inter alia*, *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). However, defendants do argue that the findings of fact fail to support the conclusions of law to the effect that "[d]efendants were fiduciaries of Plaintiff King as the result of the physician-patient relationship" and that "[t]he Agreement is unconscionable and is therefore unenforceable." Unlike findings of fact, "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citations omitted). As a result, we will review defendants' challenges to these conclusions of law using a de novo standard of review.

After carefully considering the record and the briefs and arguments submitted by the parties, we believe that the proper resolution of this case hinges upon the nature of the relationship that existed between Mr. King and Dr. Bryant at the time that the arbitration agreement was signed. Although the parties, especially in their supplemental briefs, have placed particular emphasis upon the issue of whether a physician-patient relationship could have existed between Mr. King and Dr. Bryant before Dr. Bryant met with and accepted Mr. King as a patient, we are not, after extensive reflection, convinced that this case is properly viewed through a physician-patient relationship lens. Instead, we believe that this case is most properly understood as revolving around the issue of whether a fiduciary relationship existed between Mr. King and Dr. Bryant independent of the existence of a physician-patient relationship at the time that Mr. King signed the arbitration agreement.[2]

2. Defendants have never contended at any point in this litigation that the breach of fiduciary duty issue, which was clearly discussed in the trial court and raised before the Court of Appeals during the proceedings that led to *King II*, is not properly before the Court.

"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) (citing *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984), and *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971)). "The courts generally have declined to define the term 'fiduciary relation' and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or property of either." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). "In general terms, a fiduciary relation is said to exist [w]herever confidence on one side results in superiority and influence on the other side; where a special confidence is 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 the confidence." *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951) (internal quotation marks omitted).

A number of relationships have been held to be inherently fiduciary, including the relationships between spouses, attorney and client, trustee and beneficiary, members of a partnership, *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263 266, and physician and patient, *Watts v. Cumberland County Hospital System Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986). However,

> [t]he relation may exist under a variety of circumstances; it exists in all cases where 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. . . . . Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.

Abbitt, 201 N.C. at 598, 160 S.E. at 906-07 (internal quotation marks omitted); *see also Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266 (concluding that fiduciary relationships are characterized by "a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party").

If a fiduciary relationship is found to exist, the fiduciary is "held to a standard 'stricter than the morals of the market place' . . . '[n]ot honesty alone, but the punctilio of an honor the most sensitive, is [then] the standard of behavior.' " *Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266 (second alteration in original) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)). Liability for breach of fiduciary duty "is based on [the taking advantage of] a confidential relationship rather than a specific misrepresentation." *Barger v. McCoy Hillard Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678-79 (1981)); *Priddy v. Kernersville Lumber Co.*, 258 N.C., 653, 658, 129 S.E.2d 256, 261 (1963) (stating that liability for breach of fiduciary duty "may exist without any fraudulent intent"). As a result, "[w]here a relation of trust and confidence exists between the parties, there is a duty to disclose all material facts and failure to do so constitutes" a breach of fiduciary duty. *Vail*, 233 N.C. at 114, 63 S.E.2d at 206 (internal quotation marks omitted).[3] However, before liability for breach of fiduciary duty can exist, it must be shown that the defendant sought to benefit himself at the expense of the other party. *Barger*, 346 N.C. at 666-67, 488 S.E.2d at 224.

The record evidence, as reflected in the factual findings contained in the May 2013 and November 2015 orders, demonstrates that Mr. King was referred to Dr. Bryant by his family practitioner for the purpose of having a hernia repair procedure performed. Individuals consult with surgeons, like they do with other physicians, because such persons possess "special knowledge and skill in diagnosing and treating diseases and injuries, which the patient lacks;" accordingly, "the patient has sought and obtained the services of the physician because of such special knowledge and skill." *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985) (internal quotation marks omitted). Upon arrival at defendants' office, Mr. King was presented with a collection of documents, including the arbitration agreement, and asked to complete them. The majority of the documents that Mr. King was requested to

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3. The elements of a claim for breach of fiduciary relationship are the same as those for constructive fraud. *See Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971) (stating that, "[w]here a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud" (citing *Vail*, 233 N.C. 109, 63 S.E.2d 202)); *Rhodes v. Jones*, 232 N.C. 547, 548, 61 S.E.2d 725, 726 (1950) (stating that "[c]onstructive fraud often exists where the parties to a transaction have a special confidential or fiduciary relation which affords the power and means to one to take undue advantage of, or exercise undue influence over the other." (internal quotation marks omitted) (citing *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943)).

complete and sign involved the provision of medical information, which is inherently sensitive and confidential in nature, for Dr. Bryant's use in determining whether to accept Mr. King as a patient and in determining how he should be treated. No one directed Mr. King's attention to the arbitration agreement, which was only one of a number of documents presented to him on that occasion, or made any attempt to explain the ramifications that would result from any decision on his part to sign it. After Mr. King completed and signed these documents and met with Dr. Bryant, Dr. Bryant agreed to assume responsibility for providing Mr. King with medical care and treatment.

A careful examination of the information contained in the findings of fact made in the May 2013 and November 2015 orders persuades us that, regardless of whether a physician-patient relationship existed between Mr. King and Dr. Bryant at the time that the arbitration agreement was signed, there was a confidential relationship between them at that point. It is difficult for us to see how one could reach any conclusion other than that Mr. King reposed trust and confidence in Dr. Bryant, to whom he had been referred by his family physician for the purpose of receiving surgical treatment. As we have already noted, the fact that Mr. King decided to consult Dr. Bryant constituted recognition on Mr. King's part that Dr. Bryant possessed "special knowledge and skill in diagnosing and treating diseases and injuries, which the patient lacks." *Black*, 312 N.C. at 646, 325 S.E.2d at 482. Before he even saw Dr. Bryant, Mr. King demonstrated sufficient trust and confidence in him to provide Dr. Bryant with confidential medical information. Finally, unlike Dr. Bryant, Mr. King had received a limited education and had little to no experience interpreting legal documents. As a result, we conclude that a fiduciary relationship existed between Mr. King and Dr. Bryant at the time that Mr. King signed the arbitration agreement.

Similarly, we conclude that defendants violated their fiduciary duty to Mr. King by failing to make full disclosure of the nature and import of the arbitration agreement to him at or before the time that it was presented for his signature. Instead of specifically bringing this agreement, which substantially affected his legal rights in the event that an untoward event occurred during the course of the treatment that he received from defendants, to Mr. King's attention and explaining it to him, defendants presented Mr. King with the arbitration agreement, which, at a minimum, could have been worded more clearly, in a collection of documents, thereby creating the understandable impression that the arbitration agreement was simply another routine document that Mr. King needed to sign in order to become a patient. Moreover, consistent with

the unchallenged findings of fact, defendants benefitted from Mr. King's action in signing the arbitration agreement by ensuring that any subsequent dispute between the parties would be resolved using the forum, procedures, and decision makers of their choice. As a result, the findings of fact contained in the May 2013 and November 2015 orders establish that defendants failed to act consistently with their fiduciary duty to Mr. King by requesting that he sign a document with substantial legal ramifications and which they believed to be of benefit to themselves without making full disclosure to Mr. King.

Aside from the fact that defendants have failed to clearly advance a federal preemption argument in reliance upon *Concepcion* and related decisions in the briefs that they filed before this Court, *State v. Garcell*, 363 N.C. 10, 41, 678 S.E.2d 618, 638 (stating that, "[d]espite citing due process concerns to the trial court, defendant fails to adequately develop a constitutional claim on appeal and has thus abandoned any such argument") (citing N.C. R. App. P. 28(a), (b)(6))), *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009), and the fact that defendants have made no attempt to show that the present arbitration agreement is subject to the Federal Arbitration Act,[4] we do not believe that our decision in this case is in any way inconsistent with the federal preemption principles enunciated in *Concepcion* and related cases. As those decisions clearly recognize, arbitration agreements are subject to invalidation based upon " 'generally applicable contract defenses, such as fraud,[5] duress, or unconscionability,' but not by defenses that

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4. Any federal preemption claim advanced in this case pursuant to *Concepcion* and related decisions must rest upon 9 U.S.C. § 2, which applies to "contract[s] evidencing a transaction involving commerce." The necessary nexus between the relevant transaction and "interstate commerce" exists in the event that "the 'transaction' in fact 'involv[e][s]' interstate commerce, even if the parties did not contemplate an interstate commerce connection." *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753, 769 (1995) (first set of brackets in original). Given that the present record contains no indication that the agreement between the parties constitutes a "transaction involving commerce," 9 U.S.C. § 2 (2012), and given that the burden of demonstrating the applicability of the Federal Arbitration Act rests upon defendants, *Sillins v. Ness*, 164 N.C. App. 755, 760, 596 S.E.2d 874, 877-78 (2004) (observing that "defendants were required to submit sufficient evidence in support of their motion to compel arbitration to establish that plaintiff's contract evidenced a transaction involving interstate commerce" and reversing and remanding for additional findings an order denying arbitration, while noting that "defendants offered no evidence in support of their motion to compel arbitration apart from the employment agreement" itself), a necessary precondition to federal preemption under *Concepcion* and related cases simply does not appear to exist in this case.

5. According to well-established North Carolina law, a breach of fiduciary duty "constitutes fraud." *Link*, 278 N.C. at 192, 179 S.E.2d at 704.

apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[6] *Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1746, 179 L. Ed. 2d at 751 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902, 909 (1996)) (other citations omitted). A decision to refrain from enforcing the agreement on breach of fiduciary duty grounds does not rest upon the fact that it provides for the arbitration of medical negligence claims, does not treat arbitration agreements differently than other contracts, and does not make the enforcement of arbitration agreements more difficult than the enforcement of any other contract. On the contrary, we would have reached the same result on these facts with respect to any agreement that substantially affected Mr. King's substantive legal rights, such as an agreement absolving defendants from the necessity for compliance with otherwise applicable confidentiality requirements, providing for the transfer of items of real or personal property from Mr. King to defendants, or waiving any tort or contract-based claims that Mr. King might have had against either or both defendants. Thus, since the breach of fiduciary duty defense to enforcement of the agreement that we uphold in this case does not apply "only to arbitration" or "derive [its] meaning from the fact that an agreement to arbitrate is at issue," *id.* at 339, 131 S. Ct. at 1746, 179 L. Ed. 2d at 759, a refusal to enforce an arbitration agreement on that basis does not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* at 352, 131 S. Ct. at 1753, 179 L. Ed. 2d at 759 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 2d 581, 587 (1941)). Instead, consistently with *Prima Paint Corp. v. Flood & Conklin Manufacturing. Co.*, 388 U.S. 395, 403-04, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270, 1277 (1967), our decision simply recognizes that a "claim [of] fraud in the inducement of the arbitration [agreement] itself—an issue which goes to the 'making' of the agreement to arbitrate—[is one that a] court may proceed to adjudicate."[7] As a result,

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6. As the language quoted in the text of this opinion clearly recognizes, a party is entitled to challenge the enforceability of an arbitration agreement on recognized state law grounds in addition to unconscionability.

7. Given that judicial consideration of fraud-based challenges to the enforceability of arbitration agreements is limited, by virtue of *Prima Paint*, to instances in which the arbitration agreement, rather than the entire contract between the parties, was induced by fraud, the fact that the "benefit" that defendants derived from the existence of the arbitration agreement in this case was the right to litigate any dispute between the parties in an arbitral rather than a judicial forum has no bearing on a proper analysis of any federal preemption issue that might be before us in this case. Any other result, given the limitations that *Prima Paint* places upon judicial challenges to the enforceability of arbitration agreements predicated on fraud or some similar defense, would effectively eliminate the ability of a party to assert such a defense despite *Concepcion's* recognition of its continued viability.

our decision to refrain from enforcing the arbitration agreement at issue in this case is not precluded by the doctrine of federal preemption.

Thus, for all of these reasons, we hold that the arbitration agreement at issue in this case was obtained as a result of defendants' breach of a fiduciary duty that they owed to Mr. King.[8] In light of that determination, we hold that the Court of Appeals did not err by upholding the trial court's decision to deny defendants' motion to enforce the arbitration agreement.[9] We do, however, wish to make clear that nothing in our decision in this case should be understood to cast any doubt upon the ability of physicians and patients, assuming that proper disclosure is made, to enter into appropriately drafted agreements providing for the arbitration of disputes like the one that underlies this case. However, given our determination that Mr. King had entered into a fiduciary relationship with Dr. Bryant at the time that the arbitration agreement was signed and the fact that defendants did not make full disclosure to Mr. King before presenting the agreement at issue in this case for his signature, we hold that the arbitration agreement was obtained as the result of a breach of fiduciary duty from which defendants benefitted and is, for that reason, unenforceable. Thus, we modify and affirm the decision of the Court of Appeals in *King II* by holding the arbitration agreement unenforceable on breach of fiduciary duty, as opposed to unconscionability, grounds.

MODIFIED AND AFFIRMED.

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

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8. In view of our determination that the arbitration agreement is unenforceable on breach of fiduciary duty grounds, we need not address plaintiff's unconscionability claim, *Vail*, 233 N.C. at 114, 63 S.E.2d 206 (stating that, in the event of a breach of fiduciary duty, " 'the transaction will be set aside even though it could not have been impeached had no such relation existed, whether the unconscionable advantage was obtained by misrepresentation, concealment or suppression of material facts, artifice, or undue' advantage" (quoting 23 Am. Jur. *Fraud and Deceit* § 14 (1939))), even if there is no finding of unconscionability.

9. The decision of the Court of Appeals in *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 721 S.E.2d 712 (2012), has no bearing upon the proper resolution of this case given the absence of a claim that the contract at issue in that case was allegedly procured as the result of a breach of fiduciary duty.

Chief Justice MARTIN dissenting.

In *Tillman v. Commercial Credit Loans, Inc.*, this Court applied common law unconscionability doctrine to invalidate an arbitration clause in the plaintiffs' loan agreements. 362 N.C. 93, 103-09, 655 S.E.2d 362, 370-74 (2008) (plurality opinion); *id.* at 110-11, 655 S.E.2d at 374-75 (Edmunds, J., concurring in result only). Three years later, the Supreme Court of the United States decided *AT&T Mobility LLC v. Concepcion*, which clarified the scope of the Federal Arbitration Act's preemptive effect when state law might otherwise make an arbitration agreement unenforceable. *See* 563 U.S. 333, 340, 352 (2011). Because *Concepcion*'s rationale extends to a case like this one, in which a broadly applicable state law defense (constructive fraud) purportedly requires non-enforcement of an arbitration agreement specifically because it is an arbitration agreement, I respectfully dissent.

Before I turn to the preemption issue, a few observations are in order about the majority's parsing of state law fiduciary duty principles. Because it asserts that Dr. Bryant committed constructive fraud by failing to adequately disclose certain contractual terms to Mr. King, the majority first has to find that a fiduciary relationship between Mr. King and Dr. Bryant existed when Mr. King filled out the paperwork that included the arbitration agreement—paperwork that Mr. King filled out at Dr. Bryant's office before Dr. Bryant had met him or accepted him as a patient. As the majority correctly notes, certain relationships automatically "give[ ] rise to a fiduciary relationship as a matter of law." *CommScope Credit Union v. Butler & Burke, LLP*, ___ N.C. ___, ___, 790 S.E.2d 657, 660 (2016). Curiously, though, the majority does not decide whether a *physician-patient* relationship had been formed by the time Mr. King signed the arbitration agreement. The majority thus does not determine whether, as a matter of law, a fiduciary duty existed at that time. Instead, the majority decides only that, at the time that Mr. King signed the arbitration agreement, Dr. Bryant owed Mr. King a fiduciary duty in fact.

But, although the majority finds that a fiduciary relationship existed here only as a matter of fact, it effectively determines that a physician-patient relationship existed here in all but name. A fiduciary relationship exists as a matter of fact "whenever 'there is confidence reposed on one side, and resulting domination and influence on the other.' " *Id.* at ___, 790 S.E.2d at 661 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). Pointing to specific findings of fact by the trial court, the majority maintains that a fiduciary relationship existed between Mr. King

and Dr. Bryant primarily because Mr. King placed his trust in Dr. Bryant *as a doctor*.[1] In addition, the majority quotes *Black v. Littlejohn* to suggest that Mr. King sought Dr. Bryant's services because of Dr. Bryant's "special knowledge and skill," *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985) (quoting 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 167 (1981)), and later quotes *Black* to assert that Dr. Bryant possessed "special knowledge and skill in diagnosing and treating diseases and injuries, which the patient lacks," *id.* (quoting 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 167 (1981)). Both of these quotes come from a passage in *Black* that discusses the characteristics of a fiduciary relationship that exists between a physician and his patient. *See id.* Thus, the majority determines, in effect, that the fiduciary relationship existed *because* Dr. Bryant was Mr. King's *doctor*—even though the majority claims that its conclusion is reached "independent of the existence of a physician-patient relationship."

So the majority tries to have its cake and eat it too. It purports not to take a position on whether a physician-patient relationship exists, but then rests its analysis on the characteristics of the physician-patient relationship. More particularly, the majority does not indicate whether a physician-patient relationship exists at the moment that a prospective patient fills out his preliminary paperwork, even when (as here) the doctor has never met the patient or accepted him as a patient. Yet the majority uses the characteristics of a physician-patient relationship, and the things that a prospective patient thinks and does, to find a fiduciary relationship in fact. By relying almost exclusively on aspects of a physician-patient relationship but then finding a fiduciary duty that is "independent" of that kind of relationship, the majority has muddied the waters in this area of the law. This legal sleight of hand is especially troubling for our fiduciary duty jurisprudence and for doctors and patients, who necessarily rely on us to provide clear and predictable rules to guide their daily interactions.

What's more, the majority's muddled parsing of state law, however well intentioned, must yield to principles of federal preemption. Section 2 of the Federal Arbitration Act (FAA) provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such

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1. On the other hand, the majority also finds a fiduciary duty here at least in part because Mr. King "provide[d] Dr. Bryant with confidential medical information," which is not exactly based on Dr. Bryant's status as a doctor. (A patient may, for instance, provide confidential medical information to a health insurance company.) But the majority's reasoning confuses a duty of confidentiality—a more limited duty that can arise even when no fiduciary duty exists—with a full-fledged fiduciary duty.

grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012).[2] In cases that it handed down before this Court decided *Tillman*, the Supreme Court of the United States held that Section 2 of the FAA preempted state law provisions that "set[ ] out a precise, arbitration-specific limitation." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 n.3 (1996). In *Perry v. Thomas*, for example, the Supreme Court held that Section 2 of the FAA preempted a California statute that allowed actions for the collection of wages to be maintained even in the face of a private arbitration agreement. *See* 482 U.S. 483, 484, 490-91 (1987). And in *Doctor's Associates, Inc. v. Casarotto*, the Court held that Section 2 preempted a Montana statute that imposed special notice requirements "specifically and solely" on "contracts 'subject to arbitration.' " 517 U.S. at 683 (quoting Mont. Code Ann. § 27-5-114(4) (1995)); *id.* at 688. Both of these cases addressed state statutory provisions that applied specifically to arbitration agreements, but did not apply to contracts that did not have arbitration agreements.

After *Tillman*, however, the Supreme Court of the United States issued its decision in *AT&T Mobility v. Concepcion*. In *Concepcion*, the Court squarely held that the use of even a doctrine like unconscionability—which can be applied to any contract, even one that does not contain an arbitration clause—can be preempted by Section 2 of the FAA when the doctrine "ha[s] been applied in a fashion that disfavors arbitration." 563 U.S. at 341. The Court reaffirmed its holding in *Concepcion*

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2. The majority expresses considerable doubt that Section 2 of the FAA applies to the arbitration agreement at issue in this case. But it is unclear why the majority thinks that this is such an uphill battle. By its terms, Section 2 applies to any contract to arbitrate a transaction that is either specified in the contract or referred to by the contract, as long as the contract "evidenc[es] a transaction involving commerce." 9 U.S.C. § 2. Section 2's phrase "involving commerce" has the same meaning as the phrase "affecting commerce," *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995), and Section 2's reach thus "extend[s] . . . to the limits of Congress' Commerce Clause power," *id.* at 268. The arbitration agreement that Mr. King signed pertained to "any dispute arising out of or related to the provision of healthcare services," and clearly falls within both the commerce power and, by extension, the terms of Section 2. The provision of healthcare services is a form of commerce, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, ___ U.S. ___, ___, 132 S. Ct. 2566, 2587-88 (2012) (opinion of Roberts, C.J.); *id.* at ___, ___, 132 S. Ct. at 2617, 2621 (Ginsburg, J., concurring in part and dissenting in part), and contracting for those services is an economic activity that, when aggregated with other economic activities of its kind, is bound to substantially affect interstate commerce, *see Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *see also Nat'l Fed'n of Indep. Bus.*, ___ U.S. at ___ n.7, 132 S. Ct. at 2622 n.7. The only quirk in this case is that the arbitration agreement was made separately from any agreement to provide the services themselves. But Section 2, which applies to "a contract . . . to settle by arbitration a controversy thereafter arising out of such contract *or transaction*," 9 U.S.C. § 2 (emphasis added), clearly covers this scenario.

two years later. *See Am. Express Co. v. Italian Colors Rest.*, ___ U.S. ___, ___, 133 S. Ct. 2304, 2312 (2013). *Concepcion*'s holding and rationale apply directly to the majority's approach and make the majority's holding untenable.[3]

The majority claims that, because Dr. Bryant owed a fiduciary duty to Mr. King, Dr. Bryant committed constructive fraud "by failing to make full disclosure of the nature and import of the arbitration agreement to" Mr. King. But this conclusion requires the majority to find that defendant sought to benefit himself at Mr. King's expense. *See Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666-67, 488 S.E.2d 215, 224 (1997). The majority does so by finding that the arbitration agreement "ensur[ed] that any subsequent dispute between the parties would be resolved using the forum, procedures, and decision[-]makers of their choice."[4] Of course, that is precisely what arbitration clauses in contracts of adhesion do. And that gets to the heart of the matter: the majority takes issue with the arbitration agreement in this case *because it is an arbitration agreement*.

In doing so, the majority runs headlong into the FAA's prohibition of state law defenses that specifically target arbitration agreements. State law cannot address the concerns presented by contracts of adhesion in a way that "conflict[s] with the FAA or frustrate[s] its purpose to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 347 n.6. Nor can state courts apply a doctrine like constructive fraud "in a fashion that disfavors arbitration."

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3. The majority asserts that "defendants have failed to clearly advance a federal preemption argument" but then proceeds to address that argument at length. That is likely because defendants did cite to *Concepcion*. Quoting *Torrence v. Nationwide Budget Finance*, a recent case from our Court of Appeals, defendants raised the fact that *Concepcion* "dismiss[ed] . . . the idea that an arbitration agreement, apart from any other form of contract, could be found substantively unconscionable based solely upon its adhesive nature." 232 N.C. App. 306, 322, 753 S.E.2d 802, 812, *disc. rev. denied and cert. denied*, 367 N.C. 505, 759 S.E.2d 88 (2014). Although defendants' reference to this sentence is not the clearest articulation of *Concepcion*'s preemption principle, it is notable that the very next sentence in *Torrence* states that the dismissal of this unconscionability argument "was an explicit part of the Supreme Court's reasoning" in holding that the FAA preempted a state unconscionability rule. *Id.* at 322, 753 S.E.2d at 812.

4. The majority refers to the trial court's "unchallenged findings of fact" that Dr. Bryant benefitted from the arbitration agreement in this way. But the majority is making a *legal* argument that the arbitration agreement benefitted Dr. Bryant, and that Dr. Bryant may therefore be liable for the breach of his purported fiduciary duty to Mr. King. We review all conclusions of law de novo, even those that the trial court has characterized as findings of fact.

Id. at 341. Because the majority does exactly that, its holding is preempted by Section 2 of the FAA.

The majority maintains that its rationale does not single out arbitration agreements for negative treatment because the majority would treat "any agreement that substantially affected Mr. King's substantive legal rights" in the same way. The majority gives examples of other agreements that it thinks would substantially affect a person's legal rights in ways that have nothing to do with arbitration. But the fact that the majority might find *other* contractual provisions to be problematic for other reasons does not change the fact that the majority finds *this* arbitration agreement to be problematic because it is an arbitration agreement.[5]

In sum, if a state court cannot say that an arbitration agreement is unconscionable for arbitration-specific reasons, it likewise cannot say that the same agreement gives rise to a constructive fraud claim for arbitration-specific reasons. By declining to reach the unconscionability issue and focusing on constructive fraud instead, the majority artfully tries to evade federal preemption. But in our post-*Concepcion* legal landscape, federal law cannot be so easily evaded. Because the majority has applied the constructive fraud doctrine in a way that disfavors arbitration, and because the FAA clearly prohibits applying that doctrine in that way, I respectfully dissent.

Justice NEWBY dissenting.

The United States Supreme Court has repeatedly held that arbitration agreements may not be invalidated by state-law defenses arising from the fact that an arbitration agreement is at issue. Congress has explicitly indicated that arbitration is to be favored. Despite these mandates, the majority invents a new defense to enforcement of an arbitration agreement, not raised by plaintiff below, to mask their disparate treatment of and continued hostility towards arbitration, thereby attempting to

5. The majority quotes *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*'s statement that, "if [a] claim is fraud in the inducement of the arbitration clause itself," then a "court may proceed to adjudicate it." 388 U.S. 395, 403-04 (1967). But this invocation of *Prima Paint* is a red herring because *Prima Paint* is not about preemption at all. It is simply about whether a certain kind of claim arising under Section 2 of the FAA—namely, a "claim[ ] of fraud in the inducement of [a] contract generally," *id.* at 404—should be resolved by an arbitrator or by a court, *id.* at 396-97. Thus, *Prima Paint*'s holding that an arbitrator, not a court, should resolve this claim, *see id.* at 404—and its related assertion that a court *may* resolve a claim about fraud in the inducement of an arbitration clause specifically, *see id.* at 403-04—does not provide any grist for the majority's mill.

circumvent an unconscionability analysis. Startlingly, without argument or findings, the majority baldly asserts that the Federal Arbitration Act (FAA) does not apply. This jiggery-pokery is precisely the type of impermissible "rationalization" admonished by the United States Supreme Court. Such a tortured attempt to obviate the FAA fails. Because the arbitration agreement at issue here is not unconscionable and is otherwise enforceable at law, I respectfully dissent.

The majority seeks to avoid an unconscionability analysis by fabricating a contract defense not raised by plaintiff, namely the breach of a fiduciary duty.[1] Based solely on the fact that the contract in question is an arbitration agreement, which the majority contends "substantially affected [plaintiff's] legal rights," the majority holds that "defendants violated their fiduciary duty to [plaintiff] by failing to make full disclosure of the nature and import of the arbitration agreement to him." In their view, this breach of fiduciary duty would void the arbitration agreement ab initio. The majority asserts that "defendants benefitted by [plaintiff's] action in signing the arbitration agreement," and states that the language "could have been worded more clearly" and was presented "in a collection of documents, thereby creating the [ ] impression that the arbitration agreement was simply another *routine* document." (Emphasis added.)

Since 1925 Congress has established that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act (FAA), ch. 213, § 2, 43 Stat. 883, 883 (1925) (codified as amended at 9 U.S.C. § 2 (2012)). The FAA "reverse[d] the longstanding judicial hostility to arbitration agreements . . . and place[s them] upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26, 36 (1991). The

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1. Though plaintiffs are Robert E. King and wife Jo Ann O'Neal, the record reflects Mr. King was the primary actor in the following events, and I refer to him in the singular as "plaintiff."

Plaintiff never raised a "breach of fiduciary duty" defense to enforcement of the agreement. At the trial court, plaintiff opposed defendants' motion to compel arbitration on three grounds: that the arbitration agreement was (1) "not a contract" but an unenforceable "agreement to agree," (2) ineffective as to co-plaintiff's consortium claim for lack of her signature, and (3) unconscionable. The trial court denied defendants' motion on the first ground. Only on interlocutory appeal did the Court of Appeals, not plaintiff, mention "fiduciary relationship" as a *procedural consideration* for plaintiff's burden of proof *under his unconscionability defense* on remand. *King v. Bryant*, 225 N.C. App. 340, 349, 737 S.E.2d 802, 809 (2013).

preemptive effect of the FAA may "extend even to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract.' " *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S. Ct. 1740, 1747, 179 L. Ed. 2d 742, 752 (2011) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527 n.9, 96 L. Ed. 2d 426, 437 n.9 (1987) (emphasis omitted)).

Arbitration agreements may "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 339, 131 S. Ct. at 1746, 179 L. Ed. 2d at 751 (quoting *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902, 909 (1996)). A court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9.

Contract defenses cannot be "applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341, 131 S. Ct. at 1747, 179 L. Ed. 2d at 752. Such an application is not justified by state-law "rationalizations," even when the defense could apply to other contracts. *Id.* at 342, 131 S. Ct. at 1747, 179 L. Ed. 2d at 752 ("In practice, of course, the [defense] would have a disproportionate impact on arbitration agreements; but it would presumably apply to [nonarbitration] contracts . . . as well."); *see also id.* at 342, 131 S. Ct. at 1747, 179 L. Ed. 2d at 753 ("Such [rationalizations] are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959))).

Contrary to well-settled law, the majority impermissibly targets arbitration agreements for disparate treatment, attempting to ignore plaintiff's claim of unconscionability and cloaking their disfavor of arbitration under the guise of newly constructed fiduciary-relationship principles. This sort of manufactured state-law justification is a facade and cannot displace the preemptive effect of the FAA.

The purported breach of a fiduciary duty described by the majority is a procedural consideration in an unconscionability analysis. As such, any concerns arising from the circumstances under which plaintiff signed the arbitration agreement are squarely contemplated by his assertion of unconscionability, yet the majority refuses to address this defense *at all*. *See Rite Color Chem. Co. v. Velvet Textile Co.*, 105 N.C.

App. 14, 20, 411 S.E.2d 645, 648 (1992) ("Procedural unconscionability involves 'bargaining naughtiness,' " which encompasses the use of sharp practices and unequal bargaining power. (citations omitted)). Instead, the majority has taken the extraordinary step of crafting a new legal theory for plaintiff, attempting to bypass the obligation to address his unconscionability defense. Though plaintiff "should not be allowed to change his position with respect to a material matter in the course of litigation," *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 340, 777 S.E.2d 272, 282 (2015) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 886 (2004)), and "[i]t is not the role of the appellate court[ ] . . . to create [his] appeal," *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam), it seems this Court is more than willing to do so for him when arbitration is involved.

Our case law is clear that a fiduciary relationship raises a procedural hurdle, not a requirement to void the transaction. Only when a complainant alleges and establishes that a fiduciary relationship arose *and* that the offending party benefitted from the transaction to the detriment of the complainant, does the burden shift from the complainant to the offending party to prove that "no fraud was committed, and no undue influence or moral duress exerted." *Wachovia Bank & Tr. Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967) (emphasis omitted) (quoting *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616-17 (1943)); *see Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986). The majority fails to identify any such detriment to plaintiff and instead relies on the unlawful presumption that arbitration itself is harmful. The majority's speculation that "defendants benefitted from [plaintiff's] action in signing the arbitration agreement by ensuring that any subsequent dispute between the parties would be resolved using the forum, procedures, and decision makers of their choice" falls well short of establishing the requisite benefit and harm. Such a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with" the FAA. *Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9.

Assuming without deciding that the alleged breach of fiduciary duty results in procedural unconscionability, the agreement is plainly not substantively unconscionable, and plaintiff's defense therefore fails. The agreement contains none of the "harsh, oppressive, and 'one-sided terms' " that are the hallmarks of substantive unconscionability, *Rite Color Chem. Co.*, 105 N.C. App. at 20, 411 S.E.2d at 648-49 (citations omitted), and follows the "Health Care Claim Settlement Procedures

of the American Arbitration Association," governed by the FAA. Furthermore, this analysis comports with recent comprehensive appellate review of arbitration agreements. *See Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 77-78, 721 S.E.2d 712, 715 (2012) (concluding that an arbitration agreement was valid and not unconscionable when signed among a stack of other patient intake forms for a nursing home facility). By skirting such an analysis, *see id.* at 79, 721 S.E.2d at 716, the majority's new breach of fiduciary duty defense seems without limit, deprived of the traditional constraints of the unconscionability doctrine.[2]

Irrespective of whether a fiduciary relationship arose, the majority justifies handling plaintiff's arbitration agreement differently than other "routine [contract] documents" because the agreement "substantially affected [plaintiff's] legal rights." Isolating arbitration agreements in this way plainly subjects them to impermissible scrutiny. *See Concepcion*, 563 U.S. at 342, 131 S. Ct. at 1747, 179 L. Ed. 2d at 752. All contracts affect legal rights; the contract at issue here designates dispute resolution through arbitration. *See Am. Express Co. v. Italian Colors Rest.*, ___ U.S. ___, ___, 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417, 424 (2013) ("[A]rbitration is a matter of contract" and "courts must 'rigorously enforce' arbitration agreements." (citations omitted) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158, 165 (1985)); *see also Ussery*, 368 N.C. at 336, 777 S.E.2d at 279 ("One who executes a written instrument is ordinarily charged with knowledge of its contents, . . . and he may not base his action on ignorance of the legal effect of its provisions in the absence of considerations such as fraud or mistake." (citations omitted)); *accord Westmoreland*, 218 N.C. App. at 83, 721 S.E.2d at 718 (citation omitted). Either arbitration agreements are on equal footing with other "routine" contracts or they are not. The United States Supreme Court has directed that a court cannot construe arbitration "agreement[s] in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9.

In a strained effort to add more window dressing, the majority brazenly claims that the FAA does not apply "[g]iven the record contains no indication that the agreement between the parties constitutes a 'transaction involving commerce,' 9 U.S.C. § 2." Not only have the parties not argued this point, nor has the trial court made any accompanying

2. For example, is there always a breach of fiduciary duty by a professional who does not adequately explain arbitration, and is the required result that the agreement is void ab initio?

findings, but the first line of plaintiff's arbitration agreement expressly incorporates the FAA by stating: "In accordance with the terms of the Federal Arbitration Act, 9 USC 1-16 . . . ." *See Johnston County v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 92-93, 414 S.E.2d 30, 33 (1992) (discussing the incorporation of law into contracts); *Pike v. Wachovia Bank & Tr. Co.*, 274 N.C. 1, 16, 161 S.E.2d 453, 465 (1968) ("[L]aws in force at the time of the execution of a contract become a part of the contract."); *see also Perry*, 482 U.S. at 490, 107 S. Ct. at 2526, 96 L. Ed. 2d at 436 (The FAA's ambit is expansive and "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause."). Moreover, such professional service contracts generally "involve commerce" under the broad purview of the FAA.[3]

In sum, plaintiff raised his contract defenses and received the benefit of asserting them.[4] The arbitration agreement is not substantively unconscionable, and plaintiff's defense therefore fails. Apparently unsatisfied with this result, the majority, once again, impermissibly targets arbitration agreements. *E.g.*, *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 114, 655 S.E.2d 362, 377 (2008) (Newby, J., dissenting) ("The majority finds the agreement unconscionable based on provisions that would *only exist in an arbitration agreement.*" (emphasis added)); *see also Torrence v. Nationwide Budget Fin.*, 232 N.C. App. 306, 321, 753 S.E.2d 802, 811 (concluding that *Tillman* conflicts with United States Supreme Court precedent), *disc. rev. denied and cert. denied*, 367 N.C. 505, 759 S.E.2d 88 (2014). Such a policy decision is not for this Court to determine. *See Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9 (A court may not construe arbitration agreements differently or "rely on the[ir] uniqueness . . . as a basis" for a contract defense, "for this would enable the court to effect what . . . the state legislature cannot."). Instead of pursuing its relentless assault on the FAA, the majority should follow the principles clearly expressed by the United States Supreme Court. Because the majority has concocted a new contract defense in a fashion that disfavors arbitration in contravention of the FAA and binding United States Supreme Court precedent, I respectfully dissent.

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3. *See, e.g.*, *Morrison v. Colo. Permanente Med. Grp.*, 983 F. Supp. 937, 943-44 (D. Colo. 1997) (finding a patient-physician "medical services agreement" evidenced a "transaction involving commerce"); *Ex parte Lorance*, 669 So. 2d 890, 892 (Ala. 1995) (finding a physician's professional services contract "involve[es] commerce"); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 515-16 (Miss. 2005) (same for patient's "nursing home admissions agreement"), *overruled in part on other grounds by Covenant Health & Rehab., LP v. Estate of Moulds*, 14 So. 3d 695, 706 (Miss. 2009).

4. Plaintiff's remaining contract defenses are not before the Court at this time.

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

26 JANUARY 2017

002P17	State v. Juan Antonia Miller	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/04/2017** 2.
004P17	State v. Leonard Paul Schalow	1. State's Motion for Temporary Stay (COA16-330) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR under N.C.G.S. § 7A-31	1. Allowed **01/6/2017** 2. 3.
007P17	In the Matter of J.A.M.	1. Petitioner's PDR Under G.S. 7A-31 (COA16-563) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for *Writ of Supersedeas*	1. 2. Allowed **01/10/2017** 3.
014A17	State v. Barry Randall Revels	1. Def's Motion to Abate Proceeding Based on Defendant's Death 2. Def's Motion for Extension of Time to File Brief	1. Allowed **01/25/2017** 2. Dismissed as moot **01/25/2017**
020P17	State v. Melvin Emanuel Goodwin	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/12/2017**
025P17	State v. Jesus Martinez	1. State's Motion for Temporary Stay (COA16-374) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/19/2017** 2. 3.
038P06-2	State v. Omeako Lavon Brisbon	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Denied
042P04-9	State v. Larry McLeod Pulley	1. Def's *Pro Se* Motion for Formal Complaint Against the Office of the Clerk 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
082A14	State v. Sethy Tony Seam	Def's Motion to Expedite Mandate	Denied **12/29/2016** **Ervin, J., recused**

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

26 JANUARY 2017

088P15-5	Mason White Hyde v. Katie Poole	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/12/2016** **Ervin, J., recused**
123P16	State of North Carolina, *ex rel.* William G. Ross, Secretary, North Carolina Department of Environmental and Natural Resources, Division of Waste Management v. Jay Carter, a/k/a William Joseph Carter, a/k/a William Joseph Carter, IV, a/k/a William Joseph Carter, Sr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-629) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
201P16-2	State v. Timothy Wiley, Jr.	Def's *Pro Se* Motion for PDR (COA06-451)	Dismissed
252A16	Michael Krawiec, Jennifer Krawiec, and Happy Dance, Inc./CMT Dance, Inc. (d/b/a Fred Astaire Franchised Dance Studios) v. Jim Manly, Monette Manly, Metropolitan Ballroom, LLC, Ranko Bogosavac, and Darinka Divljak	Defs' Motion to Appear on Behalf of All Defendants	Allowed
254P16	Dawn Weideman v. Erin Atalie Shelton v. Annette Wise, Intervenor	Intervenor's PDR Under N.C.G.S. § 7A-31 (COA15-772)	Denied
260P16-2	Archie David Powell, Jr. v. State of NC	1. Plt's *Pro Se* Motion for PDR 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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

26 JANUARY 2017

281P06-9	Joseph E. Teague, Jr., P.E., C.M. v. The North Carolina Department of Transportation, et al.	Plt's *Pro Se* Motion for Petition for Properly Hearing 281P06-8 to Dismiss Underlying Case of Wrongful Termination	Dismissed **Martin, C.J., recused**
301P16-2	Michael Anthony Taylor v. Ola Mae Lewis, Senior Resident Superior Court Judge of Brunswick County	1. Petitioner's *Pro Se* Motion for Notice of Appeal (COAP16-462) 2. Petitioner's *Pro Se* Motion for PDR 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* **12/29/2016** 2. Denied **12/29/2016** 3. Allowed **12/29/2016**
313P16	State v. Lawrence Henry Dawson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1399)	Denied
326P15-4	Burl Anderson Howell v. North Carolina Wayne County Department of Health and Human Services, by and through, Reese Phelps; Lou Jones	Petitioner's *Pro Se* Motion for Reconsideration	Dismissed
329P16	State v. Travis Lamont Daughtridge	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-1160) 2. State's PDR Under N.C.G.S. § 7A-31 3. State's Conditional PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied 3. Dismissed as moot 4. Dismissed as moot
334P16	ACTS Retirement-Life Communities, Inc. v. Town of Columbus, North Carolina	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1333)	Allowed
337P16	State v. Brian Hancock	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1311)	Denied

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

26 JANUARY 2017

347P16	Cape Hatteras Electric Membership Corporation, An Electric Membership Corporation Organized and Existing Pursuant to N.C. Gen. Stat. Chapter 117 v. Gina L. Stevenson and Joseph F. Noce	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1102)	Denied
357P16	State v. Robert Lee Nichols	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County	Dismissed
361P16	North Carolina Department of Transportation v. Mission Battleground Park, DST; Mission Battleground Park Leaseco, LLC, Lessee; Lasalle Bank National Association, as Trustee for the Registered Holders of CD 2006-CD3 Commercial Mortgage Pass-Through Certificates; and LAT Battleground Park, LLC	1. Defs' PDR Pursuant to N.C.G.S. § 7A-31 (COA16-125) 2. James F. Collins' Conditional Motion for Leave to File Amicus Brief	1. Allowed 2. Allowed
370P04-16	State v. Anthony Leon Hoover	Def's *Pro Se* Motion for Mandamus Mandate Mandatory Injunction Appeal	Dismissed **Hudson, J., recused**
381P16	State v. Rickey Harding Wagner, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1111)	Denied
385P16	State v. Matthew Devon Fields	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-1086) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed

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

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390P16	State v. Linda Beth Chekanow and Robert David Bishop	1. State's Motion for Temporary Stay (COA15-1294) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/19/2016** 2. Allowed 3. Allowed
391A16	Next Advisor Continued, Inc. v. LendingTree, Inc. et al.	Court Order	Appeal Dismissed *ex mero motu* **12/14/2016**
402PA15-2	State v. Donna Helms Ledbetter	1. Def's Motion for Temporary Stay (COA15-414-2) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **12/22/2016** 2.
407P03-2	State v. Phillip Vance Smith, II	1. Def's *Pro Se* Motion for Notice of Appeal (COA16-847) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
407P14-4	State v. Dwain Cornelius Ferrell	Def's *Pro Se* Motion for PDR (COAP16-627)	Dismissed
409PA15	Gregory P. Nies and Diane S. Nies v. Town of Emerald Isle	Court Order	Appeal Dismissed *ex mero motu* **12/14/2016**
409P16	In Re N.G.F., A.L.F.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA16-297)	Denied
411P16	Union County v. Town of Marshville	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Denied **11/15/2016** 2. Denied **Ervin, J., recused**
412P16	Campbell, et al. v. The City of Statesville, et al.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-101)	Denied
414P16	State v. Brenda Sanders Lanclos	Def's PDR Pursuant to N.C.G.S. § 7A-31 (COA16-122)	Denied
415P16	Curtis L. Sangster v. Deborah Shandles, Attorney	Plt's *Pro Se* Motion for Appeal of Decision of the North Carolina State Bar	Dismissed

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

26 JANUARY 2017

419P16	Willowmere Community Association, Inc., A North Carolina Non-Profit Corporation and Nottingham Owners Association, Inc., A North Carolina Non-Profit Corporation v. City of Charlotte, A North Carolina Body Politic and Corporate, and Charlotte-Mecklenburg Housing Partnership, Inc., A North Carolina Non-Profit Corporation	Plaintiffs' PDR Under N.C.G.S. § 7A-31 (COA15-977)	Allowed
422P16	State v. Drayton Lamar Thompson	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 (COA16-406) 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
424P16-2	Corey D. Greene v. Susan White	Petitioner's *Pro Se* Motion for PDR	Denied **12/09/2016**
425P16	State v. Ronald Michael Thomas	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-326)	Dismissed

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

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427A16	Abrons Family Practice and Urgent Care, PA; Nash OB-GYN Associates, PA; Highland Obstetrical-Gynecological Clinic, PA; Children's Health of Carolina, PA; Capital Nephrology Associates, PA; Hickory Allergy & Asthma Clinic, PA; Halifax Medical Specialists, PA; and Westside OB-GYN Center, PA; Individually and on Behalf of All Others Similarly Situated v. NC Department of Health and Human Services and Computer Sciences Corporation	1. Def's (Computer Sciences Corporation) Notice of Appeal Based Upon a Dissent (COA15-1197) 2. Def's (Computer Sciences Corporation) PDR as to Additional Issues 3. Def's (NCDHHS) Notice of Appeal Based Upon a Dissent 4. Def's (NCDHHS) PDR as to Additional Issues	1. --- 2. Allowed 3. --- 4. Allowed
429P16	Denise Catanese Chafin v. Stephen Robert Chafin	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1152)	Denied
431P16	State v. Edward Roy Frye	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-362) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
432P16	State v. Robert Leon Gray, III	Def's *Pro Se* Motion for Return of Property	Dismissed
433P16	Steven James Hall v. Attorney Fredilyn Sison	Plt's *Pro Se* Motion for Court Review	Dismissed
434P16	State v. Seyi Odueso	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County	Denied
435P16	State v. Stephen Lamont Ward	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-52)	Denied

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

26 JANUARY 2017

438P16	State v. Darryl A. McPhaul	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of N.C. Court of Appeals (COA16-799) 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
439P16	State v. Twyan Kenneth Coleman	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-305) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. 2. Allowed **12/09/2016** 3.
442P16	State v. Calvin Denard Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA16-84)	Denied
443P16	State v. Ronnie Paul Godbey	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-877) 2. State's Motion to Amend Response to PDR	1. Allowed 2. Allowed
444P16	Susan Hedden v. Ann Isbell	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA16-406)	1. Dismissed *ex mero motu* 2. Denied
446P16	In the Matter of A.J.P.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA16-473)	Denied
448P16	State v. Timothy Devon King	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-261)	Denied
449P16	Patrick A. Merrill v. Winston-Salem Forsyth County Board of Education	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-232)	Denied
452P16	State v. John Eddie Mangum	1. Def's Motion for Temporary Stay (COA16-344) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **12/16/2016** 2.
454P16	State v. Andrew Robert Holloway	1. State's Motion for Temporary Stay (COA16-381) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/20/2016** 2.

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

26 JANUARY 2017

455P16	State v. William Sheldon Howell	1. State's Motion for Temporary Stay (COA16-303) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/20/2016** 2.
458P16	State v. Danny Wayne Powell	Def's PDR Under N.C.G.S. § 7A-31 (COA16-499)	Denied
459P16	State v. James Howard Killian	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-268) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. 2. Allowed **12/22/2016** 3.
464P16	State v. Terril Courtney Battle	1. State's Motion for Temporary Stay (COA16-355) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/22/2016** 2.
465P16	State v. Christopher Angelo Whitehead	1. State's Motion for Temporary Stay (COA16-294) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/22/2016** 2.
482P13-2	State v. Carl Lynn Williams	Def's *Pro Se* Motion for PDR (COAP16-323)	Denied
499P10-2	State v. Damien Lanel Gabriel	1. Def's *Pro Se* Motion for Review of the Appellate Court's Decision (COAP16-535) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

IN RE HUGHES

[369 N.C. 489 (2017)]

IN THE MATTER OF MARY LUCILLE HUGHES, BY AND THROUGH VIRGINIA HUGHES INGRAM, ADMINISTRATRIX OF THE ESTATE OF MARY LUCILLE HUGHES, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM

No. 87A16

Filed 17 March 2017

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. ___, 785 S.E.2d 111 (2016), dismissing an appeal from an amended decision and order filed on 28 April 2015 by the North Carolina Industrial Commission and remanding the matter to the Commission for transfer to the Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1(a1). On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 13 February 2017.

UNC Center for Civil Rights, by Elizabeth Haddix and Mark Dorosin; and Pressly, Thomas & Conley, PA, by Edwin A. Pressly, for claimant-appellant/appellee.

Joshua H. Stein, Attorney General, by Elizabeth A. Fisher, Assistant Solicitor General, and Amar Majmundar, Special Deputy Attorney General, for defendant-appellant/appellee State of North Carolina.

PER CURIAM.

For the reasons stated in *In re Redmond*, ___ N.C. ___, ___ S.E.2d ___ (Mar. 17, 2017) (No. 86A16), the decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals.

REVERSED AND REMANDED.

IN RE REDMOND

[369 N.C. 490 (2017)]

IN THE MATTER OF KAY FRANCES REDMOND, BY AND THROUGH LINDA NICHOLS, ADMINISTRATRIX OF THE ESTATE OF KAY FRANCES REDMOND, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM

No. 86A16

Filed 17 March 2017

Constitutional Law—Eugenics Board compensation—Court of Appeals jurisdiction

In a matter arising from the Eugenics Board and the resulting compensation program, heard first before the Industrial Commission, the Court of Appeals had jurisdiction to consider claimant's constitutional challenge to N.C.G.S. § 143B-426.50(1). The Industrial Commission had no authority to decide constitutional questions.

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. ___, 785 S.E.2d 111 (2016), dismissing an appeal from a decision and order filed on 27 April 2015 by the North Carolina Industrial Commission and remanding the matter to the Commission for transfer to the Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1(a1). On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 13 February 2017.

UNC Center for Civil Rights, by Elizabeth Haddix and Mark Dorosin; and Pressly, Thomas & Conley, PA, by Edwin A. Pressly, for claimant-appellant/appellee.

Joshua H. Stein, Attorney General, by Elizabeth A. Fisher, Assistant Solicitor General, and Amar Majmundar, Special Deputy Attorney General, for defendant-appellant/appellee State of North Carolina.

JACKSON, Justice.

In this case we consider whether the North Carolina Court of Appeals has jurisdiction to consider claimant's constitutional challenge to an act of the General Assembly on appeal from a final decision and order of the North Carolina Industrial Commission. Because we conclude that the Court of Appeals has jurisdiction to reach the merits of claimant's constitutional challenge, we reverse the Court of Appeals' dismissal of claimant's appeal and remand this case to that court to consider the merits of claimant's constitutional challenge.

IN RE REDMOND

[369 N.C. 490 (2017)]

In 1956 claimant Kay Frances Redmond was sterilized involuntarily at the age of fourteen by order of the now-dismantled Eugenics Board of North Carolina pursuant to Chapter 224 of the Public Laws of North Carolina of 1933. *See* N.C.G.S. § 35-39 (1950) (repealed 2003). Claimant passed away in 2010. In 2013 the General Assembly established the Eugenics Asexualization and Sterilization Compensation Program (Compensation Program) to provide "lump-sum compensation" to any "claimant determined to be a qualified recipient." *Id.* § 143B-426.51 (2013). A qualified recipient was "[a]n individual who was asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." *Id.* § 143B-426.50(5) (2013). More relevant to this case, a claimant was defined as "[a]n individual on whose behalf a claim is made for compensation as a qualified recipient" who was "alive on June 30, 2013."[1] *Id.* § 143B-426.50(1) (2013).

Claimant's estate filed a claim pursuant to the Compensation Program to the North Carolina Industrial Commission (the Commission); however, the claim initially was determined to be ineligible because claimant was not alive on 30 June 2013, as required by subsection 143B-426.50(1). That conclusion was upheld following an evidentiary hearing before a deputy commissioner. On appeal to the full Commission, claimant raised a constitutional challenge to subsection 143B-426.50(1), arguing that the requirement that a claimant be alive on 30 June 2013 violates the guarantees of equal protection and due process in Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. The full Commission denied the claim for not meeting the subsection 143B-426.50(1) criteria, but certified the constitutional question to the Court of Appeals. In certifying the question, the Commission noted the lack of an explicit statutory framework for doing so. In contrast to N.C.G.S. § 97-86, which gives the Commission statutory authority to certify questions of law to the Court of Appeals in workers' compensation

1. The Compensation Program expired as provided in the 2013 enabling act, as amended in 2014. *See* [The] Current Operations and Capital Improvements Appropriations Act of 2013, ch. 360, secs. 6.18(a)-(g), 2013 N.C. Sess. Laws 995, 1019-23 (making pertinent provisions of the statutes creating the Program effective July 1, 2013, and setting an expiration date of June 30, 2015, except for final adjudication of any claims still pending on that date), *as amended by* The Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, secs. 6.13(a)-(f), 2013 N.C. Sess. Laws (Reg. Sess. 2014) 328, 346-48 (adding, *inter alia*, a provision stating that the Office of Justice for Sterilization Victims also expired on June 30, 2015).

cases, the Commission observed that the statutes providing adjudicatory authority to the Commission here pursuant to the Compensation Program contain no such provision. Claimant appealed the final decision of the full Commission to the Court of Appeals.

The Court of Appeals did not reach the constitutional question raised in claimant's appeal. *In re Hughes*, ___ N.C. App. ___, ___, 785 S.E.2d 111, 116 (2016).[2] Instead, the Court of Appeals held that it did not have jurisdiction to consider claimant's appeal from the full Commission because any challenge to the constitutionality of an act of the General Assembly first must be submitted to a three-judge panel of the Superior Court of Wake County pursuant to N.C.G.S. § 1-267.1(a1). *Id.* at ___, 785 S.E.2d at 116. Consequently, the Court of Appeals dismissed claimant's appeal and remanded the case to the Commission to transfer "those portions of the action[ ] challenging the constitutional validity of N.C. Gen. [ ]Stat. § 143B-426.50(1)" to Wake County for resolution by a three-judge panel. *Id.* at ___, 785 S.E.2d at 116. Both claimant and the State have appealed the Court of Appeals' dismissal of the appeal to this Court and argue that the Court of Appeals has jurisdiction to consider claimant's constitutional challenge to subsection 143B-426.50(1). We agree.

Eligibility for compensation pursuant to the Compensation Program is determined by the North Carolina Industrial Commission. N.C.G.S. § 143B-426.52(c) (2013). "[I]nitial determinations of eligibility for compensation" are made by a deputy commissioner upon review of "the claim and supporting documentation submitted on behalf of a claimant." *Id.* § 143B-426.53(b) (2013). In determining eligibility, the Commission has "all powers and authority granted under Article 31 of Chapter 143 of the General Statutes." *Id.* § 143B-426.53(a) (2013). Article 31, Chapter 143, commonly referred to as the Tort Claims Act, states that the Commission is "constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments." *Id.* § 143-291(a) (2015). Section 143B-426.53 of the Compensation Program statutes provides for multiple stages of review within the Commission and an ultimate appeal as of right from a decision of the full Commission to the Court of Appeals "in accordance with the procedures set forth in G.S. 143-293 and G.S. 143-294." *Id.* § 143B-426.53(d)-(f) (2013).

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2. On appeal to the Court of Appeals, claimant's case was combined with those of two other claimants—one being Mary Lucille Hughes—who were also deemed ineligible for the Compensation Program by the Commission pursuant to subsection 143B-426.50(1). *See In re Hughes*, ___ N.C. App. at ___, 785 S.E.2d at 112.

Although the Commission acts as a court for purposes of the Tort Claims Act and for determining eligibility of claimants pursuant to the Compensation Program, *see id.* § 143B-426.53(a), the Commission's judicial power is limited, or quasi-judicial. We have determined that the Commission "is not a court with general implied jurisdiction" but "primarily is an administrative agency of the state" granted judicial power "as is necessary to perform the duties required of it by the law which it administers." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985) (citation omitted). That judicial power clearly does not extend to consideration of constitutional questions, as it is a "well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board." *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); *see also State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 673-74, 446 S.E.2d 332, 341-42 (1994); *Gulf Oil Corp. v. Clayton*, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966); *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961), *overruled on other grounds by Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Similar to the limited judicial power of the Industrial Commission, the North Carolina Utilities Commission is "deemed to exercise functions judicial in nature and [to] have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law." *Carolina Util. Customers Ass'n*, 336 N.C. at 673, 446 S.E.2d at 342 (quoting N.C.G.S. § 62-60 (1989)). Such power is properly exercised "[f]or the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath." *Id.* at 673, 446 S.E.2d at 342 (quoting N.C.G.S. § 62-60). When an interested party argued that this judicial power authorized the Utilities Commission to determine the constitutionality of a statute falling within the Utilities Commission's administrative purview, we concluded that "[a]s an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments." *Id.* at 674, 446 S.E.2d at 342.

Although not controlling on this Court, we note with approval the Court of Appeals' reasoning in a similar case. When the Industrial Commission determined in its opinion and award that certain changes to the Workers' Compensation Act violated the Due Process Clause of the United States Constitution, the Court of Appeals vacated the opinion and award, citing the "well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board."

Carolinas Med. Ctr. v. Emp'rs & Carriers, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (quoting *Meads*, 349 N.C. at 670, 509 S.E.2d at 174). In reaching this holding, the court reasoned that a party has at least two avenues to challenge the constitutionality of a statute. *Id.* at 553, 616 S.E.2d at 591. First, the party asserting the constitutional challenge may bring "an action under the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* (2004)." *Id.* at 553, 616 S.E.2d at 591 ("A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein." (quoting *Woodard v. Carteret County*, 270 N.C. 55, 60, 153 S.E.2d 809, 813 (1967))). "Alternatively, pursuant to N.C. Gen. Stat. § 97-86 the Industrial Commission of its own motion could have certified the question of the constitutionality of the statute to this Court before making its final decision." *Id.* at 553, 616 S.E.2d at 591.

Section 97-86 states: "The Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court." N.C.G.S. § 97-86 (2015). Although this provision is part of the Workers' Compensation Act, and is not implicated in the statutes creating the Compensation Program, it is instructive as to the limitations of the Commission's judicial authority. Correctly recognizing that it did not have authority to rule on claimant's constitutional challenge in this case, but acting in accord with its status as an administrative agency with a process of appeal to the Court of Appeals encompassing a broad spectrum of subject matters, *see id.* § 97-86 (providing for appeals to the Court of Appeals from final awards of the full Commission pursuant to the Workers' Compensation Act); *id.* § 143-293 (2015) (providing for appeals to the Court of Appeals from decisions and orders of the full Commission pursuant to the Tort Claims Act); *id.* § 143B-426.53(f) (providing for appeals to the Court of Appeals from decisions of the full Commission pursuant to the Compensation Program), the Industrial Commission certified the question to the Court of Appeals for judicial determination.

In addition, the North Carolina Constitution states that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). The General Assembly has conferred upon the Court of Appeals "jurisdiction to review upon appeal decisions . . . of administrative agencies, upon matters of law or legal inference." N.C.G.S. § 7A-26 (2015). There is no doubt that a question as to the constitutionality of an act of the General Assembly is a "matter[ ] of law or legal inference." This Court also has recognized that

"[i]n 'double appeal' states, including North Carolina . . . , cases involving a substantial constitutional question are appealable in the first instance to the intermediate appellate court." *State v. Colson*, 274 N.C. 295, 302-03, 163 S.E.2d 376, 381 (1968), *cert. denied*, 393 U.S. 1087 (1969). The General Assembly has provided specifically that "appeal as of right lies directly to the Court of Appeals" from "any final order or decision of . . . the North Carolina Industrial Commission." N.C.G.S. § 7A-29 (2015). The appeal in this case arises from a "decision and order" of the full Commission denying claimant's claim based on the application of subsection 143B-426.50(1)—the statutory provision that is the subject of claimant's constitutional question.

In its opinion below, the Court of Appeals relied on N.C.G.S. § 1-267.1(a1) to conclude that its appellate jurisdiction has been limited by the General Assembly in the context of this case. *See In re Hughes*, ___ N.C. App. at ___, 785 S.E.2d at 116. Subsection 1-267.1(a1) provides in part that "any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel." N.C.G.S. § 1-267.1(a1) (2015). According to North Carolina Rule of Civil Procedure 42(b)(4), when "a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State . . . . the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel." *Id.* § 1A-1, Rule 42(b)(4) (2015).

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575, 573 S.E.2d 118, 121 (2002) (alterations in original) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)). By the plain language of subsection 1-267.1(a1), the General Assembly confined the scope of the statute to the requirements of Rule 42(b)(4). In this case claimant filed a *claim* with the Commission pursuant to section 143B-426.52 of the Compensation Program, and not a "complaint or amended complaint in any court in this State." *See* N.C.G.S. § 1A-1, Rule 42(b)(4). Moreover, the Commission "is not a court" as contemplated in Rule 42(b)(4), but "primarily is an administrative agency of the state." *Hogan*, 315 N.C. at 137, 337 S.E.2d at 483. Consequently, subsection 1-267.1(a1), read in conjunction with Rule 42(b)(4), does not require that claimant's constitutional challenge

be heard by a three-judge panel of the Superior Court of Wake County. Therefore, subsection 1-267.1(a1) does not limit the appellate jurisdiction of the Court of Appeals with respect to this matter.

That the Commission is not a court, but an administrative agency of the State with statutorily limited judicial authority, also makes distinguishable our prior reasoning in cases like *City of Durham v. Manson*, 285 N.C. 741, 743, 208 S.E.2d 662, 664 (1974) ("[I]n conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." (italics omitted) (quoting *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955))), and *State v. Cumber*, 280 N.C. 127, 132, 185 S.E.2d 141, 144 (1971) ("Having failed to show involvement of a substantial constitutional question which was raised and passed upon in the trial court and properly brought forward for consideration by the Court of Appeals, no legal basis exists for this appeal to the Supreme Court, and it must therefore be dismissed."). As we have established already, the Commission has no authority to decide constitutional questions, making the rule announced in these cases inapplicable to whether the Court of Appeals may consider the constitutional question raised in this case.

Inasmuch as our prior decision in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau* applied cases like *Manson*, *Cumber*, and *Jones* in the context of an appeal from an administrative agency, *see* 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980), that case is distinguishable from the present case because it involved an appeal from the Commissioner of Insurance's denial of a rate increase that was subject to judicial review pursuant to the Administrative Procedure Act (APA), *see id.* at 394-96, 269 S.E.2d at 559. Although petitions for judicial review of final agency decisions governed by the APA ordinarily are "filed in the superior court of the county where the person aggrieved by the administrative decision resides," N.C.G.S. § 150B-45(a) (2015), in *Rate Bureau*, appeal was taken directly from the Commissioner of Insurance to the Court of Appeals. 300 N.C. at 392, 269 S.E.2d at 557. In that case, no constitutional challenge regarding rate-making was considered by the Court of Appeals. *See generally State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 41 N.C. App. 310, 255 S.E.2d 557 (1979). Moreover, in *Rate Bureau*, this Court reasoned:

> [T]he Commissioner's original order denying the Reinsurance Facility rate increase stated only that such rates are "unfairly discriminatory" presumably in the statutory sense. He never held that any of the statutes or

> actions were unconstitutional. In his brief, however, he does make vague assertions that it would be "constitutionally suspect" to interpret the statutes contrary to his findings and conclusions. He states, "The governing statutes should be construed so as to avoid serious doubts as to constitutionality."

300 N.C. at 429, 269 S.E.2d at 577.

Citing a holding by the Supreme Court of Michigan in *Shavers v. Attorney General Kelley*, 402 Mich. 554, 267 N.W.2d 72, *cert. denied*, 442 U.S. 934, 99 S. Ct. 2869 (1978), the Commissioner argued that "certain ratemaking mechanisms were constitutionally deficient in failing to provide due process." *Rate Bureau*, 300 N.C. at 429, 269 S.E.2d at 578. This Court noted:

> However, the Michigan court unquestionably based its holding on constitutional due process considerations. Indeed, the Michigan action was a declaratory judgment action specifically brought to determine the constitutionality of the Michigan No-Fault Insurance Act. The constitutional question was the basis for the action from trial court to final appellate adjudication. This is completely unlike the case before us where the record discloses no constitutional question presented or passed in the Commissioner's original order.

Id. at 429, 269 S.E.2d at 578.

We believe that the decision regarding the issue of a constitutional challenge before this Court in *Rate Bureau* was incorrect. When an appeal lies directly to the Appellate Division from an administrative tribunal, in the absence of any statutory provision to the contrary, *see*, *e.g.*, N.C.G.S. § 150B-45(a), a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice. As in this case, a claim made pursuant to the Compensation Program is appealed from a final decision of the Commission directly to the Court of Appeals without judicial review by a trial court. *See id.* § 143B-426.53(f).

Here, the Commission necessarily deemed claimant ineligible for the Compensation Program pursuant to subsection 143B-426.50(1), as required by the General Assembly. Claimant ultimately appealed the Commission's decision to the Court of Appeals on the basis that denial of her claim pursuant to 143B-426.50(1) was unconstitutional—a question

of law outside the scope of the Commission's limited judicial authority but within the purview of the General Court of Justice. Furthermore, subsection 1-267.1(a1) does not modify the Court of Appeals' jurisdiction to review decisions of the Commission on "matters of law or legal inference" pursuant to section 7A-26, final decisions of the Commission pursuant to section 7A-29, or final decisions of the full Commission regarding eligibility for the Compensation Program pursuant to subsection 143B-426.53(f). Consequently, we hold that claimant's appeal based on a constitutional challenge was properly before the Court of Appeals and that the Court of Appeals has appellate jurisdiction over claimant's appeal. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court to consider the merits of claimant's constitutional challenge to subsection 143B-426.50(1).

REVERSED AND REMANDED.

IN RE SMITH

[369 N.C. 499 (2017)]

IN THE MATTER OF TOMMIE JUNIOR SMITH, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM

No. 88A16

Filed 17 March 2017

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. ___, 785 S.E.2d 111 (2016), dismissing an appeal from a decision and order filed on 7 May 2015 by the North Carolina Industrial Commission and remanding the matter to the Commission for transfer to the Superior Court, Wake County, under N.C.G.S. § 1-267.1(a1). On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 13 February 2017.

UNC Center for Civil Rights, by Elizabeth Haddix and Mark Dorosin; and Pressly, Thomas & Conley, PA, by Edwin A. Pressly, for claimant-appellant/appellee.

Joshua H. Stein, Attorney General, by Elizabeth A. Fisher, Assistant Solicitor General, and Amar Majmundar, Special Deputy Attorney General, for defendant-appellant/appellee State of North Carolina.

PER CURIAM.

For the reasons stated in *In re Redmond*, ___ N.C. ___, ___ S.E.2d ___ (Mar. 17, 2017) (No. 86A16), the decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals.

REVERSED AND REMANDED.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY AND UNITED BANK & TRUST COMPANY, VERSAILLES, KY., F/K/A FARMERS BANK & TRUST COMPANY (GEORGETOWN, KY.)

v.

HARTFORD FIRE INSURANCE COMPANY, SHRIJEE LLC, HELM BUILDERS, LLC, AND MICHAEL D. ANDREWS, IN HIS OFFICIAL CAPACITY AS SHERIFF OF DURHAM COUNTY, NORTH CAROLINA

No. 155A16

Filed 17 March 2017

Estoppel—judicial—collateral attack—inconsistent position

The trial court did not abuse its discretion by invoking the doctrine of judicial estoppel to dismiss counterclaims arising from a failed hotel development project. In a prior related case, defense counsel had assured a federal court that defendant would not collaterally attack the federal judgment by relitigating claims from the same facts. The trial court found that defendant essentially took the action which defense counsel had stated it would not take, thereby adopting an inconsistent position.

Justice ERVIN dissenting.

Justices HUDSON and BEASLEY join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 185 (2016), affirming an order on summary judgment entered on 30 September 2014 by Judge Henry W. Hight, Jr., and reversing and remanding an order granting judgment on the pleadings entered on 14 August 2014 by Judge G. Wayne Abernathy, both in Superior Court, Durham County. Heard in the Supreme Court on 14 February 2017.

Manning Fulton & Skinner, P.A., by Judson A. Welborn, J. Whitfield Gibson, and Natalie M. Rice, for plaintiff-appellant United Bank & Trust Company.

Lewis & Roberts, PLLC, by James A. Roberts, III and Jessica E. Bowers, for defendant-appellee Hartford Fire Insurance Company.

NEWBY, Justice.

The doctrine of judicial estoppel preserves the integrity of judicial proceedings by preventing a party from taking inconsistent positions before the court, thus safeguarding the rule of law and securing public confidence in the court system. Here the trial court found that, in a prior related case, defense counsel assured a federal court that defendant Hartford Fire Insurance Company (defendant or Hartford) would not collaterally attack the federal judgment post hoc by relitigating its related claims arising from the same facts. Defendant declined to join that federal litigation, but nonetheless raises substantially similar tort claims here. As such, the trial court found that defendant essentially takes the action which defense counsel stated it would not take, thereby adopting an inconsistent position. Affording the appropriate deference to the trial court, we conclude that the trial court did not abuse its discretion by invoking the doctrine of judicial estoppel to bar defendant from proceeding with its tort counterclaims. Accordingly, we reverse the decision of the Court of Appeals.

This case arises from a bonding dispute, which stems from a failed hotel development project. Four suits involving various parties, including the property owner, general contractor, lender, and bonding company, ensued, the last of which is before this Court. The third suit arose in federal court, which Hartford, the bonding company, declined to join, and during which the bonding company's counsel made declarations to the federal court, which may reasonably be interpreted as contravening the bonding company's actions sub judice.

On 14 November 2007, Shrijee LLC (owner and developer) contracted with Helm Builders, LLC (general contractor) for the construction of a Durham hotel project, known as Hotel Indigo. Under the contract Helm agreed to furnish labor and materials for a total cost of $13,050,000, and Helm was required to obtain a payment and performance bond.

On 20 December 2007, United Bank & Trust Company (lender) issued a construction loan to Shrijee in the amount of $13,600,000 for use on the project,[1] and Shrijee executed a "deed of trust, assignment and security agreement" on the underlying hotel real property for the benefit of the Bank, which was recorded on 21 December 2007 with the Durham County Register of Deeds. At Helm's request, on 22 February 2008, United Bank sent a letter (the 2008 Letter) to Helm "confirm[ing] that the financing is available for the Hotel Indigo," that "[t]he minimum

1. Farmers Bank & Trust was the original issuer of the loan and merged with United Bank in November 2008. For purposes of this opinion, actions by Farmers Bank before the merger are referred to as those of United Bank, its undisputed successor in interest.

of $13,050,000 has been allocated for the contract amount to Helm Builders, LLC for the construction of the project," and that "payment authorizations will be determined and conducted by a third-party architect." The Bank further stated: "We understand this letter is to be used to release the Payment and Performance bonds for the construction of this project."

On 8 July 2008, Hartford issued a labor and material payment bond and a performance bond "to guarantee HELM's faithful performance of HELM's obligations under the Contract." Helm had executed various general indemnity agreements beforehand, dating back to 15 August 2005, which assigned to Hartford all of its rights under the construction contract, including tort claims, and which also gave Hartford the discretion to "assert and pursue all of the assigned . . . rights, actions, causes of action, claims, and/or demands."

Over the next two years, Helm substantially completed the Hotel Indigo project, which received a conditional certificate of occupancy in August of 2009, but Shrijee withheld payment for certain work. Hartford subsequently made payments under the bonds to various subcontractors whom Helm had failed to pay. On 28 January 2010, Helm sued Shrijee in Superior Court, Durham County (*Helm I*), and ultimately obtained a judgment for the unpaid work in the amount of $1,074,163.20, plus interest of $352,796.40 and $278,287.05 in attorneys' fees, on 20 October 2011 (the Shrijee Judgment).

During the pendency of the *Helm I* suit, on 31 January 2011, Helm sued United Bank in the United States District Court for the Middle District of North Carolina (the federal action), alleging that the 2008 Letter, which "confirmed in writing . . . that financing was being made available," contained fraudulent "misrepresentations made by the Bank," namely, that the monies were not actually allocated to pay Helm. Helm asserted claims of, *inter alia*, fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive trade practices, all of which relied upon the alleged misrepresentations in the 2008 Letter.

On 14 November 2012, counsel for Hartford contacted United Bank to "reaffirm" that "Hartford was the lawful owner of the Shrijee Judgment" under its previous general indemnity agreements. On 20 November 2012, Helm re-memorialized the agreement by executing an "Assignment of Judgment," filed with the Durham County Clerk of Superior Court, which stated that "HELM Builders, LLC does hereby further assign, transfer and grant to Hartford all of its rights to sue . . . and all other legal processes necessary to the enforcement of the [Shrijee]

Judgment and all proceeds recovered," and that "the [previous indemnity agreements] shall remain in full force and effect."

Nonetheless, on 4 June 2013, Helm filed a complaint in Superior Court, New Hanover County, against Hartford (*Helm II*) seeking, *inter alia*, a declaratory judgment that Helm's "Assignment is null and void," that Hartford "has no rights or interest in the [federal action]," and that "Helm's claims asserted in the [federal action] are not subject to the assignment provisions of the Hartford Indemnity Agreements."

In light of Helm's apparent assignment to Hartford of the Shrijee Judgment and tort claims, United Bank became "concern[ed] over the possibility of inconsistent verdicts should United Bank be forced to litigate the same issues against Helm and Hartford in separate actions." Furthermore, faced with "Hartford's alleged ownership of all claims arising from or related to the [Hotel Indigo] Project," the Bank became concerned about not only the claims arising in Helm's name, but those arising in the name of Hartford. Ultimately, on 7 June 2013, the Bank moved the federal court to substitute Hartford as the plaintiff or, in the alternative, to join Hartford as a necessary party, noting that "it is undisputed that Hartford claims an interest in the subject of this [federal] action," and thus any related claims arising therefrom.

On 21 June 2013, in the action sub judice United Bank filed its complaint in Superior Court, Durham County, against Hartford seeking, *inter alia*, a declaratory judgment that the Bank's deed of trust securing the construction loan has priority over Helm's lien against Shrijee for "labor performed or materials furnished."[2]

On 3 July 2013, counsel for Helm, United Bank, and Hartford appeared before the federal court regarding the Bank's motion to include Hartford as a plaintiff or necessary party in the federal action. Noting the recently filed state court litigation, the *Helm II* suit and the suit sub judice, the court inquired about the "purported dispute between the plaintiff here [Helm] and Hartford with regard to what rights Hartford may or may not have in this litigation." The court expressed concerned about

> who would be the real party in interest in this case, who owns this action, and whether or not if Helm pursues this case, Hartford would have some right to come along at a later time and say we're not bound by that, we own this, and we think Helm should have pursued a different

2. Old Republic National Title Insurance Company, as the title insurer for the deed of trust, is a co-plaintiff.

> course, we don't think they waived anything that would effect [sic] us. That bothers me. So my question to you is, are Helm and Hartford on the same page with regard to our proceeding ahead with this lawsuit?

Counsel for Hartford responded: "Hartford has no objection with this case moving forward without Hartford . . . , and that Hartford does not—will not seek to collaterally attack any judgment entered in this action with Hartford not as a named party." Counsel acknowledged concerns regarding the possible estoppel of its claims in the related actions, stating to the court: "To the extent there are—there is evidence brought to the Court's attention in this case, it would be Hartford's position that there would be no issue preclusion as to Hartford in that related litigation."

The court responded: "I don't know that I can make any ruling with regard to issue preclusion that would be applied by the state court, . . . [and] anything I say or do would be only advisory with regard to what the state court may find to be precluded." In other words, if Hartford declined to join the federal action, it would assume the risk that its claims may be estopped in the related state court litigation.

Counsel for Hartford acquiesced, stating:

> [I]t is clear from Hartford's perspective that it is not a necessary party to this litigation. To the extent Your Honor does have concerns as to any purported assignments of the general agreements indemnity as they are brought to the Court's attention, or issues of equitable subrogation, I think that that could be essentially be handled post-litigation through interpleader action.

The court agreed. Hartford ultimately declined to join the federal action.

After extensive discovery and deposition testimony, Helm's claims arising from the 2008 Letter were tried before a jury in the federal action. As described by United Bank, "Counsel for Hartford sat through the majority of the trial and never advised the court of any reason to add Hartford to the case." On the verdict sheet the jury expressly concluded that the February 2008 Letter did not contain "false information" and that Helm did not suffer harm therefrom. Following adjudication of Helm's claims, on 16 July 2013, the federal court ordered that Helm "have and recover nothing from [United Bank]" and dismissed the case with prejudice.

On 17 October 2013, Hartford answered United Bank's complaint sub judice and filed, *inter alia*, tort counterclaims based on the alleged falsity of the 2008 Letter, which are the only claims at issue before this Court.[3] Based on that alleged falsity, Hartford raises strikingly similar tort counterclaims as those raised by Helm in the federal action, consisting of fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive trade practices. Hartford alleges that United Bank acted fraudulently by "ma[king] false and misleading representations" in the 2008 Letter and that "Hartford would not have issued both the Payment and Performance Bonds absent the Bank's express representations" therein. In response, United Bank points to the related federal action and raises affirmative defenses of "res judicata and/or collateral estoppel" because the same tort claims "were litigated to final judgment" by Hartford's assignor Helm. The Bank asserted other defenses as well, including waiver, unclean hands, and "judicial estoppel/estoppel by inconsistent positions" based on Hartford's counsel's declarations to the federal court.

On 25 February 2014, United Bank successfully moved for judgment on the pleadings as to the tort counterclaims. *See* N.C.G.S. § 1A-1, Rule 12(c) (2016). The trial court found that "Hartford is in privity with Helm" due to Helm's prior assignment. Given "Hartford's counsel's representations to [the federal court]" and "Hartford's decision not to participate in the [federal action]," which would have afforded Hartford "a full and fair opportunity to litigate its claims," the trial court found that "Hartford is bound by the judgment entered in the [federal action]." Citing *Whitacre Partnership v. BioSignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), the trial court concluded that "Hartford is judicially estopped from asserting the counterclaims against United Bank." In addition to finding judicial estoppel, the trial court found that Hartford's counterclaims were also barred by the doctrines of collateral estoppel and res judicata because the "central issue to the Counterclaims all revolves around the truth or falsity of the statements in the February 2008 Letter," which statements the federal jury had already determined "to be true." Hartford appealed to the Court of Appeals.

In a divided opinion, the Court of Appeals reversed the dismissal of Hartford's tort counterclaims. *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, ___ N.C. App. ___, 785 S.E.2d 185, 2016 WL 1321139 (2016) (unpublished). The majority concluded that, though

3. On 13 October 2014, the trial court entered a consent judgment, which the parties concede resolved all other remaining claims.

"Hartford was in privity with respect to [Helm's] claims in the federal action," *Old Republic*, 2016 WL 1321139, at *4, such participation "only bars any claim Hartford might otherwise have (as assignee of [Helm's] claims) to recover for [*Helm's*] damages based on [Helm's] reasonable reliance on representations made by United Bank," *id.* The dissent opined that Hartford had "numerous opportunities" to join the federal action and that the doctrines of res judicata and collateral estoppel bar its tort counterclaims. *Id.* at *12 (Hunter, Jr., J., dissenting). Neither the majority nor the dissent, however, addressed the trial court's implementation of judicial estoppel, despite arguments made by the parties. United Bank appeals as a matter of right.

North Carolina has long recognized the importance of candor with the trial court. *See Whitacre P'ship*, 358 N.C. at 12, 591 S.E.2d at 878 (citing *Kannan v. Assad*, 182 N.C. 77, 78, 108 S.E. 383, 384 (1921)). The doctrine of "judicial estoppel seeks to protect the integrity of the judicial process," *id.* at 16, 591 S.E.2d at 880, "which 'lies at the foundation of all fair dealing . . . and without which, it would be impossible to administer law as a system,' " *id.* at 27, 591 S.E.2d at 887 (quoting *Armfield v. Moore*, 44 N.C. (Busb.) 157, 161 (1852)).

A party is generally not "allowed to change his position with respect to a material matter, during the course of litigation, nor should he be allowed to 'blow hot and cold in the same breath.' " *Id.* at 12, 591 S.E.2d at 878 (quoting *Kannan*, 182 N.C. at 78, 108 S.E. at 384); *see id.* at 29, 591 S.E.2d at 888 (Judicial estoppel is proper when "a party's subsequent position . . . [is] ' "clearly inconsistent" with its earlier position.' " (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 1815, 149 L. Ed 2d 968, 978 (2001))). Unlike its "closely related" cousins, the doctrines of collateral estoppel and res judicata, judicial estoppel is "dissimilar in critical respects." *Id.* at 16, 591 S.E.2d at 880 (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)). Judicial estoppel seeks to protect the judicial process itself and does not require " 'mutuality' of the parties," detrimental reliance, or that an issue have been "actually litigated in a prior proceeding." *Id.* at 16-18, 591 S.E.2d at 880-82 (citations omitted).

As a "discretionary equitable doctrine," *id.* at 26, 591 S.E.2d at 887, judicial estoppel empowers the court with the necessary "means to protect the integrity of judicial proceedings where [other] doctrines . . . might not adequately serve that role," *id.* at 26, 591 S.E.2d at 887 (citations omitted). Because judicial estoppel "protect[s] the courts rather than the litigants, . . . a court, even an appellate court, may raise [judicial]

estoppel on its own motion." *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir.) (footnote omitted) (citing *Allen*, 667 F.2d at 1168 n.5)), *cert. denied*, 498 U.S. 812, 111 S. Ct. 48, 112 L. Ed. 2d 24 (1990).

We review de novo the trial court's order granting judgment on the pleadings. *See CommScope Credit Union v. Butler & Burke, LLP*, ___ N.C. ___, ___, 790 S.E.2d 657, 659 (2016). The trial court's implementation of judicial estoppel as a basis to grant the order, however, is reviewed for abuse of discretion, *Whitacre P'ship*, 358 N.C. at 38, 591 S.E.2d at 894 (citing *New Hampshire*, 532 U.S. at 750, 121 S. Ct. at 1814-15, 149 L. Ed 2d at 977-78), and will only be overturned "upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision," *In re Foreclosure of Lucks*, ___ N.C. ___, ___, 794 S.E.2d 501, 506 (2016) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

Though the parties have primarily focused their briefing on the companion doctrines of collateral estoppel and res judicata, we proceed no further than judicial estoppel. Hartford argues that it is not prosecuting its "Assigned Claims" from Helm but rather "its own, independent Tort Claims." Such a factual inquiry, however, reaches beyond the appropriate standard of review for judicial estoppel. Presented with Hartford's counsel's apparently contradictory declarations before the federal court and the substantial similarities of its tort claims to those of Helm, as revealed in the pleadings, the trial court reasonably invoked judicial estoppel to prevent Hartford from taking an inconsistent position, and therefore, did not abuse its discretion.

By filing its similar tort counterclaims, the trial court could reasonably conclude that Hartford takes the action that it stated to the federal court it would not take. *See Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 888. The federal court expressed concerns that Hartford might "come along at a later time and say we're not bound by [the federal action]" and further advised Hartford that it could not rule regarding its state-court estoppel concerns. Despite knowing of the estoppel risk, Hartford declined to join the federal action and stated that it "will not seek to collaterally attack any judgment entered in this action with Hartford not as a named party." *See Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 47-48 (1857) ("The law . . . will not . . . suffer a man to contradict or gainsay, what, under particular circumstances, he may have previously said or done."); *see also Collateral Attack*, *Black's Law Dictionary* (10th ed. 2014) ("[A]n attempt to undermine a judgment through a judicial proceeding in which the ground . . . is that the judgment is ineffective.").

Nonetheless, Hartford seeks to raise similar fraud claims to those of its assignor Helm, all of which contest the same adjudicated facts in the federal action—the very situation about which the federal court expressed concern. Moreover, United Bank moved to join Hartford as a necessary party in that action, seeking to avoid such relitigation.

Allowing Hartford to proceed in the face of its own contravening assertions made before the federal court poses a significant threat of inconsistent court determinations. *See Whitacre P'ship*, 358 N.C. at 13-14, 591 S.E.2d at 879; *Jones v. Sasser*, 18 N.C. (1 Dev. & Bat.) 452, 464 (1836) (Estoppel is "*founded* upon the great principles of morality and public policy . . . to prevent that which deals in duplicity and inconsistency."); *see also Cates v. Wilson*, 321 N.C. 1, 18, 361 S.E.2d 734, 744 (1987) (Mitchell, J., concurring in result) ("A lawsuit is not a parlor game . . . ."). Permitting such a conflicting position and inconsistency would serve to undermine public confidence in the judicial process.

In sum, Hartford had ample opportunity to litigate all of its related claims, including those attributable to its assignor Helm and to Hartford individually, by joining the federal action. Hartford elected not to do so. Given the statements made by Hartford's counsel before the federal court and the substantial similarity of its counterclaims, which contest prior adjudicated facts, we conclude that the trial court reasonably invoked judicial estoppel to restrain Hartford from adopting an inconsistent position. *See Whitacre P'ship*, 358 N.C. at 26-27, 591 S.E.2d at 887 (Judicial estoppel serves "as a gap-filler" and is appropriate "where the technical requirements of" its companion estoppel doctrines may not be met.). The trial court did not abuse its discretion and therefore, properly dismissed Hartford's tort counterclaims. Accordingly, we reverse the decision of the Court of Appeals, which reversed the trial court's dismissal of the tort counterclaims.

REVERSED.

Justice ERVIN dissenting.

The majority has resolved this case based upon judicial estoppel considerations instead of the collateral estoppel and res judicata principles upon which the dissenting opinion in the Court of Appeals relied in determining that the trial court's order should be upheld. Moreover, in holding that Hartford is judicially estopped from seeking relief from United Bank separate and apart from Helm, the majority assumes, without demonstrating, that (1) Hartford "collaterally attack[ed] the federal

judgment *post hoc*" and (2) attempted to "re-litigat[e] its related claims arising from the same facts." On the contrary, the fact that two different parties have asserted that the same defendant committed the same torts in connection with the same overall transaction does not, at least in my opinion, mean that these parties have asserted identical claims in the event that those claims are supported by different facts. As a result, given that the dissenting opinion in the Court of Appeals, which provides the basis for our jurisdiction over this case, did not rely on judicial estoppel principles in upholding the trial court's decision and my belief that the claims that Hartford seeks to assert against United Bank are fundamentally different from the claims that Helm asserted against that financial institution, I respectfully dissent from the Court's decision with respect to the judicial estoppel issue.

Neither the majority nor the dissenting opinions in the Court of Appeals make any mention of judicial estoppel. *Old Republic Nat'l. Title Ins. Co. v. Hartford Fire Ins. Co.*, --- N.C. App. ---, 785 S.E.2d 185 (2016). "When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) . . . . N.C. R. App. P. 16(b). Although " '[t]his Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice,' and may do so to 'consider questions which are not properly presented according to [its] rules,' " *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007) (brackets in original) (quoting *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975)), I am not persuaded that we should do so in this case given the limited extent to which the parties addressed this subject in their briefs. As I read the record, United Bank mentioned the subject of judicial estoppel in an eight line footnote found on the last page of its principal brief in which it made the conclusory assertion that Hartford was not entitled to "represent to the court in the Prior Action that it was not a necessary party and would not collaterally attack the judgment entered in that action and then – three months after the jury verdict – assert identical claims premised on the same facts and issues actually litigated to a final judgment in the Prior Action." (Citing *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 21, 591 S.E.2d 870, 884 (2004)). Although Hartford addressed the judicial estoppel issue in more detail, it did little more than point out that the judicial estoppel issue had not been addressed in the dissenting opinion in the Court of Appeals and was not, for that reason, properly before the Court and to assert that,

since it was "prosecuting its own, independent Tort Claims," it was not judicially estopped from pursuing those claims in this case. (Citing *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005), and *Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 888-89)). As a general proposition, deciding an issue that has not been fully briefed and argued by the parties involves risks that I see no reason for the Court to take in this case. In addition, I am not persuaded, and the majority has not demonstrated, that a decision to address and resolve the judicial estoppel issue when it is not properly before us promotes the "expeditious administration of justice." *Ellis*, 361 N.C. at 205, 639 S.E.2d at 428. As a result, I do not believe that we should deviate from our usual practice of refraining from deciding issues that are not properly before us. However, in light of the fact that I disagree with the majority's decision with respect to the judicial estoppel issue as well, I will discuss the merits of the Court's determination that Hartford is judicially estopped from pursuing the claims that it has asserted against United Bank.

The matter before the Court stems from the trial court's decision to grant United Bank's motion for judgment on the pleadings. "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citation omitted). "The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.* at 137, 209 S.E.2d at 499 (citing, *inter alia*, *Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 61 S. Ct. 418, 85 L. Ed. 577 (1941); *Austad v. United States*, 386 F.2d 147 (9th Cir. 1967)). A trial court order granting a motion for judgment on the pleadings is reviewed de novo. *See CommScope Credit Union v. Butler & Burke, LLP*, __N.C. __, __, 790 S.E.2d 657, 659 (2016) (citation omitted). "Under the *de novo* standard of review, the [Court] 'consider[s] the matter anew[ ] and freely substitut[es] its own judgment for' [that of the lower court]." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, __ N.C.__, __, 794 S.E.2d 785, 791 (2016) (brackets in original) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004)).

Judicial estoppel is "customarily used to promote the fairness and integrity of judicial proceedings." *Whitacre P'ship*, 358 N.C. at 13, 591 S.E.2d at 879. "A party is not permitted to take a position in a subsequent

judicial proceeding which conflicts with a position taken by him in a former judicial proceeding, where the latter position disadvantages his adversary." *Id.* at 21, 591 S.E.2d at 884 (quoting *Rand v. Gillette*, 199 N.C. 462, 463, 154 S.E. 746, 747 (1930)). However, "a party may not be judicially estopped to assert 'inconsistent positions with respect to issues that are only superficially similar.' " *Id.* at 16, 591 S.E.2d at 880 (quoting 18 James Wm. Moore et al., *Moore's Federal Practice* § 134.30, at 134–69 (3d ed. 1997)). In other words, "judicial estoppel is limited to the context of inconsistent factual assertions." *Id.* at 32, 591 S.E.2d at 890. For that reason, in order to invoke judicial estoppel, a party must show that (1) the opposing party "advanced an inconsistent factual position in a prior proceeding, and (2) the prior inconsistent position was adopted by the first court in some manner." *AXA Marine & Aviation Ins. (UK) Ltd. v. Seajet Indus. Inc.*, 84 F.3d 622, 628 (2d Cir. 1996); *see also Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000) (same). In other words, "there must be a true inconsistency between the statements in the two proceedings"; "[i]f the statements can be reconciled there is no occasion to apply an estoppel." *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72-73 (2d Cir. 1997) (citing, *inter alia*, *AXA Marine & Aviation*, 84 F.3d at 628). As a general proposition, "a trial court's application of judicial estoppel is reviewed for abuse of discretion." *Whitacre P'ship*, 358 N.C. at 38, 591 S.E.2d at 894 (citation omitted). "Where the essential element of inconsistent positions is not present, it is an abuse of discretion to bar plaintiff's claim on the basis of judicial estoppel." *Estate of Means ex rel. Means v. Scott Elec. Co. Inc.*, 207 N.C. App. 713, 719, 701 S.E.2d 294, 299 (2010) (citation omitted). Thus, the issues before us in this instance are: (1) whether the allegations and admissions in the parties' pleadings, considered in the light most favorable to Hartford, demonstrate that Hartford took inconsistent positions in the related federal case and in this case; and (2) whether the trial court abused its discretion in invoking judicial estoppel to bar the assertion of Hartford's claims. In view of my belief, after reviewing the allegations and admissions in the pleadings in the light most favorable to Hartford, that Hartford has not made inconsistent assertions in the related federal case and this case, I believe that the trial court erred by dismissing Hartford's claims on judicial estoppel grounds.

In the related federal action, Helm asserted claims against United Bank for (1) fraudulent and deceptive conduct, including the intentional misrepresentation and concealment of material facts from Helm, that constituted unfair and deceptive trade practices; (2) fraud, based upon representations made to Helm by Michael Schornick in a February 2008 letter, by Judy Tackett in July 2009 telephone conversations, and by

Kermin Fleming in both a voice mail and telephone conference in July 2009; (3) fraud in the inducement based upon these same representations to Helm; (4) unjust enrichment; and (5) negligent misrepresentation based upon these same representations to Helm.

On 7 June 2013, United Bank filed a motion in the related federal action seeking to have Hartford substituted for Helm as the party plaintiff on the grounds that Hartford, which owned any judgment that Helm might obtain, was the real party in interest. At a hearing held for the purpose of considering various pretrial motions held on 3 July 2013, United States District Judge N. Carlton Tilley, Jr., expressed concern that "Hartford would have some right to come along at a later time and say we're not bound by [the federal court judgment], we own this, and we think Helm should have pursued a different course, we don't think they waived anything that would [a]ffect us." In response, counsel for Hartford informed the federal district court that: (1) "Hartford has no objection with *this case* moving forward without Hartford as a named party to *this litigation*"; and (2) "Hartford . . . will not seek to collaterally attack any judgment entered in *this action*." (Emphases added.) In other words, as the italicized statements make clear, the representations made by Hartford's counsel to the federal district court were strictly limited to the issues currently before that forum. Shortly thereafter, Hartford's counsel told United Bank's counsel in an e-mail that the representations that she had made to the district court in the federal proceeding did not include any separate claims that Hartford might have against United Bank. More specifically, Hartford's counsel informed counsel for United Bank that, while it "will not seek to re-litigate those claims brought by HELM Builders in" the federal action, "Hartford did not represent to the [federal district court] that it was waiving and/or in any way releasing any claim that it may possess against United Bank from this date until the end of time, whether known or unknown."

About three months after the conclusion of the federal trial, in which the jury returned a verdict in United Bank's favor, Hartford asserted claims against United Bank for (1) fraud, based upon a contention that the 22 February 2008 letter contained representations and omitted material facts that had the effect of making that letter false and misleading so as to deceive *Hartford*; (2) fraud in the inducement, based upon a contention that United Bank had induced Hartford to provide bonding services for the Hotel Indigo project based upon misleading representations and omissions to *Hartford* associated with the 22 February 2008 letter; (3) unfair trade practices, based upon the misleading representations and omissions to *Hartford* associated with the 22 February 2008

letter; and (4) negligent misrepresentation, based upon a contention that United Bank had failed to exercise ordinary care in its communications with *Hartford*. In determining that Hartford is judicially estopped from asserting these claims based upon the representations that it had made to the district court during the related federal case, the majority has failed to analyze the claims that Hartford has asserted against United Bank in order to ascertain whether they are the same as those that Helm asserted against United Bank. When such an analysis is undertaken, it is clear to me that the claims that Hartford seeks to assert against United Bank in this case are not identical to the claims that Helm asserted against United Bank in the related federal action.

In seeking relief from United Bank, Hartford alleged that, "[p]rior to the issuance of the performance and payment bond," it "required verification and written assurance from the Bank that the Bank had allocated funds from the Construction Loan sufficient to cover and pay to HELM Builders the base scope of the Shrijee Contract—i.e. $13,050,000.00" and that, "prior to February 22, 2008, the Bank knew and understood that HELM Builders' surety had refused to issue the performance and payment bond in the amount of $13,050,000.00 for the Hotel Indigo Project based solely upon the Bank's issuance of the Bank Commitment Letter" and that Hartford "required the Bank to provide assurances that it had allocated funds from the Construction Loan sufficient to cover the base scope of the Shrijee Contract—i.e., $13,050,000.00 in order for Hartford to issue the performance and payment bond." In light of that understanding, United Bank provided a letter from Michael E. Schornick, Jr., an Executive Vice President, to Scott McAllister, who served as Helm's President, dated 22 February 2008 in which Mr. Schornick stated that:

> This letter is to confirm that the financing is available for the Hotel Indigo, Durham, NC project. The minimum of $13,050,000 has been allocated for the contract amount to Helm Builders, LLC for the construction of the project. Direct funding to Helm Builders LLC is contingent upon Shrijee LLC authorization, draw percentages must be commensurate with completion percentage and the standard lien waivers from both Helm and all subcontractors including vendors. Inspections & payment authorizations will be determined and conducted by a third-party architect.
>
> We understand this letter is to be used to release the Payment and Performance bonds for the construction of this project.

According to Hartford, United Bank "provided the February 2008 Bank Letter to Har[t]ford, in care of HELM Builders, to obtain Hartford's issuance of the requested performance and payment bonds for the construction of the Hotel Indigo Project." However, as Hartford discovered during the trial of the related federal action, United "Bank had not allocated at least $13,050,000 of the Construction Loan for the Shrijee Contract;" "never intended to allocate at least $13,050,000.00 of the Construction Loan for the Shrijee Contract;" and did not "include within the February 2008 Bank Letter sufficient information to put Hartford on notice that the Bank was not financing one hundred percent (100%) of the construction costs for the Hotel Indigo Project" or "to put Hartford on notice that the Bank had not allocated at least $13,050,000 of the Construction Loan for the Shrijee Contract." Hartford contended that it "would not have issued both the Payment and Performance Bonds absent the Bank's express representations to Hartford, set forth in the February 2008 Bank Letter." As a result, Hartford alleged that it was entitled to recover damages from United Bank for fraud, fraud in the inducement, unfair and deceptive trade practices, and negligent misrepresentation.

The essence of the claim that Hartford seeks to assert against United Bank is that Hartford could have reasonably understood the statements contained in the 22 February 2008 letter to indicate that the bank had committed sufficient funds from the construction loan to pay for the construction of the Hotel Indigo project; that no such commitment had, in fact, been made; and that Hartford would not have provided bonding services for the project had it understood that the bank had not allocated sufficient funds from the construction loan to pay for the construction of the Hotel Indigo. Although Helm had asserted that the 22 February 2008 letter contained misrepresentations as to Helm and that Helm would not have commenced construction had it known that sufficient funds had not been committed from the construction loan to pay the costs that Helm anticipated occurring in connection with the construction of the Hotel Indigo, I do not believe that there is any inconsistency between a representation to a federal district court that Hartford did not intend to collaterally attack or otherwise seek to relitigate claims based upon representations that were allegedly false as to Helm, which Hartford owned by virtue of an assignment that it had received from Helm, and the assertion of claims based upon misrepresentations that were alleged to have been made directly to Hartford, particularly given that this issue is being resolved at the pleading stage without the benefit of further factual development. As a result, given that the statements made by Hartford to the federal district judge prior to the federal trial

were limited to a commitment that Hartford would not attempt to relitigate the claims that Helm had asserted against United Bank and given that the claims that Hartford has asserted against United Bank rest upon alleged misrepresentations made to Hartford rather than to Helm, I do not believe that the undisputed information in the present record provides any basis for a determination that Hartford's representations to the federal district court conflict with the position that Hartford has taken in this case. As a result, since the allegations set out in the parties' pleadings, viewed in the light most favorable to Hartford, provide ample justification for a determination that Hartford did not make inconsistent representations in the related federal case and in this case, I respectfully dissent from the Court's decision to uphold the dismissal of Hartford's claims against United Bank on judicial estoppel grounds.[1]

Justices HUDSON and BEASLEY join in this dissenting opinion.

1. In view of the fact that the Court has not reached the issue of whether Hartford is precluded from asserting its claims against United Bank on collateral estoppel or res judicata grounds, I express no opinion concerning the manner in which that issue should be decided.

STATE v. STITH

[369 N.C. 516 (2017)]

STATE OF NORTH CAROLINA
v.
MORRIS LEAVETT STITH

No. 173A16

Filed 17 March 2017

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. ___, 787 S.E.2d 40 (2016), finding no error after appeal from a judgment entered on 24 September 2014 by Judge Claire V. Hill in Superior Court, Johnston County. Heard in the Supreme Court on 15 February 2017.

Joshua H. Stein, Attorney General, by Charles G. Whitehead, Special Deputy Attorney General, for the State.

Kimberly P. Hoppin for defendant-appellant.

PER CURIAM.

AFFIRMED.

WALKER v. N.C. STATE BD. OF DENTAL EXAM'RS.

[369 N.C. 517 (2017)]

CYNTHIA WALKER, D.D.S., PETITIONER
v.
THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, RESPONDENT

No. 95PA16

Filed 17 March 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 518 (2016), affirming an order entered on 23 October 2014 by Judge Elaine Bushfan in Superior Court, Wake County. Heard in the Supreme Court on 13 February 2017.

Smith Moore Leatherwood LLP, by Elizabeth Brooks Scherer and Ryan McKaig, for petitioner-appellant.

Ellis & Winters LLP, by Matthew W. Sawchak, Stephen D. Feldman, Troy D. Shelton, and Paul M. Cox; and Carolin Bakewell for respondent-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clinton R. Pinyan, for North Carolina Board of Pharmacy, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DOSS v. ADAMS

[369 N.C. 518 (2017)]

REGINA RADFORD DOSS AND AMY RADFORD BARRETT, AS THE CO-ADMINISTRATORS OF THE ESTATE OF TONY MARIE PRIDGEN RADFORD	)	
v.	)	From Nash County
BRENTON D. ADAMS, BRENT ADAMS LAW OFFICES, PC, D/B/A BRENT ADAMS & ASSOCIATES	)	

No. 1P17

ORDER

The petition for discretionary review is allowed for the purpose of addressing the issues set forth in the petition and the following additional issue: "Is plaintiffs' second claim for relief ('Breach of Fiduciary Duty and Constructive Fraud') barred by the statute of limitations or statute of repose?"

By Order of the Court in Conference, this 16th day of March, 2017.

s/Michael R. Morgan
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of March, 2017.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme
Court of North Carolina

STATE v. GANN

[369 N.C. 519 (2017)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Buncombe County
	)	
JIMMY LEE GANN	)	

No. 243P16

ORDER

The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals in order to consider any of the challenges to the trial court's judgments advanced in defendant's brief before that Court that the Court did not address in its original opinion and, in the event that the Court of Appeals determines that none of defendant's additional challenges to the trial court's judgments have any merit, to modify its original decision so as to provide for a further remand to the trial court for entry of judgment and resentencing on the lesser included offense of second degree arson.

By order of the Court, this the 16th day of March, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of March, 2017.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme
Court of North Carolina

STATE v. MARTINEZ

[369 N.C. 520 (2017)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
JESUS MARTINEZ	)	

No. 25P17

ORDER

Upon consideration of the Petition for Discretionary Review filed by the State of North Carolina on 19 January 2017, the Court enters the following order:

"The Court allows the State's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for the purpose of determining whether the trial court's instruction held to have been erroneous by the Court of Appeals constituted plain error as required by *State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 366 N.C. 548, 742 S.E.2d 798 (2013)."

By order of the Court, this the 16th day of March, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of March, 2017.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme
Court of North Carolina

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

16 MARCH 2017

001P17	Regina Radford Doss and Amy Radford Barrett, as the Co-Administrators of the Estate of Tony Marie Pridgen Radford v. Brenton D. Adams, Brent Adams Law Offices, PC, d/b/a Brent Adams & Associates	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-446)	Special Order
004P17	State v. Leonard Paul Schalow	1. State's Motion for Temporary Stay (COA16-330) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/6/2017** 2. Allowed 3. Allowed
005P17	Gary Warren Spruill v. Westfield Insurance Company, Allstate Property and Casualty Insurance Company	Def's (Westfield Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA15-1329)	Denied
008P17	Mina Kompani Hashemi v. Ali Reza Hashemi-Nejad	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-358) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
009P17	State v. Eliazar Juan Mendoza	Def's PDR Under N.C.G.S. § 7A-31 (COA16-224)	Denied
011P17	State v. Royal Spencer Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-567)	Denied
012P17	Eli Global, LLC and Greg Lindberg v. James A. Heavner	1. Def's Notice of Appeal Based on a Constitutional Question (COA16-186) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plts' Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed

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015P17	Marlow Williams v. Frank L. Perry, in His Official Capacity as Secretary, North Carolina Department of Public Safety, and Paul G. Butler, Jr., in His Official Capacity as Chairman of the North Carolina Post-Release Supervision and Parole Commission	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-372) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
016P17	Timothy R. Poole v. State of North Carolina	Plt's *Pro Se* Motion for *Writ of Mandamus*	Denied
017P17	Settlers Edge Holding Company, LLC; Mountain Air Development Corporation; Virginia A. Banks; William R. Banks; Jeani H. Banks; Michael R. Watson; Sheree B. Watson; Virginia A. Banks, William R. Banks, and Sheree B. Watson in Their Capacity as Trustees of William A. Banks Revocable Trust; Morris Atkins in His Capacity as Trustee of William Banks Family Irrevocable Trust Number 1; and Morris Atkins in His Capacity as Trustee of William Banks Family Irrevocable Trust Number 2 v. RES-NC Settlers Edge, LLC	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA15-1055) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
018P17	State v. Daniel Edward Palacios	Def's Petition for *Writ of Certiorari* to Review Order of COA	Dismissed
019P17	State v. Susan Annette Allen	Def's PDR Under N.C.G.S. § 7A-31	Denied

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021P17	James Townsend and Lucretia Townsend v. N.C. Department of Transportation	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-478)	Denied
023P15-2	State v. Jackie Emmitt Moorehead	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Halifax 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
024P17	State v. Calvin Lamar Adams	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1384)	Denied
025P17	State v. Jesus Martinez	1. State's Motion for Temporary Stay (COA16-374) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/19/2017** Dissolved **03/16/2017** 2. Dismissed as moot 3. Special Order
027A17	Karen Head v. Gould Killian CPA Group, P.A., G. Edward Towson, II, CPA	1. Defs' Notice of Appeal Based Upon a Dissent (COA16-525) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed
029P17	Harry A. Wiley and Gerald D. Gilman v. L3 Communications Vertex Aerospace, LLC	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-460) 2. M. Nan Alessandra's Motion for Admission *Pro Hac Vice*	1. Denied 2. Allowed
031P17	State v. Jarvis Montrale Bell	Def's PDR Under N.C.G.S. § 7A-31 (COA16-326)	Denied
033P17	State v. William Davis Whitaker	Def's PDR Under N.C.G.S. § 7A-31 (COA16-521)	Denied
037P17	State v. Kevin John Kirkman	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-407)	Denied

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038P17	State v. Anton Christen	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake 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
041P16	E. Brooks Wilkins Family Medicine, P.A. v. WakeMed; WakeMed d/b/a Falls Pointe Medical Group; Inam Rashid, MD; Michele Casey, MD; Monica Oei, MD; and Leslie Robinson, MD	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-217)	Denied
042P17	Maria Vaughan v. Lindsey Mashburn, M.D. and Lakeshore Women's Specialists, PC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1230) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Denied
043P17	State v. John Phillip Locklear	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA16-179)	Denied
047P17	State v. Avery Joe Lail, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-608) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
050P17	State v. Robert Wayne Smith	Def's *Pro Se* Motion to the Denial of *Writ of Mandamus*	Denied **Ervin, J., recused** **Hudson, J., recused**
051P17	In the Matter of Mary Ellen Brannon Thompson	Appellant's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-1380)	Denied

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052P17	Roy A. Cooper, III, in His Official Capacity as Governor of the State of North Carolina v. Philip E. Berger, in His Official Capacity as President *Pro Tempore* of the North Carolina Senate; and Timothy K. Moore, in His Official Capacity as Speaker of the North Carolina House of Representatives	1. Plt's Motion for Temporary Stay (COAP17-101) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **02/13/2017** 2. Dismissed as moot 3. Dismissed as moot
053P17	State v. Billy Joe Edwards	Def's *Pro Se* Motion for Writ of Supervisory Control	Dismissed **03/03/2017**
054P17	State v. David Felton	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. Denied 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
056P17	Dr. Robert Corwin as Trustee for the Beatrice Corwin Living Irrevocable Trust, on Behalf of a Class of Those Similarly Situated v. British American Tobacco, PLC; Reynolds American, Inc.; Susan M. Cameron; John P. Daly; Neil R. Withington; Luc Jobin; Sir Nicholas Scheele; Martin D. Feinstein; Ronald S. Rolfe; Richard E. Thornburgh; Holly K. Koeppel; Nana Mensah; Lionel L. Nowell, III; John J. Zillmer; and Thomas C. Wajnet	1. Def's (British American Tobacco, PLC) Motion for Temporary Stay (COA15-1334) 2. Def's (British American Tobacco, PLC) Petition for *Writ of Supersedeas* 3. Def's (British American Tobacco, PLC) PDR Under N.C.G.S. § 7A-31 4. Gary A. Bornstein's Motion to be Admitted *Pro Hac Vice*	1. Allowed **02/20/2017** 2. 3. 4.

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063A17	State v. Antwarn Lee Rogers	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/23/2017** 2. Allowed **03/15/2017**
065P17	State v. Jeffrey Robert Parisi	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/24/2017** 2.
066P17	State v. Rocky Kurt Williamson	1. State's Motion for Temporary Stay (COA16-631) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **02/27/2017** 2. 3. 4.
068P17	Arkeem Hakim Jordan v. State of North Carolina	1. Petitioner's *Pro Se* Motion for Notice of Appeal 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Motion to Proceed as a Man Without Proper Funds	1. Dismissed 2. Denied 3. Allowed **Ervin, J., recused**
074P17	Nathaniel Bryant and Joseph L. Gillespie v. Charles Wilbur Bryant and Carl Bryant	1. Plt's (Nathaniel Bryant) *Pro Se* Motion for Temporary Stay 2. Plt's (Nathaniel Bryant) *Pro Se* Petition for *Writ of Supersedeas*	1. Denied **03/13/2017** 2. Denied **03/14/2017**
078P17	In the Matter of the Foreclosure of a Deed of Trust Executed by Bruce J. Adams Dated December 28, 2004 and Recorded in Book 18194 at Page 265 in the Mecklenburg County Public Registry, North Carolina	1. Appellant's Motion for Temporary Stay (COA16-653) 2. Appellant's Petition for *Writ of Supersedeas*	1. Allowed **03/13/2017** 2.
081P17	State v. Gregory Alan Adams, Jr.	Def's *Pro Se* Motion to Stay and Legal Notice (COA16-397)	Dismissed **03/14/2017**

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082P15-2	In the Matter of A.E.C.	Petitioner's Petition for *Writ of Certiorari* to Review Order of COA (COA16-495)	Allowed
083P17	State v. Thomas Stout, Jr.	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Denied **03/14/2017**
083P17-2	State v. Thomas Stout, Jr.	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Denied **03/16/2017**
084P15-5	State v. Curtis Louis Sangster	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
131P16-4	State v. Somchai Noonsab	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/23/2017**
131P16-5	State v. Somchai Noonsab	Petitioner's *Pro Se* Motion to Default in the Matters of Denied Writ of Habeas Corpus	Denied **03/10/2017**
152PA16	Catawba County, by and through its Child Support Agency, *ex rel.* Shawna Rackley v. Jason Loggins	Plt's Motion to Allow Amicus Curiae to Participate in Oral Argument	Allowed **03/09/2017**
158P06-10	State v. Derrick D. Boger	1. Def's *Pro Se* Motion for Tort Claim 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
164P16-2	State v. David Michael Wilson	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-759) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
190P16-2	Joseph Earl Clark, II v. North Carolina Department of Public Safety	Petitioner's *Pro Se* Motion for PDR	Dismissed

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211PA16	SED Holdings, LLC v. 3 Star Properties, LLC, James Johnson, TMPS LLC, Mark Hyland, and Home Servicing, LLC	1. Defs' Motion to Appear 2. Plt's Motion to Stay Proceedings Against 3 Star Properties, LLC Due to Bankruptcy 3. Plt's Motion that Plaintiff be Permitted to Proceed Now in the Trial Court Against the Remaining Defendants 4. Plt's Motion to Lift Stay Order 5. Defs' Motion to Allow Time to Respond to Motion of Plaintiff to Dissolve the PDR Allowed by this Court	1. Allowed **11/01/2016** 2. Special Order **11/01/2016** 3. Special Order **11/01/2016** 4. 5. Allowed **02/02/2017**
212P16	Brian Blue v. Mountaire Farms, Inc., Mountaire Farms of North Carolina Corp., Mountaire Farms, LLC, Charles Branton, Daniel Pate, James Lanier, Robert Garroutte, a/k/a Robert Garroutte, Jr., Christopher Smith, Halley Ondona, Thomas Saufley, Detra Swain, as Executrix of the Estate of Clifton Swain, the Estate of Clifton Swain, and Bradford Scott Hancox, Public Administrator of Cumberland County, North Carolina, and as Successor or Substitute Personal Representative and/or Administrator and/or Collector of the Estate of Clifton Swain	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-791)	Denied
237P16-2	Avery M. Riggsbee v. W. Baine Jones, Jr., Judge Government	Employees Plt's *Pro Se* Motion for Enforcement Orders	Dismissed
240P16	Mary Ponder v. Mark Ponder	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA15-1277) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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243P16	State v. Jimmy Lee Gann	1. State's Motion for Temporary Stay (COA15-1344) 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 **06/27/2016** Dissolved **03/16/2017** 2. Dismissed as moot 3. Special Order 4. Dismissed as moot
245A08-2	State v. Terrance Lowell Hyman	1. State's Motion for Temporary Stay (COA16-398) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/10/2017** 2.
247P16-2	Jonathan Eugene Brunson v. North Carolina Department of Public Safety's Superintendent Felix Taylor of Pasquotank Correctional Institution and State of North Carolina, *et al.*	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/15/2017**
247P16-3	Jonathan Eugene Brunson v. North Carolina Department of Public Safety's Superintendent Felix Taylor of Pasquotank Correctional Institution and State of North Carolina, *et al.*	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/10/2017**
297P16	In the Matter of the Adoption of C.H.M., a minor child	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA15-1057)	Allowed

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314P16	Davidson County Broadcasting Company, Inc., Larry W. Edwards, and Wife, Shirley Edwards v. Iredell County v. Wayne McConnell, Rusty N. McConnell, Ann and Don Scott, Bill Mitchell, and David Lowery, Intervening Respondents	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA15-959) 2. N.C. Association of Broadcasters' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot
324A16	State v. Antwan Anthony (DEATH)	Def's Motion for Stay of Appellate Proceedings in Light of Pending Racial Justice Act Motion	Allowed **02/01/2017**
326P15-5	Burl Anderson Howell v. North Carolina Wayne County Department of Health and Human Services, by and through, Reese Phelps; Lou Jones	Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	Dismissed
330A16	Allscripts Healthcare, LLC v. Etransmedia Technology, Inc.	W. Swain Wood's Motion to Withdraw as Counsel for Petitioner-Appellant	Allowed
333P16-2	State of North Carolina *ex rel.* Commissioner of Insurance v. North Carolina Rate Bureau In the Matter of the Filing Dated January 3, 2014 by the North Carolina Rate Bureau for Revised Homeowners' Insurance Rates and Homeowners' Insurance Territory Definitions	North Carolina Rate Bureau's Petition for Reconsideration	Denied **02/14/2017**
335P16	State v. Gyrell Shavonta Lee	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1352)	Allowed

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341P12-4	State v. Donald Durrant Farrow	1. Def's *Pro Se* Motion for PDR (COAP16-888) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed **Ervin, J., recused**
349P16	KB Aircraft Acquisition, LLC v. Jack M. Berry, Jr., and Goforth Road, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-823)	Allowed
352P16	State v. Jeral Thomas Ore, Jr.	1. State's Motion for Temporary Stay (COA16-100) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/29/2016** Dissolved **03/16/2017** 2. Denied 3. Denied
363A14-2	Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, North Carolina, Hans J. Miller, in His Official Capacity; State of North Carolina, Governor Patrick Lloyd (Pat) McCrory, in His Official Capacity; Secretary of the North Carolina Department of Public Safety, Frank Perry, in His Official Capacity; Director of the North Carolina State Bureau of Investigation, Bernard W. (B.W.) Collier, II, in His Official Capacity; Director or Branch Head of the Alcohol Law Enforcement Branch of the State Bureau of Investigation, Mark J. Senter, in His Official Capacity	1. Def's (Sheriff of Onslow County) PDR Under N.C.G.S. § 7A-31 (COA16-390) 2. Def's (Sheriff of Onslow County) Motion for Leave to Withdraw PDR	1. --- 2. Allowed **Ervin, J., recused**

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368P14-2	State v. Kirk James Keller	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **02/17/2017** 2. Allowed **02/17/2017** 3. Dismissed as moot **02/17/2017**
368P16	Animaw Azige, Tewodros Abebe, Meseret Tefera, Zenash Abey, Tadese Gebregiorgis, Dawit Getahun, Edom A. Geru, Azemerawu Getaneh, Tsige Kibret, Tewodrose G. Tirfe, Hailu Afro, Mequanint Tsegaw, Zebene Mesele, Meaza Jembere, Nigatu Kassa, Almaz Mekonen, Aster Mles, Addisu Fentahum Ayalwe, Askale Yeshanew, and Haimonot Gedamu v. Holy Trinity Ethiopian Orthodox Tewahdo Church, Solomon Gugsa, Luleseged Deribe, Tesfa Gashareba, Samuel Agonafer, Samson Kassaye, Gedewon Kassa, Yohannes Assefa, Tassew Kassahun, and Eyoel Mulugeta	1. Plts' Notice of Appeal Based on a Constitutional Question (COA15-760) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's (Kassahun) Motion to Dismiss Plaintiff Azige's Claims Against All Defendants Without Prejudice 4. Def's (Kassahun) Motion to Dismiss Plts' Claims Against Defendant Kassahun Without Prejudice	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Dismissed as moot **Ervin, J., recused**
375P09-7	State v. Avenger Ridgeway	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Supplement 3. Def's *Pro Se* Motion to Amend	1. Denied 2. Dismissed as moot 3. Dismissed as moot **Ervin, J., recused**

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387P05-4	State v. Earl James Watson	1. Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP16-688) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Catawba County 3. State's Motion to Strike Reply to State's Response to Petition for *Writ of Certiorari*	1. Dismissed 2. Dismissed 3. Dismissed as moot **Ervin, J., recused**
388P16	Tawoos Bazargani, MD v. Dr. David Morris Marks, Duke University Hospital, Duke University, and Infectious Disease Control Association	1. Plt's *Pro Se* Motion for Notice of Appeal (COA16-176) 2. Plt's *Pro Se* Petition for Rehearing 3. Plt's *Pro Se* Motion to Supplement Notice of Appeal	1. Dismissed *ex mero motu* 2. Dismissed 3. Allowed
395P13-2	State v. John Lewis Wray, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, 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
401P16	State v. Gary Arthur Metzger	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1093)	Denied
402P14-2	State v. Bobby Lee Rawlings	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wayne 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
407P13-3	State v. Shawn Germaine Fraley	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/14/2017** **Ervin, J., recused**
407P14-5	State v. Dwain Cornelius Ferrell	1. Def's *Pro Se* Motion for Notice of Appeal (COA16-627) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Dismissed
411A94-6	State v. Marcus Reymond Robinson	Def's Motion for Extension of Time to File Petition for *Writ of Certiorari*	Allowed

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421P16	State v. Kendra Potts Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA16-236)	Denied
426A16	The North Carolina State Bar v. David C. Sutton, Attorney	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-1198) 2. Plt's Motion to Dismiss Appeal 3. Def's Motion to Amend Notice of Appeal	1. --- 2. Allowed 3. Denied
427A16	Abrons Family Practice and Urgent Care, P.A.; Nash OB-GYN Associates, P.A.; Highland Obstetrical-Gynecological Clinic, P.A.; Children's Health of Carolina, P.A.; Capital Nephrology Associates, P.A.; Hickory Allergy & Asthma Clinic, P.A.; Halifax Medical Specialists, P.A. and Westside OB-GYN Center, P.A., Individually and on Behalf of All Others Similarly Situated v. North Carolina Department of Health and Human Services and Computer Sciences Corp.	1. Motion to Admit Bryant C. Boren, Jr. *Pro Hac Vice* 2. Motion to Admit Van H. Beckwith *Pro Hac Vice*	1. Allowed **01/31/2017** 2. Allowed **01/31/2017**
428P16	State v. Ottis McGill	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-296) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
436P16	State v. Howard Franklin Eubanks	1. Def's Motion for Temporary Stay (COA16-251) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/05/2016** Dissolved **03/16/2017** 2. Denied 3. Denied
437P16	Johnnie M. Darden, Sr. v. North Carolina Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-377)	Denied

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439P16	State v. Twyan Kenneth Coleman	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-305)	1. Denied
		2. Def's Motion for Temporary Stay	2. Allowed **12/09/2016** Dissolved **03/16/2017**
		3. Def's Petition for *Writ of Supersedeas*	3. Denied
440P16	State v. Christopher Glenn Turner	1. State's Motion for Temporary Stay (COA16-656)	1. Allowed **12/06/2016**
		2. State's Petition for *Writ of Supersedeas*	2. Allowed
		3. State's PDR Under N.C.G.S. § 7A-31	3. Allowed
441P16	State v. Marian Olivia Curtis	1. State's Motion for Temporary Stay (COA16-458)	1. Allowed **12/06/2016**
		2. State's Petition for *Writ of Supersedeas*	2. Allowed
		3. State's PDR Under N.C.G.S. § 7A-31	3. Allowed
445P16	Jamestown Pender, L.P. v. NC Department of Transportation and Wilmington Urban Area Metropolitan Planning Organization	1. Def's (NCDOT) PDR Under N.C.G.S. § 7A-31 (COA15-925)	1. Denied
		2. Def's (Wilmington Urban Area Metropolitan Planning Organization) Conditional PDR Under N.C.G.S. § 7A-31	2. Dismissed as moot
		3. Def's (Wilmington Urban Area Metropolitan Planning Organization) Motion for Leave to Withdraw as Counsel of Record and Notice of Appearance of Substitute Counsel	3. Allowed
		4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot
447P16	Sheila McLean v. Bank of America, N.A., Nationstar Mortgage LLC, and Wells Fargo Bank, N.A., Solely in Its Capacity as Trustee for the Securitized Asset Backed Receivables, LLC, 2005-FR5 Mortgage Pass-Through Certificates, Series 2005-FR5	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-97)	Denied

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449P11-15	State v. Charles Everette Hinton	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **Ervin, J., recused**
452P16	State v. John Eddie Mangum	1. Def's Motion for Temporary Stay (COA16-344) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal 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 **12/16/2016** Dissolved **03/16/2017** 2. Denied 3. --- 4. Denied 5. Allowed
455P16	State v. William Sheldon Howell	1. State's Motion for Temporary Stay (COA16-303) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/20/2016** 2. Allowed 3. Allowed
456P16	In the Matter of W.C.D.	Respondent-Mother's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-351)	Denied
457P16	State v. Eric Scott Turner	Def's PDR Under N.C.G.S. § 7A-31 (COA16-214)	Denied
459P16	State v. James Howard Killian	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-268) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas* 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Allowed **12/22/2016** Dissolved **03/16/2017** 3. Denied 4. Dismissed as moot
463P16	State v. Dwayne Hoyte Dockery	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Buncombe County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

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

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506P08-2	State v. Antwan Terrell Murphy	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Pitt 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
514PA11-2	State v. Harry Sharod James	1. Def's Motion for Temporary Stay (COA15-684) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal 6. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **05/20/2016** 2. Allowed 3. --- 4. Allowed 5. Allowed 6. Allowed
514P13-6	State v. Raymond Dakim Harris Joiner	Def's *Pro Se* Motion for Notice of Appeal	Dismissed *ex mero motu*
669P03-5	State v. Tony Robert Jones	Def's *Pro Se* Motion for Rehearing of Motion to Dismiss	Dismissed **Ervin, J., recused**

IN RE LABARRE

[369 N.C. 538 (2017)]

IN RE: INQUIRY CONCERNING A JUDGE, NO. 15-222

DAVID Q. LABARRE, RESPONDENT

No. 370A16

Filed 5 May 2017

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 26 September 2016 that Respondent David Q. LaBarre, an Emergency Judge of the General Court of Justice, be censured for conduct in violation of Canons 1 and 2A 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. This matter was calendared for argument in the Supreme Court on 22 March 2017, 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 (2015).

No counsel for Judicial Standards Commission or Respondent.

ORDER

The issue before this Court is whether Judge David Q. LaBarre (Respondent) should be censured for violations of Canons 1 and 2A 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). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be censured by this Court.

On 25 April 2016, the Commission Counsel filed a Statement of Charges against Respondent alleging that he had

> engaged in conduct inappropriate to his judicial office when, on December 16, 2015, he drove his vehicle recklessly and while substantially impaired, putting at risk his own life and the lives of others [and that] Respondent's belligerent, offensive, and denigrating behavior towards the responding law enforcement officers and emergency personnel was outrageous and unbecoming of a judicial officer, bringing into question whether it is

> appropriate for the Respondent to continue to serve as an Emergency Judge.

According to the allegations in the Statement of Charges, Respondent's driving while substantially impaired and belligerent behavior towards law enforcement officers and emergency personnel violated Canons 1 and 2A of the North Carolina Code of Judicial Conduct. As a result, Commission Counsel asserted that Respondent's actions "constitute[d] conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or otherwise constitutes grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina."

On 3 June 2016, Respondent filed an answer in which he admitted the factual allegations in the Statement of Charges and expressed remorse "for this uncharacteristic lapse in judgment." On 2 August 2016, Respondent and Commission Counsel filed a number of joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to censure Respondent. Also, Respondent "voluntarily resigned his commission as an Emergency Judge, and agree[d] not to seek another commission in the future." On 12 August 2016, the Commission heard this matter.

On 26 September 2016, the Commission filed a Recommendation of Judicial Discipline, in which it made the following findings of fact:

> 1. Respondent served honorably as a District Court Judge in Durham County from 1978 until 1994. He was appointed Chief District Court Judge on 3 January 1985 and served as Chief District Court Judge of Durham County from 3 January 1985 through 12 January 1990. Respondent was elected and served honorably as a Superior Court Judge in Durham County from 1994 until his retirement in 2002. Respondent was commissioned by the Governor as an Emergency Superior Court Judge and an Emergency District Court Judge in January 2003 and January 2004 respectively.
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> 2. Shortly before 11:00 p.m. on 16 December 2015, the Durham Police Department received a call from a concerned driver reporting a suspected drunk driver. The caller provided the license plate number and indicated that the vehicle was driving northbound on Hillandale Road in Durham, North Carolina. The caller also reported that this vehicle had nearly hit four (4) other vehicles.

3. After checking the license plate number provided by the caller, Durham Police Officer J. A. Alcala determined that the vehicle was registered to Respondent, whose address was listed as near where the vehicle had been observed. In response, Officer Alcala drove to the registered address for the vehicle. Upon arriving at the apartment complex where the vehicle was registered, Officer Alcala observed a vehicle with the license plate number that matched the number reported to the police.

4. As Officer Alcala approached the vehicle, he noticed that the engine was still running and noted the only occupant, later identified as Respondent, was a male slumped over in his seat and who appeared to be sleeping at the wheel. The officer also noticed that the vehicle was still in drive with Respondent's foot on the brake. After knocking on the window and waking him, Respondent opened the vehicle's window, at which time Officer Alcala detected a strong odor of alcohol emanating from Respondent. Because of Respondent's level of impairment, another officer who arrived at the scene had to put the car in park as Respondent was unable to do so himself.

5. When Respondent finally exited his vehicle, he was unable to stand on his own without leaning against the vehicle, his speech was slurred, and he was unable to comprehend many of the officer's questions or follow basic instructions necessary for the officer to perform several field sobriety tests.

6. At approximately 11:25 p.m., at the officer's request, Respondent submitted to an initial portable breath test, which registered a positive result for the presence of alcohol. When asked to provide the requisite second sample, however, Respondent became belligerent, used offensive and vulgar expletives towards the officer, and refused to submit to a second test. Officer Alcala called Durham County Emergency Medical Services (EMS) to the scene to evaluate Respondent for a possible medical emergency. While waiting for Durham County EMS to arrive, Respondent continued to use vulgar language and expletives towards the police officers at the scene as they attempted to help him remain steady.

7. While at the scene, Officer Alcala examined Respondent's vehicle and noticed fresh damage and paint transfer on the right corner of the front bumper. The officer also observed the rear left tire rim was cracked and the front right tire had grey marks consistent with being scraped on a curb. While the officer was inspecting the vehicle, Respondent again directed expletives and rude statements towards the officer. Respondent's use of vulgar language and expletives towards law enforcement officers at the scene continued as they asked him routine questions and attempted to help him contact a family member.

8. When EMS arrived, Respondent refused to cooperate as they tried to take his vital signs, and he directed the same vulgar language and expletives towards EMS personnel as he had towards the police officers. Respondent was transported by ambulance to the local hospital after concerns were raised about his health and level of impairment. Respondent's offensive language continued throughout the ride to the local hospital.

9. The ambulance carrying Respondent arrived at the hospital at approximately 12:20 a.m. on 17 December 2015. After his admission, Respondent continued to use vulgar language and expletives towards police officers who were present. In addition, Respondent refused to submit to a blood draw to determine his level of impairment, forcing Officer Alcala to secure a search warrant to obtain a sample of Respondent's blood. During the interim period, Respondent again continued to direct expletives towards other officers and workers trying to assist him.

10. Officer Alcala returned to the hospital with a search warrant for Respondent's blood, and at approximately 2:20 a.m., a sample of Respondent's blood was taken by a nurse and submitted to the N.C. State Crime Laboratory for analysis. After the blood draw, Respondent was issued a citation for driving while impaired and released into the care of his family.

11. A true and correct copy of the Durham County Police Report detailing this incident and Respondent's arrest is attached to the Stipulation as Exhibit 1.

12. The matter of State v. David Q. LaBarre, Durham County file number 15CR3988, was heard on 5 February 2016. On that date, Respondent appeared with counsel, and entered a plea of guilty to driving while impaired. Respondent was placed on twelve (12) months of unsupervised probation, ordered to obtain a substance abuse assessment and complete any recommended education or treatment, pay a $100.00 fine, court costs and community service fee, to complete twenty-four (24) hours of community service, and comply with other conditions of probation.

13. Respondent has paid all court ordered financial obligations, completed the court ordered substance abuse assessment and recommended education/treatment, and has completed the court ordered community service.

(Citations omitted.) Based upon these findings of fact, the Commission concluded as a matter of law that:

A. Driving While Impaired

1. Canon 1 of the Code of Judicial Conduct sets forth the broad principle that "[a] judge should uphold the integrity and independence of the judiciary." To do so, Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."

2. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

3. The clear, cogent and convincing evidence supporting the Commission's findings of fact show[s] that Respondent violated the criminal laws of the State of North Carolina by driving while impaired, thereby putting the lives of others and himself at risk.

4. Respondent agrees that by driving while impaired in violation of the criminal laws of the State of North Carolina, he acted in violation of Canon 1 of the North Carolina Code of Judicial Conduct and Canon 2A of the North Carolina Code of Judicial Conduct, and engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376.

5. Based upon the agreement of Respondent and the clear, cogent and convincing evidence supporting the Commission's findings of fact that Respondent violated the laws of the State of North Carolina by driving while impaired, the Commission concludes that Respondent: (1) failed to personally observe standards of conduct to ensure the integrity and independence of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct; and (2) failed to respect and comply with the law and to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.

6. The Commission further concludes that the facts and circumstances aggravate this misconduct to a level warranting more than a private letter of caution. Accordingly, Respondent's violations of Canon 1 and Canon 2A of the Code of Judicial Conduct also amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § 7A-376(b).

B. <u>Belligerent, Offensive and Denigrating Behavior Towards Law Enforcement and Emergency Personnel</u>

7. The clear, cogent and convincing evidence supporting the Commission's findings of fact show[s] that Respondent engaged in belligerent, offensive and denigrating behavior towards local law enforcement and emergency personnel as they executed their official duties and attempted to assist Respondent during the incident underlying these proceedings.

> 8. Respondent agrees that by his belligerent, offensive, and denigrating behavior towards law enforcement and emergency personnel, he acted in violation of Canon 1 and Canon 2A of the North Carolina Code of Judicial Conduct, and engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. §[ ]7A-376.
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> 9. Based upon the agreement of Respondent and the clear, cogent and convincing evidence supporting the Commission's findings of fact, the Commission concludes that Respondent: (1) failed to personally observe standards of conduct to ensure the integrity and independence of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct and (2) failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.
>
> 10. The Commission further concludes that the facts and circumstances aggravate this misconduct to a level warranting more than a private letter of caution. Accordingly, Respondent's violations of Canon 1 and Canon 2A of the Code of Judicial Conduct also amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § 7A-376(b).

(Citations omitted.) Based upon these findings of fact and conclusions of law, the Commission recommended that this Court censure Respondent for "driving while impaired in violation of the laws of the State of North Carolina" and "engaging in belligerent, offensive and denigrating behavior towards law enforcement and emergency personnel of the State of North Carolina." The Commission based this recommendation on the Commission's earlier findings and conclusions and the following additional dispositional determinations:

> 1. Respondent agreed to enter into the Stipulation to bring closure to this matter and because of his concern for protecting the integrity of the court system. Respondent understands the negative impact his actions have had on the integrity and impartiality of the judiciary. Even after an esteemed judicial career spanning thirty-seven (37)

years, Respondent acknowledges his behavior during this single incident has jeopardized the public's confidence in his ability to continue to serve fairly and impartially.

2. Respondent has voluntarily resigned his commission as an Emergency Judge, and agrees not to seek another commission in the future, in lieu of facing a more severe disciplinary recommendation.

3. Respondent has an excellent reputation in his 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. Respondent has been fully cooperative with the Commission's investigation, voluntarily providing information about the incident and fully and openly admitting error and remorse.

4. Respondent's record of service to the judiciary, the profession and the community at large is otherwise exemplary. Respondent has been active in community and civic affairs, including service as chairman of the Deacons and chairman of the Trustees at Greystone Baptist Church.

5. Respondent agrees to accept a recommendation of **censure** from the Commission and acknowledges that the conduct set out in the stipulation establishes by clear and convincing evidence that his 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 North Carolina General Statute § 7A-376(b).

6. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all seven Commission members present at the hearing of this matter concur in this recommendation to **censure** Respondent.

(Citations omitted.)

When reviewing a recommendation from the Commission in a judicial discipline proceeding, "the Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court.' " *In re Mack*, ___ N.C. ___, ___, 794 S.E.2d 266, 273 (2016) (order) (quoting

In re Hartsfield, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order)). In conducting an independent evaluation of the evidence, "[w]e 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.* at ___, 794 S.E.2d at 273 (quoting *In re Hartsfield*, 365 N.C. at 428, 722 S.E.2d at 503 (alterations in original)). "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.' " *Id.* at ___, 794 S.E.2d at 274 (quoting *In re Hartsfield*, 365 N.C. at 429, 722 S.E.2d at 503).

After careful review, this Court concludes that the Commission's findings of fact, including the dispositional determinations set out above, 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. As a result, we accept the Commission's findings and conclusions and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that Respondent should be censured.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that Respondent David Q. LaBarre be CENSURED for violations of Canons 1 and 2A 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).

By order of the Court in Conference, this the 3rd day of May, 2017.

s/Michael R. Morgan
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of May, 2017.

Clerk of the Supreme Court

s/J. Bryan Boyd
Clerk

STATE v. WALSTON

[369 N.C. 547 (2017)]

STATE OF NORTH CAROLINA
v.
ROBERT TIMOTHY WALSTON, SR.

No. 392PA13-3

Filed 5 May 2017

Witnesses—expert—repressed memory and suggestibility of memory

The trial court did not err in a prosecution for child sex offenses by excluding the testimony of a defense expert regarding repressed memory and the suggestibility of memory. A defense expert is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues concerning the prosecuting witness at trial. Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony, and the record here demonstrated sufficient evidence to support the trial court's decision to exclude the testimony.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 780 S.E.2d 846 (2015), reversing judgments entered on 17 February 2012 by Judge Cy A. Grant in Superior Court, Dare County, and ordering that defendant receive a new trial, after the Supreme Court of North Carolina remanded the Court of Appeals' prior unpublished decision in this case, *State v. Walston*, 239 N.C. App. 468, ___ S.E.2d ___, 2015 WL 680240 (2015). Heard in the Supreme Court on 13 February 2017.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Assistant Attorney General, for the State-appellant.

Mark Montgomery for defendant-appellee.

BEASLEY, Justice.

In this case we consider whether the trial court abused its discretion in excluding defense expert testimony regarding repressed memory and the suggestibility of memory. We find that the trial court did not abuse its discretion, and we reverse the decision of the Court of Appeals and reinstate defendant's convictions.

On 14 November 2011, Robert Timothy Walston, Sr. (defendant) was indicted for a number of child sex offenses. After a trial in February 2012, the jury found defendant guilty of one count of first-degree sexual offense, three counts of first-degree rape of a child, and five counts of taking indecent liberties with a child. Defendant appealed his convictions arguing, *inter alia*, that the trial court erred in excluding his expert's testimony.[1] *See State v. Walston*, ___ N.C. App. ___, ___,780 S.E.2d 846, 849-50 (2015). The Court of Appeals agreed with defendant and granted him a new trial. *Id.* at ___, ___, 780 S.E.2d at 857-58, 862. The State petitioned this Court for discretionary review, arguing that the trial court did not abuse its discretion in excluding defendant's proffered expert testimony and that exclusion of the expert testimony was not prejudicial. We agree, and thus, we reverse the Court of Appeals.

Before trial defendant notified the State that he planned to introduce expert testimony from Moina Artigues, M.D. regarding repressed memory and the suggestibility of children. The State successfully moved to suppress Dr. Artigues's testimony. The State argued that the testimony was not relevant or admissible pursuant to Evidence Rules 702 and 403 because the case did not involve "repressed" or "recovered" memories; that the expert was not qualified under Rule 702 to testify regarding "false" memories, specifically because she had not examined or evaluated the two alleged victims; and that the testimony should be excluded under Rule 403 because its potential to prejudice or confuse the jury would substantially outweigh its probative value.[2]

At the pretrial hearing, the trial court expressed doubt that this case concerned repressed or recovered memories and indicated that if the case did not concern repressed or recovered memories, Dr. Artigues's testimony about that subject would be irrelevant or misleading. In response, defense counsel contended that even if Dr. Artigues was not permitted to testify about repressed or recovered memories, she should be allowed to testify about the suggestibility of memory in children based on certain statements the victims made during discovery, which

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1. This case has been before this Court and the Court of Appeals a number of times on other issues. The history of this case is detailed in the most recent Court of Appeals opinion and is not discussed here. *See State v. Walston*, ___ N.C. App. ___, ___, 780 S.E.2d 846, 848-49 (2015).

2. The State also requested that the court prohibit the testimony because of defendant's late disclosure of the expert witness. *See* N.C.G.S. § 15A-910 (2016). At the pretrial hearing, the court did not rule on the State's request to exclude Dr. Artigues's testimony on this ground.

indicated the children's relatives may have pressured them to say they had been abused. The State countered this argument by asserting that the trial court should exclude the expert testimony because, *inter alia*, the expert had not interviewed or examined the victims or anyone else involved in the case. The State relied on *State v. Robertson*, 115 N.C. App. 249, 260-61, 444 S.E.2d 643, 649 (1994), for this proposition. The State noted that *Robertson* was similar to the case at bar in that the defendant in *Robertson* sought to introduce expert testimony concerning suggestibility of children; there the trial court excluded the expert testimony on grounds that its probative value was outweighed by the potential to prejudice or confuse the jury because the expert had never examined or evaluated the victims in any way. *Id.* at 261, 444 S.E.2d at 649. The State also argued here that defendant's expert testimony should be excluded because there was no basis for Dr. Artigues's opinion.

The trial court ruled that Dr. Artigues could not testify, but allowed voir dire to preserve Dr. Artigues's testimony for appellate review. After the conclusion of voir dire, defense counsel requested that the court reconsider its suppression ruling. Defense counsel asserted that Dr. Artigues's opinion was relevant in relation to scientific opinions regarding repressed memory and suggestibility of memory, was relevant to assist the jury in determining credibility, and was not unfairly prejudicial to the State. The State reasserted its arguments that this case does not involve repressed memories and that, as to suggestibility, "this type of expert testimony does not come in when the expert has not evaluated the victim . . . [which] didn't take place in this case." The court stated it was "not inclined to change [its] ruling."

On appeal, as to whether the trial court erred in excluding defendant's proffered expert testimony from Dr. Artigues, defendant argued to the Court of Appeals that Rule 702 does not require that a witness personally interview the person about whom she will testify. Defendant cited to previous cases from this Court and the Court of Appeals in which witnesses were allowed to testify without having interviewed or examined the person about whom they were testifying. *See State v. Daniels*, 337 N.C. 243, 268-71, 446 S.E.2d 298, 314-15 (1994) (concluding that the trial court did not abuse its discretion in allowing an expert who had not personally interviewed a defendant to testify about that defendant's mental condition), *cert. denied*, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995); *State v. Jones*, 147 N.C. App. 527, 541-44, 556 S.E.2d 644, 653-55 (2001) (concluding that the trial court did not abuse its discretion in allowing a developmental and forensic pediatrician to testify about her knowledge of the medical records and behavior of the

deceased victim), *appeal dismissed and disc. rev. denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). Defendant also argued that he was prejudiced by the erroneous exclusion of Dr. Artigues's testimony; he asserted that there was a reasonable possibility the jury would have reached a different result had the trial court admitted Dr. Artigues's testimony.

The State's argument to the Court of Appeals largely relied on the similarities between this case and *Robertson*. The State argued that Dr. Artigues did not examine or evaluate the victims or anyone else involved but rather based her opinion only on an analysis of the discovery material and defense counsel's trial notes. Thus, the State asserted that Dr. Artigues's testimony was properly excluded in compliance with *Robertson*. Additionally, the State noted that Dr. Artigues did not generate a formal report outlining her opinion and the basis of her opinion regarding the suggestibility of child witnesses. The State also argued that Dr. Artigues's testimony was irrelevant.

The Court of Appeals reversed the trial court and remanded for a new trial. The Court of Appeals found that "the trial court improperly excluded Dr. Artigues'[s] testimony based upon the erroneous belief that her testimony was inadmissible as a matter of law" under *Robertson*. *Walston*, ___ N.C. App. at ___,780 S.E.2d at 857-58. The Court of Appeals reasoned that the discussion of *Robertson* during the pretrial motions hearing implied that the trial court relied on *Robertson* to prohibit Dr. Artigues's testimony because Dr. Artigues had not interviewed the prosecuting witnesses.

The Court of Appeals clarified that *Robertson* did not recognize or create a "*per se* rule that expert opinion concerning the general suggestibility of children may only be given at trial if the testifying expert has examined the child or children in question." *Id.* at ___, 780 S.E.2d at 853. Rather, "expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 . . . are met." *Id.* at ___, 780 S.E.2d at 853. Thus, Dr. Artigues's expert opinion should not be excluded as a matter of law on grounds that she did not examine the children and may be admissible if in compliance with the Rule 702 and Rule 403 requirements.

The Court of Appeals noted that the trial court did not make "any findings of fact or conclusions of law explaining the rationale" for "excluding Dr. Artigues'[s] testimony." *Id*. at ___, 780 S.E.2d at 857. Specifically, there was no evidence in the record that the trial court had conducted a Rule 702 analysis, *id.* at ___, ___, ___, 780 S.E.2d at 858, 860, 862, nor did the trial court "make any findings or conclusions related to Rule 403," *id.*

at ___, 780 S.E.2d at 862. Therefore, the Court of Appeals panel found itself unable to "make any determination concerning whether the trial court would have abused its discretion in excluding Dr. Artigues'[s] testimony pursuant to either Rule 702 or Rule 403." *Id.* at ___, 780 S.E.2d at 862. Thus, the Court of Appeals reversed defendant's convictions and remanded for a new trial. *Id.* at ___, ____, 780 S.E.2d at 858, 862.

The State petitioned this Court for discretionary review. The only issue currently before this Court is whether the Court of Appeals erred in concluding that the trial court improperly excluded Dr. Artigues's testimony. We conclude that it did and hold that the trial court did not abuse its discretion in excluding Dr. Artigues's testimony.

"In reviewing trial court decisions relating to the admissibility of expert testimony evidence, this Court has long applied the deferential standard of abuse of discretion." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012). Trial courts act as a gatekeeper in determining admissibility of expert testimony, and a trial court's decision to admit or exclude expert testimony "will not be reversed on appeal unless there is no evidence to support it." *Id.* at 75, 733 S.E.2d at 540 (quoting *State v. King*, 287 N.C. 645, 658, 215 S.E.2d 540, 548-49 (1975), *judgment vacated in part per curiam*, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976)).

North Carolina Rule of Evidence 702 controls the admission of expert testimony. N.C.G.S. § 8C-1, Rule 702 (2016). Rule 702(a) states:

> (a) If scientific, technical or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
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> (1) The testimony is based upon sufficient facts or data.
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> (2) The testimony is the product of reliable principles and methods.
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> (3) The witness has applied the principles and methods reliably to the facts of the case.

Id. (emphases added). A Rule 702 analysis takes into consideration the qualifications of the expert as well as the reliability and relevance of

the expert testimony. *See State v. McGrady*, 368 N.C. 880, 884-93, 787 S.E.2d 1, 5-11 (2016) (providing a thorough analysis of Rule 702 requirements).

> Rule 702(a), as amended in 2011, *does not mandate particular procedural requirements for exercising the trial court's gatekeeping function over expert testimony. The trial court has the discretion to determine whether or when special briefing or other proceedings are needed to investigate reliability.* A trial court may elect to order submission of affidavits, hear voir dire testimony, or conduct an *in limine* hearing. More complex or novel areas of expertise may require one or more of these procedures. In simpler cases, however, the area of testimony may be sufficiently common or easily understood that the testimony's foundation can be laid with a few questions in the presence of the jury. The court should use a procedure that, given the circumstances of the case, will secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Id. at 893, 787 S.E.2d at 11 (emphasis added) (internal citations and quotation marks omitted).[3]

If expert testimony meets the requirements of Rule 702, it may still be inadmissible under Rule of Evidence 403 if the "probative value [of the testimony] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.G.S. § 8C-1,

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3. Here both parties made their arguments to the Court of Appeals under the former Rule 702 standard. The Court of Appeals determined that the new 702 standard should apply to this case based on the date of the superseding indictment. *State v. Walston*, 229 N.C. App. 141, 151-52, 747 S.E.2d 720, 728 (2013), *rev'd*, 367 N.C. 721, 766 S.E.2d 312 (2014).

In a previous opinion in this case, the Court of Appeals determined that because the new Rule 702 requirements are more stringent than the former requirements, defendant was not prejudiced by the trial court's application of the incorrect standard in excluding Dr. Artigues's testimony. In making that determination, however, the Court of Appeals failed to address the merits of defendant's argument that the exclusion of Dr. Artigues's testimony was improper because it was based on an incorrect understanding of the law. *State v. Walston*, 239 N.C. App. 468, ___ S.E.2d ___, 2015 WL 680240 (2015) (unpublished).

In the most recent Court of Appeals opinion in this case, the Court of Appeals did address the merits of defendant's argument, as discussed above, and agreed with defendant that Dr. Artigues's testimony was improperly excluded. *Walston*, ___ N.C. App. ___, 780 S.E.2d 846.

Rule 403 (2016); *see King*, 366 N.C. at 75-76, 733 S.E.2d at 540. In *State v. King* this Court upheld the trial court's exclusion of the State's proffered expert testimony; even though Rule 702 requirements had been met, "the expert testimony was inadmissible under Rule 403" because "the probative value of the evidence was outweighed by its prejudicial effect." 366 N.C. at 76, 733 S.E.2d at 540. "Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court." *Id.* at 76, 733 S.E.2d at 540 (quoting *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986)). "If all other tests are satisfied, the ultimate admissibility of expert testimony in each case will still depend upon the relative weights of the prejudicial effect and the probative value of the evidence in that case." *Id.* at 76-77, 733 S.E.2d at 541. "[W]hen a judge concludes that the possibility of prejudice from expert testimony has reached the point where the risk of the prejudice exceeds the probative value of the testimony, Rule 403 prevents admission of that evidence." *Id.* at 77, 733 S.E.2d at 541.

Under the abuse of discretion standard applicable to this case, our role is to decide whether the trial court's decision to exclude Dr. Artigues's testimony was "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Though the trial court did not explicitly state or demonstrate its Rule 702 or Rule 403 analysis,[4] "[a] correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (citation omitted), *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

Here the Court of Appeals was correct to clarify that a defendant's expert witness is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial. We agree with and affirm the Court of Appeals' legal analysis on this issue. Such a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts. *See State v. Fletcher*, 322 N.C. 415, 419, 368 S.E.2d 633, 635 (1988).

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4. When specific findings of fact and conclusions of law are not required, it is within the trial court's discretion to make fact findings "if a party does not choose to compel a finding through the simple mechanism of so requesting." *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987). We have previously stated that "[w]hen the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment." *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986) (citations omitted).

We disagree, however, with the Court of Appeals' determination that the trial court based its decision to exclude defendant's proffered expert testimony solely on an incorrect understanding of the law. Based on the discussion of *Robertson* during the pretrial motions hearing, as well as the parties' briefs on appeal, the Court of Appeals presumed that the trial court excluded Dr. Artigues's testimony based on an erroneous belief that *Robertson* created a per se rule of exclusion when an expert has not interviewed the victims. The trial court, however, never stated that *Robertson* created such a rule nor that it based its decision to exclude Dr. Artigues's testimony solely on *Robertson*.

Furthermore, as this Court notes in *McGrady*, Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony. *See* 368 N.C. at 893, 787 S.E.2d at 11. Here the record demonstrates that the trial court heard arguments from both parties regarding the subject matter of Dr. Artigues's proffered testimony, conducted voir dire and considered the testimony that defendant wished to elicit from Dr. Artigues, and considered the parties' Rule 403 balancing arguments. Moreover, during voir dire the trial court at times engaged Dr. Artigues directly concerning possible confusion over how the victims used specific words in their deposition—such as being "grilled"[5] by an adult and "flashbacks"[6]—and Dr. Artigues's use of the clinical definitions of these words in her evaluation. Thus, the record demonstrates that there is evidence to support the trial court's decision to exclude Dr. Artigues's testimony and that the trial court properly acted as a gatekeeper in determining the admissibility of expert testimony. Therefore, we find that the trial court did not abuse its discretion in excluding

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5. [PROSECUTOR] So you're assuming that this grilling was implanting or suggesting memories to the young girls?

[DR. ARTIGUES] I don't see how it could be otherwise.

. . . .

[THE COURT] You don't see how? You can't think of any situation where grilling can be otherwise?

. . . .

[THE COURT] Grilling to you may be different from what grilling means to the mother, to me or anyone else?

[DR. ARTIGUES] Right, that is true.

6. [PROSECUTOR] You would agree, would you not, that ordinary lay people who don't live in the psychiatry world, when they use the word flashback they're using it like what you're defining as memory cues?

[DR. ARTIGUES] That is very possible, yes.

Dr. Artigues's testimony.[7] We reverse the decision of the Court of Appeals and reinstate defendant's convictions.

REVERSED.

UNITED COMMUNITY BANK (GEORGIA)
v.
THOMAS L. WOLFE AND BARBARA J. WOLFE, TRUSTEES OF THE THOMAS L. WOLFE AND BARBARA J. WOLFE IRREVOCABLE TRUST, THOMAS L. WOLFE, INDIVIDUALLY, AND BARBARA J. WOLFE, INDIVIDUALLY

No. 289PA15

Filed 5 May 2017

Mortgages—foreclosure—anti-deficiency statute—true value of property—evidence not sufficient

The trial court did not err by granting summary judgment for plaintiff-bank in an action under N.C.G.S. § 45-21.36, North Carolina's anti-deficiency statute. The borrower must show that the creditor's successful foreclosure bid was less that the property's true value; merely reciting the statutory language or asserting an unsubstantiated opinion is not sufficient.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 775 S.E.2d 677 (2015), reversing an order on summary judgment entered on 30 June 2014 by Judge Marvin P. Pope, Jr. in Superior Court, Transylvania County, and remanding for further proceedings. Heard in the Supreme Court on 20 March 2017.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Robert A. Mays, Mark A. Pinkston, and Esther E. Manheimer, for plaintiff-appellant.

Donald H. Barton, P.C., by Donald H. Barton; and Matthew J. Barton for defendant-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse and Robert A. Singer, for North Carolina Bankers Association, amicus curiae.

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7. Because we find no abuse of discretion, it is unnecessary to conduct a prejudice analysis and we decline to do so.

NEWBY, Justice.

North Carolina's anti-deficiency statute, N.C.G.S. § 45-21.36, affords protection to a borrower following a nonjudicial power-of-sale foreclosure by accounting for the "true value" of the foreclosed property, thereby potentially reducing the borrower's remaining indebtedness. To assert this statutory protection, however, the borrower must allege and show that the creditor's successful foreclosure bid was substantially less than the property's "true value" by presenting substantial competent evidence of such value. The borrower's own unsupported opinion, standing alone, is insufficient. Because defendants here failed to forecast substantial competent evidence sufficient to create a genuine issue of material fact as to the foreclosed property's "true value," we reverse the decision of the Court of Appeals and reinstate the trial court's order granting summary judgment in favor of plaintiff.

In August 2008, shortly before the collapse of the real estate market, plaintiff United Community Bank (Georgia) loaned defendants $350,000 to purchase certain real property situated in Transylvania County, North Carolina. The loan was secured by a deed of trust.[1] Sometime later defendants defaulted. Ultimately, in August 2013, the Bank foreclosed by nonjudicial power of sale under the deed of trust. At the sale the Bank bought the property for $275,000 as the highest and only bidder. The Bank had based its bid on an independent appraisal of the property dated March 2013, which valued the property at $275,000. The net proceeds realized from the foreclosure sale ($275,000 minus expenses) failed to satisfy the outstanding debt, resulting in a deficiency of over $50,000. The Bank then listed the property for sale at $279,000. After receiving no suitable market response, the Bank lowered the asking price to $244,500 in October 2013, before eventually selling the property in December 2013 for $205,000.

The Bank filed the instant action in Superior Court, Transylvania County, to collect the deficiency plus interest, attorneys' fees, and costs. In their answer defendants denied plaintiff's allegations and asserted the protection of the anti-deficiency statute. The Bank moved for summary judgment and, relying primarily on the appraisal and resale price of the property, maintained that the price it paid for the property at foreclosure was reasonable. Defendants' affidavit in opposition stated:

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1. The "credit agreement" indicates that defendants Thomas L. Wolfe and Barbara J. Wolfe borrowed the money acting both individually and as trustees of the "Thomas L. Wolfe and Barbara J. Wolfe Irrevocable Trust under the provisions of a Trust Agreement dated June 29, 2004."

> [A]ffiants verily believes [sic] that the residence and real property sold that is the subject of this Complaint was at the time of its sale fairly worth the amount of the debt it secured and affiants believe the amount bid for the property was substantially less than its fair market value at the time of the sale.

While the affidavit tracks the statutory language and asserts defendants' opinion that the property was "fairly worth the amount of the debt," the affidavit does not assign a specific dollar value to the property or specify any supporting evidence. Following a hearing, the trial court granted summary judgment in favor of the Bank and awarded $57,737.74 for the deficiency and accrued interest, plus attorneys' fees and costs. Defendants appealed.

The Court of Appeals reversed, concluding that defendants' affidavit created a genuine issue of material fact as to the "true value" of the foreclosed property under section 45-21.36. *United Cmty. Bank (Ga.) v. Wolfe*, ___ N.C. App. ___, ___, 775 S.E.2d 677, 680 (2015). Because defendants personally knew the loan balance at the time of the foreclosure sale, and their affidavit, as the property owners, stated that the foreclosed property was "fairly worth the amount of the debt," the Court of Appeals reasoned that defendants were not only competent to testify but that their unsupported opinion created a genuine issue of material fact. *Id.* at ___, 775 S.E.2d at 680 (citing *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006); *N.C. State Highway Comm'n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974)). The Court of Appeals reversed the trial court's grant of summary judgment for the Bank and remanded for trial. *Id.* at ___, 775 S.E.2d at 681. This Court allowed discretionary review.

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) (2015). Supporting affidavits and affidavits in opposition to summary judgment

> shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . [A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this

> rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id., Rule 56(e) (2015). The nonmoving party survives a motion for summary judgment by presenting substantial evidence that creates a genuine issue of material fact. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278-79 (2015) (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)). This Court reviews appeals from summary judgment de novo. *Id.* at 334-35, 777 S.E.2d at 278.

Foreclosure by power of sale arises under the contract between the borrower and the creditor, allowing the creditor to sell the mortgaged property upon the borrower's default. *In re Foreclosure of Lucks*, ___ N.C. ___, ___, 794 S.E.2d 501, 504 (2016). Following a foreclosure sale, the amount of the borrower's debt is reduced by the net proceeds from the sale. N.C.G.S. § 45-21.31(a)(4) (2015). Generally, a borrower is liable for the deficiency. When the creditor is also the high bidder at the nonjudicial power-of-sale foreclosure, however, the borrower may assert the protection of section 45-21.36:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part . . . . [T]his section shall not

> apply to foreclosure sales made pursuant to an order or decree of court . . . .

Id. § 45-21.36 (2015).

In a creditor's action to collect the deficiency, this "anti-deficiency statute" provides the method of calculating a borrower's remaining indebtedness by deducting from the total debt owed the "true value" of the foreclosed property, rather than the amount paid by the creditor at the foreclosure sale. *See High Point Bank & Tr. v. Highmark Props., LLC*, 368 N.C. 301, 307, 776 S.E.2d 838, 843 (2015); *see also Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr.*, 210 N.C. 29, 34, 185 S.E. 482, 485 (1936) ("[The creditor] shall not recover judgment against his debtor for any deficiency . . . without first accounting to his debtor for the fair value of the property at the time and place of the sale . . . . In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property."), *aff'd*, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937). When the statutory protection is asserted, the "true value" of the property becomes a material fact. *Wachovia Realty Invs. v. Hous., Inc.*, 292 N.C. 93, 112, 232 S.E.2d 667, 679 (1977). The borrower's remaining liability may be eliminated altogether or reduced by way of "offset" if the borrower shows that the foreclosed property "was fairly worth the amount of the debt" or that the foreclosure bid "was substantially less than [the foreclosed property's] true value." N.C.G.S. § 45-21.36.

A borrower opposing summary judgment must forecast substantial competent evidence by way of specific facts to show the property's "true value" is genuinely at issue. *See id.* (requiring the borrower to "*allege and show* as matter of defense and offset" (emphasis added)); *see also* N.C.G.S. § 1A-1, Rule 56(e). Only "[u]pon such [a] showing" can a borrower defeat or offset a deficiency judgment against him or her. *Id.* § 45-21.36; *see Wachovia Realty Invs.*, 292 N.C. at 112-13, 232 S.E.2d at 679 (considering resale price after foreclosure as an indication of the true value of the property at foreclosure); *Blue Ridge Savs. Bank v. Mitchell*, 218 N.C. App. 410, 412-13, 721 S.E.2d 322, 324-25 (considering appraisal value, foreclosure price, and resale price as competent evidence of true value), *aff'd per curiam*, 366 N.C. 331, 734 S.E.2d 572 (2012).

In opposing summary judgment here, defendants relied on their status as the property owners and their joint affidavit "made on [defendants'] personal knowledge," stating that they "verily believe[ ] that the . . . property sold . . . was at the time of [the foreclosure] sale fairly worth the amount of the debt it secured." Defendants' conclusory statement

without any supporting facts is insufficient to create a genuine issue of material fact. *See* N.C.G.S. § 1A-1, Rule 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); *Lowe v. Bradford*, 305 N.C. 366, 370, 289 S.E.2d 363, 366 (1982) ("[W]hen the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him.").

Once the Bank produced substantial competent evidence of value, Rule 56 required even the property owners to provide more than a conclusory statement. *See Lexington State Bank v. Miller*, 137 N.C. App. 748, 753-54, 529 S.E.2d 454, 457 (characterizing the defendant property owner's affidavit, which stated that the property "was worth substantially more than the amount which was bid and paid by [the bank]," as "unsupported allegations" rather than the "specific facts" needed to survive summary judgment), *disc. rev. denied*, 352 N.C. 589, 544 S.E.2d 781 (2000); *see also N.C. Dep't of Transp. v. Haywood County*, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006) (land condemnation case excluding "experts' testimony about [their] feelings and personal opinions" on valuation because the trial court found the testimony "unsupported by objective criteria," "based on hunches and speculation," and therefore "lack[ing] sufficient reliability"). Simply restating the statutory language in affidavit form is inadequate. The Court of Appeals' reliance on the land condemnation cases *Department of Transportation v. M.M. Fowler, Inc.* and *North Carolina State Highway Commission v. Helderman* is misplaced. Here the issue is not a landowner's competency to testify but whether the landowners' affidavit presented substantial competent evidence under Rule 56(c) regarding the "true value" of the foreclosed property.

In sum, defendants failed to present substantial competent evidence to create a genuine issue of material fact regarding the "true value" of the foreclosed property. Under Rule 56, merely reciting the statutory language or asserting an unsubstantiated opinion regarding the foreclosed property's value is insufficient. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's grant of summary judgment in favor of the Bank.

REVERSED.

WILKIE v. CITY OF BOILING SPRING LAKES

[369 N.C. 561 (2017)]

EDWARD F. WILKIE AND DEBRA T. WILKIE	)	
v.	)	From Brunswick County
CITY OF BOILING SPRING LAKES	)	

No. 44P17

ORDER

Plaintiffs' petition for discretionary review is allowed only as to the first and third issues listed in plaintiffs' petition. Plaintiffs' discretionary review petition is denied as to any remaining issues.

By order of the Court, this the 3rd day of May, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of May, 2017.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme
Court of North Carolina

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

3 MAY 2017

006P17	In the Matter of A.H., C.H.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA16-581)	Denied
013P17	State v. Kalmeaice Kawanna Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA16-432)	Denied
024P17-2	State v. Calvin Lamar Adams	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA15-1384)	Dismissed
030P17	State v. Napoleon Richard Cooper	Def's PDR Under N.C.G.S. § 7A-31 (COA16-483)	Denied
036P17	State v. Constance Michelle Sheperd	Def's PDR Under N.C.G.S. § 7A-31 (COA16-270)	Denied
039P12-2	State v. Ray Lee Ross	Def's Petition for *Writ of Certiorari* to Review Order of COA (COA17-56)	Dismissed **Beasley, J., recused**
044P17	Edward F. Wilkie and Debra T. Wilkie v. City of Boiling Spring Lakes	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA16-652) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
048P17	Estate of Regina Cecylia Johnson v. Fundacja Jasmin Reginy Elandt I Normana Lloyda Johnsonow, Ewa Violetta Elandt-Jankowska, and Hanna Elandt-Pogodzinska	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-528)	Denied **Morgan, J., recused**
052P17	Roy A. Cooper, III, in his Official Capacity as Governor of the State of North Carolina v. Philip E. Berger, in his Official Capacity as President *Pro Tempore* of the North Carolina Senate; and Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives	1. Plt's Motion for Temporary Stay (COAP17-101) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Petition for *Writ of Certiorari* to Review Order of COA 4. Plt's PDR Prior to a Decision of COA	1. Allowed **02/13/2017** Dissolved **05/03/2017** 2. Dismissed as moot 3. Dismissed as moot 4. Denied

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

3 MAY 2017

055P17	Harry Williams v. Advance Auto Parts, Inc., and Advance Stores Company, Incorporated, d/b/a Advance Auto Parts	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-625)	Denied
057P17	State v. Bobby Johnson	1. State's PDR Under N.C.G.S. § 7A-31 (COA16-491) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
058P17	Priscilla Gayle Brookbank v. Heather DiLorenzo Williams and Trenton Blake Williams	1. Def's (Trenton Blake Williams) Notice of Appeal Based Upon a Constitutional Question (COA16-312) 2. Def's (Trenton Blake Williams) PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
059P17	Southern Shores Realty Services, Inc. v. William G. Miller, The Miller Family Limited Partnership, II, LLC, Old Glory III, LLC, Old Glory IV, LLC, Old Glory V, LLC, Old Glory VI, LLC, Old Glory VII, LLC, Old Glory IX, LLC, Old Glory XI, LLC, Old Glory XII, LLC, Old Glory XIII, LLC	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA16-557) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
060P17	State v. Jesse Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA16-229)	Denied
062P17	State v. David Campbell Sutton	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-405) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed *ex mero motu* 2. Denied

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

3 MAY 2017

069P17	In the Matter of the Foreclosure of Real Property Under a Deed of Trust Executed by Robert C. Collins and Rhonda B. Collins Dated June 20, 2006 and Recorded on June 23, 2006 in Book K-30 at Page 975 in the Macon County Public Registry, North Carolina	Respondents' PDR Under N.C.G.S. § 7A-31 (COA16-655)	Denied
071P17	State v. Perry Lyn Dupree	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Dismissed
072P17	State v. Lequan Fox	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Dismissed **03/24/2017**
073P17	State v. Laurice D. Boston	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Pitt 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
075P17	Ocwen Loan Servicing, Bank of New York Mellon v. Margaret Ann Reaves	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-927) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Extend Time	1. Denied 2. Dismissed as moot 3. Dismissed as moot
076P17	George Burns, Mark McCann, and Charles Bartlett, Trustees of Park's Chapel Free Will Baptist Church v. Kingdom Impact Global Ministries, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1313)	Denied

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

3 MAY 2017

080P17	State v. Samuel Allen Taylor	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Dismissed as moot 3. Allowed
082P17	State v. Michael Sheridan	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County	Denied
084P17	In the Matter of S.C.H. and J.A.H., Jr.	Respondent-Father's PDR Under N.C.G.S. § 7A-31	Denied
086P17	State v. Tara May Frazier	State's PDR Under N.C.G.S. § 7A-31 (COA16-449)	Denied
090P17	State v. Gregory Monroe	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
092P17	State v. Samuel Baker	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-645)	Denied
093P17	State v. Henry Arthur Little	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-480) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
094P17	State v. Edward Charles Green	Def's *Pro Se* Motion for Voter Fraud Dismissal	Dismissed
096P17	State v. Darryll Douglas Clay	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-564) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
098P17	State v. Almedeo Eugene Stewart	Def's PDR Under N.C.G.S. § 7A-31 (COA16-347)	Denied
100P17	State v. Christopher Jason Hudson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-431)	Denied
101P17	State v. Caleb J. Lucky, III	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied

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

3 MAY 2017

103P17	State v. Earl Wayne Flowers	Petitioner's *Pro Se* Petition for a *Writ of Habeas Corpus*	Denied **04/07/2017**
104P11-9	State v. Titus Batts	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-705)	Dismissed **Ervin, J., recused**
105P17	State v. Jimmy Reid	Def's *Pro Se* Motion for Notice of Appeal (COAP17-172)	Dismissed *ex mero motu* **Ervin, J., recused**
108P17	State v. Jesse C. Santifort	1. State's Motion for Temporary Stay (COA17-202) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for *Writ of Certiorari* to Review Order of COA 4. State's Motion to Amend Petition for *Writ of Certiorari*	1. Denied **04/18/2017** 2. Denied **04/18/2017** 3. Denied **04/18/2017** 4. Allowed **04/18/2017**
109P17	In Re Olander R. Bynum	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
111P17	Grace Justice Johnson v. Glenwood F. Johnson	1. Def's *Pro Se* Motion for PDR (COAP16-840) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
112P17	State v. Anthonio Shontari Farrar	1. State's Motion for Temporary Stay (COA16-679) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **04/10/2017** 2.
115P17	State v. Dean Michael Varner	1. State's Motion for Temporary Stay (COA16-591) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/12/2017** 2. 3.

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

3 MAY 2017

117P17	Yahudah Washitaw of East Terra Indians, David Hopskins, Kerklon Stackhouse, Maurice Stackhouse (Deceased), Shawn Singletary, and Betty Singletary v. PHH Mortgage Corporation, JP Morgan Chase BK NA, Nations Star, CIT Group/Sales Financing Inc., and State of North Carolina	Petitioners' *Pro Se* Motion for Removal from State Court	Dismissed
124P17	State v. Byron Bernard Sadler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
129A96-2	State v. Carlton Eugene Anderson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Jackson County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
132P17	State v. Eddie Levord Taylor	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/24/2017**
135P17	Celia A. Bell, Employee v. Goodyear Tire and Rubber Company, Employer, Liberty Mutual Insurance Company, Carrier	1. Def's Motion for Temporary Stay (COA15-1299) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **04/26/2017** 2.
155A16	Old Republic National Title Insurance Company, et al. v. Hartford Fire Insurance Company, et al.	Def's (Hartford Fire Insurance Company) Petition for Rehearing	Denied
158P06-11	State v. Derrick D. Boger	Def's *Pro Se* Motion for Appeal for Writ of Parole	Dismissed
223PA16	North Carolina Department of Public Safety v. Chauncey John Ledford	Petitioner's Motion to Withdraw Appeal	Allowed **04/03/2017**

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232P01-4	State v. Michael Eugene Reed, II	Def's *Pro Se* Motion for PDR (COAP17-66)	Dismissed **Hudson, J., recused**
237P16-3	Avery M. Riggsbee v. W. Baine Jones, Jr., Judge Government Employees	Plt's *Pro Se* Motion for Grant of Non-Stop Payout by Defendants	Dismissed
245A08-2	State v. Terrance Lowell Hyman	1. State's Motion for Temporary Stay (COA16-398) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. State's Petition for *Writ of Certiorar*i to Review Decision of COA 6. Def's Motion to Dismiss Appeal	1. Allowed **03/10/2017** 2. Allowed 3. --- 4. Dismissed 5. Allowed 6. Denied
254P04-2	State v. Charles Francis Graham	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, 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
266P16-2	State v. Timothy Terrell Crandell	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COAP17-41) 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
315PA15-2	Quality Built Homes Incorporated and Stafford Land Company, Inc. v. Town of Carthage1.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-115-2) 2. N.C. Water Quality Association and Seven Municipalities' Conditional Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed
330A16	Allscripts Healthcare, LLC v. Etransmedia Technology, Inc.	Motion to Admit Dana L. Salazar *Pro Hac Vice*	Allowed **03/24/2017**

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330A16	Allscripts Healthcare, LLC v. Etransmedia Technology, Inc.	Plt's Motion to Withdraw Appeal	Allowed **04/20/2017**
344P16	State v. Richard Pridgen	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-75) 2. State's Motion for Withdrawal and Substitution of Counsel	1. Denied 2. Allowed
345P16-3	State v. Dwayne Demont Haizlip	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/13/2017** **Ervin, J., recused**
346P16	Gurney B. Harris v. Southern Commercial Glass, Auto Owners Insurance, and Southeastern Installation, Inc., Cincinnati Insurance Company	1. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) Motion for Temporary Stay (COA15-1363) 2. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) *Writ of Supersedeas* 3. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) PDR Under N.C.G.S. § 7A-31 4. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) Motion to Hold PDR in Abeyance 5. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) Motion for Leave to Withdraw PDR	1. Allowed **09/20/2016** Dissolved **03/16/2017** 2. Dismissed as moot 3. --- 4. Allowed **01/26/2017** 5. Allowed
350P16	TD Bank, N.A. v. Eagles Crest at Sharp Top, LLC, John W. Holdsworth, and John H. Seats	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-807)	Allowed
356P16	Virginia Radcliffe v. Avenel Homeowners Association, Inc., Carmelo (Tony) Buccafurri, Stephen Murray, Thomas Dinero, David Hull, Richard Progelhof, and Ron Zanzarella	1. Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-884) 2. Plt's Motion to Treat Petition for *Writ of Certiorari* as a PDR 3. Defs' Joint Response to Plt's Motion to Treat Petition for *Certiorari* as Motion for Discretionary Review and Defs' Motion in the Alternative to File Supplemental Response to Plt's Petition	1. Denied 2. Allowed 3. Denied

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382P10-6	State v. John Lewis Wray, Jr.	Def's *Pro Se* Motion for Review	Dismissed **Beasley, J., recused**
382P16	Desiree King, by and through Her Guardian ad Litem, G. Elvin Small, III; and Amber M. Clark, Individually v. Albemarle Hospital Authority d/b/a Albemarle Health/ Albemarle Hospital; Sentara Albemarle Regional Medical Center, LLC d/b/a Sentara Albemarle Medical Center; Northeastern Ob/ Gyn, Ltd.; Barbara Ann Carter, M.D.; and Angela McWalter, CNM	1. Defs' (Albemarle Hospital Authority d/b/a Albemarle Health/Albemarle Hospital and Sentara Albemarle Regional Medical Center, LLC, d/b/a Sentara Albemarle Medical) PDR Under N.C.G.S. § 7A-31 (COA15-1190) 2. Defs' (Northeastern Ob/Gyn, Ltd., Barbara Ann Carter, M.D., and Angela McWalter, CNM) PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
386P16	State v. Quentin Lee Dick	1. State's Motion for Temporary Stay (COA15-1400) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/14/2016** 2. Allowed 3. Allowed
395P14	Lois A. Sauls v. Roland Gary Sauls	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-41) 2. Plt's Motion for Sanctions 3. Def's Motion for Issuance of Stay 4. Def's Motion to Withdraw PDR 5. Plt's Motion for Leave to Withdraw Response to PDR and Motion for Sanctions	1. --- 2. --- 3. Dismissed as moot 4. Allowed 5. Allowed
407P03-3	State v. Phillip Vance Smith, II	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
410P16	State v. Joshua Sanchez	1. State's Motion for Temporary Stay (COA15-1401) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/07/2016** 2. Allowed 3. Allowed

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449P11-16	State v. Charles Everette Hinton	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Full Evidentiary Hearing and Trial *De Novo* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion for Trial *De Novo* 5. Def's *Pro Se* Motion for Trial By Jury	1. Dismissed 2. Dismissed 3. Dismissed as moot 4. Dismissed 5. Dismissed **Ervin, J., recused**
454P16	State v. Andrew Robert Holloway	1. State's Motion for Temporary Stay (COA16-381) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/20/2016** Dissolved **05/03/2017** 2. Denied 3. Denied
460P16	In the Matter of D.P. and B.P.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA16-529) Denied	
462P16	State v. David Lee Applewhite	Def's PDR Under N.C.G.S. § 7A-31 (COA16-335)	Denied
505P96-3	State v. Melvin Lee White (DEATH)	Def's Motion for Extension of Time to File Petition for *Writ of Certiorari*	Allowed **04/13/2017**
538P13-2	State v. Ronald Wayne Spann	1. Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP16-909) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Caldwell County	1. Dismissed 2. Dismissed **Ervin, J., recused**

KERRY RAY HARRISON, EMPLOYEE
v.
GEMMA POWER SYSTEMS, LLC, EMPLOYER,

TRAVELERS INSURANCE COMPANY, CARRIER

No. 216A16

Filed 9 June 2017

Workers' Compensation—permanent partial disability—findings and conclusions—insufficient

The Industrial Commission in a workers' compensation case did not carry out a 2014 mandate of the Court of Appeals on remand that it make additional findings of fact and conclusions of law on the issue of plaintiff's entitlement to permanent partial disability benefits under N.C.G.S. § 97-31. The case was remanded for compliance with the 2014 mandate.

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. ___, 786 S.E.2d 433 (2016), affirming an amended opinion and award filed on 4 March 2015 by the North Carolina Industrial Commission. Heard in the Supreme Court on 22 March 2017.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson, for plaintiff-appellant.

Orbock, Ruark & Dillard, P.C., by Jessica E. Lyles and Roger L. Dillard, Jr., for defendant-appellees.

HUDSON, Justice.

In the Court of Appeals, plaintiff employee challenged the Industrial Commission's determination that he is not entitled to any compensation for permanent partial disability under N.C.G.S. § 97-31. The Court of Appeals, in a divided opinion, affirmed the denial, and plaintiff appealed to this Court on the basis of the dissenting opinion. We reverse the decision of the Court of Appeals and remand this case for further proceedings.

This summary of facts is based on the stipulations of the parties as well as the forms in the record and the unchallenged findings of fact in the most recent opinion and award filed on 4 March 2015. On 2 March

2001, plaintiff, a pipefitter, suffered a compensable accident and sustained injuries to his left upper leg, neck, and other areas of his body when a heavy valve fell on his head, while he was walking at his job site. Defendants, his employer at the time and its workers' compensation insurance carrier, accepted plaintiff's claim as compensable under the Workers' Compensation Act (Act). Plaintiff received medical treatment for his injuries for a period of several years, but defendants eventually refused to authorize additional medical treatment. Defendants have handled the claim as medical only from its onset, and plaintiff has never received indemnity payments.

After his work-related accident, plaintiff immediately complained of neck pain and headaches, and he received prompt treatment from an authorized medical provider, who documented plaintiff's complaints of headaches and neck pain. Plaintiff was referred to chiropractor Larry Stogner for care. Plaintiff attempted to return to work for defendant employer by doing light duty tasks, but he was laid off on 22 April 2001. On 27 June 2001, Dixon Gerber, M.D., an orthopaedic surgeon, saw plaintiff for a second opinion examination and found that plaintiff "was at maximum medical improvement and had no permanent partial disability." Dr. Gerber's medical record also reflected plaintiff's impression that he "could probably return to work at any time." Dr. Gerber released plaintiff from treatment without restrictions as of 2 July 2001, four months after plaintiff's work-related accident.

Defendant employer re-hired plaintiff but shortly thereafter terminated him for missing work and tardiness. After that, plaintiff worked for other employers, also as a pipefitter. Plaintiff testified that he had to stop working as a pipefitter in February 2003 because of his ongoing neck pain. Plaintiff then worked in other occupations until May 2009, and he received unemployment benefits when he was not working during that time. Plaintiff became a full-time community college student in May 2009.

During the years after his work-related accident, plaintiff continued to have neck pain, and in October 2002, defendants referred him for an independent medical examination by Robert Lacin, M.D., at Goldsboro Neurological Surgery. Dr. Lacin opined that he "certainly ha[d] no doubt that [plaintiff's] symptoms are related to this incident of March 2, 2001."

In December 2003, plaintiff began treatment with Hemanth Rao, M.D., at Neurology Consultants of the Carolinas. An MRI in November 2006 showed that plaintiff had evidence of a continuing injury, for which he was referred for a surgical opinion. Plaintiff received an independent

medical evaluation from Alfred Rhyne, M.D., at OrthoCarolina in April 2009, after which Dr. Rhyne recommended another MRI. Dr. Rhyne later testified that if plaintiff had no complaints of pain or problems before his March 2001 workplace injury, that injury "precipitated the onset of his symptoms." Defendants did not authorize the MRI as recommended by Dr. Rhyne.

Plaintiff subsequently received an MRI at the Veterans Affairs Medical Center in Fayetteville, North Carolina. A medical record from that facility dated 9 August 2010 diagnosed "[m]ultilevel cervical spondylosis seen in the lower cervical spine, most prominent at C5 and C6." Chiropractor Stogner, who had treated plaintiff since shortly after his injury, also opined that it was "more probable than not" that the 2 March 2001 workplace accident caused plaintiff's neck problems and stated that he does "not expect to see any significant improvement with [plaintiff's] injury status [as he] suspect[s] that [plaintiff's] condition is permanent."

Defendants' last payment of medical compensation to plaintiff was on 18 May 2009. Plaintiff enrolled in college full time in May 2009, graduated with an associate's degree in May 2012, and at the time his case was heard before the deputy commissioner, was a full-time student pursuing a bachelor's degree in business. Plaintiff worked part time at a desk job while he was a student.

On 25 January 2012, plaintiff filed a Form 33 with the Industrial Commission, asserting that defendants "ha[d] failed to authorize plaintiff's request for further treatment with Dr. Rhyne" and contending that there was also "an issue with indemnity benefits." In their response to this filing, defendants stated that the claim "is barred by the statute of limitations [in] G.S. §97-24. Plaintiff's claim is a no lost time claim. This claim was medical only and it has been more than two years since the last payment of medical compensation."

On 7 February 2013, a deputy commissioner ordered that, to the extent they had not done so, defendants provide (pay for) all medical treatment for plaintiff's neck condition for the period between the date of injury through 18 May 2009. The deputy denied plaintiff's claim for additional benefits under the Act. Plaintiff appealed to the Full Commission (Commission), which affirmed the deputy commissioner's opinion and award on 16 September 2013.

Plaintiff appealed the Commission's opinion and award to the North Carolina Court of Appeals, arguing, *inter alia*, that the Commission's

findings of fact were inadequate and that the record evidence entitled him to permanent impairment indemnity benefits. *Harrison v. Gemma Power Sys., LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 2014 WL 2993853 (2014) (unpublished) (*Harrison I*). Specifically, plaintiff argued that Finding of Fact 22 was not supported by competent evidence and that it irreconcilably conflicted with Finding of Fact 25. *Harrison I*, 2014 WL 2993853, at *10.

Finding of Fact 22 reads:

> 22. Dr. Rhyne testified that plaintiff's probable permanent partial disability would be three percent (3%), or if plaintiff had to have surgery, the rating would be in the range of five to fifteen percent (5-15%). The Commission assigns greater weight to the testimony of Dr. Gerber regarding plaintiff's permanent partial disability rating as Dr. Gerber was plaintiff's authorized treating physician and Dr. Rhyne only performed a one time independent medical evaluation. Therefore, based on Dr. Gerber's testimony, the Commission finds plaintiff has no permanent partial disability.

In Finding of Fact 5, the Commission noted that "Dr. Gerber found that plaintiff was at maximum medical improvement and has no permanent partial disability" and "released plaintiff from treatment without restrictions as of 2 July 2001."

Finding of Fact 25 reads:

> 25. Based upon the preponderance of the evidence in view of the entire record, the medical treatment plaintiff received for his neck condition, on or before 18 May 2009, was reasonable and medically necessary, and was reasonably calculated to effect a cure and give relief from plaintiff's 2 March 2001 compensable injury by accident.

Based on these findings, the Commission reached Conclusion of Law 2, that "[p]laintiff is entitled to the provision of medical treatment for his neck condition for the period from 2 March 2001 through 18 May 2009."

In a unanimous, unpublished opinion filed on 1 July 2014, the Court of Appeals, *inter alia*, reversed the Commission's denial of indemnity benefits, concluding that the Commission's findings and conclusions on that issue were "inadequate." *Id.* at *1. Specifically, the Court of Appeals agreed with plaintiff that Finding of Fact 22 lacked evidentiary

support but disagreed that Findings of Fact 22 and 25 are irreconcilable. *Id.* at *10. With respect to Findings of Fact 22 and 25, the Court of Appeals stated:

> [A] finding that Plaintiff is at maximum medical improvement with no permanent partial disability denotes that Plaintiff's compensable injury has healed and/or stabilized, with no permanent functional loss to his neck and/or back. The fact that Plaintiff has no *permanent* functional impairment, however, does not mean, *ipso facto*, that ongoing medical treatment will not be necessary to "effect a cure and give relief" to the underlying injury.

Id. The Court of Appeals instructed: "[I]f, on remand, the Full Commission again finds Plaintiff to have no permanent partial impairment, the Full Commission is instructed to enter additional findings reconciling that finding with Finding of Fact 25." *Id.* The Court of Appeals remanded the case to the Commission "for additional findings of fact and conclusions of law on the issue of Plaintiff's entitlement to permanent partial impairment benefits under N.C. Gen. Stat. § 97-31." *Id.* at *11.

On 4 March 2015, the Commission filed an amended opinion and award that made no change to its ultimate decision, including denying all additional benefits to plaintiff under the Act. In the amended opinion and award, however, the Commission modified Findings of Fact 22 and 25 (listed as Findings of Fact 23 and 26 in the amended opinion and award), as well as Conclusion of Law 2. It also added Conclusion of Law 6.

In Finding of Fact 23 of the amended opinion and award (amending Finding of Fact 22), the Commission bolstered its reasoning for assigning greater weight to the opinion of Dr. Gerber over that of Dr. Rhyne regarding the permanent partial disability rating. Finding of Fact 23 (amending Finding of Fact 22) now reads:

> 23. Dr. Rhyne testified that plaintiff's probable permanent partial disability would be three percent (3%), or if plaintiff had to have surgery, the rating would be in the range of five to fifteen percent (5-15%). The Commission assigns greater weight to the opinion of Dr. Gerber regarding plaintiff's permanent partial disability rating as detailed in Dr. Gerber's 27 June 2001 medical record. The Commission bases the decision to assign more weight to Dr. Gerber's opinion regarding the permanent partial disability rating on the fact that Dr. Gerber was able to

> examine plaintiff in close temporal proximity to plaintiff's compensable injury and also provided his opinion on plaintiff's permanent partial disability at the time of his examination. Dr. Gerber's record noted plaintiff's statement to him that plaintiff felt he could probably return to work, and found plaintiff to be at maximum medical improvement with no permanent disability and to have no work restrictions. Dr. Gerber's examination was on 27 June 2001, less than four months after plaintiff's injury, as compared to Dr. Rhyne, who did not examine plaintiff until 27 April 2009, more than eight years after plaintiff's injury and gave his opinion on plaintiff's permanent partial disability rating more than three years after his examination of plaintiff in October of 2012. Therefore, based on Dr. Gerber's 27 June 2001 medical record, the Commission finds that plaintiff reached maximum medical improvement on 27 June 2001 and that plaintiff has no permanent partial disability.

Also, the Commission reconciled Findings of Fact 22 and 25. In the amended opinion and award, Finding of Fact 26 (amending Finding of Fact 25) now reads:

> 26. Based upon the preponderance of the evidence in view of the entire record, the medical treatment plaintiff received for his neck condition, on or before 18 May 2009, was reasonable and medically necessary, and was reasonably calculated to give relief from plaintiff's 2 March 2001 compensable injury by accident. The Commission notes that even though plaintiff is determined to have reached maximum medical improvement on 27 June 2001, that determination is not inconsistent with plaintiff continuing to receive additional medical treatment to provide relief from his compensable injury by accident.

Conclusion of Law 2 in the amended opinion and award now reads:

> 2. Plaintiff is entitled to the provision of medical treatment for his neck condition for the period from 2 March 2001 through 18 May 2009. N.C. Gen. Stat. §§ 97-25; 97-25.1. The Commission further concludes that even though the medical treatment plaintiff received subsequent to his full duty release could not lessen his period of disability, the medical treatment he did receive

provided relief. The Supreme Court of North Carolina has instructed:

> N.C.G.S. § 97-25 does not, however, limit an employer's obligation to pay future medical expenses to those cases in which such expenses will lessen the period of disability. The statute also requires employers to pay the expenses of future medical treatments even if they will not lessen the period of disability as long as they are reasonably required to (1) effect a cure or (2) give relief.

Little v. Penn Ventilator Co., 317 N.C. 206, 210, 345 S.E.2d 204, 207 (1986). Therefore, the Commission concludes that plaintiff is entitled to the provision of medical treatment following his full duty release through 18 May 2009 as the medical treatment he received provided relief from his compensable injury.

Newly added Conclusion of Law 6 reads: "Based upon Dr. Gerber's assignment of a zero percent (0%) permanent partial disability rating, plaintiff is not entitled to any compensation for permanent partial disability."

These excerpts demonstrate the Commission's attempts to bolster its reasoning for assigning greater weight to the opinion of Dr. Gerber over that of Dr. Rhyne regarding the permanent partial disability rating and to reconcile the determination that plaintiff is entitled to medical treatment for his neck condition for the period from 2 March 2001 through 18 May 2009 (Finding of Fact 26, Conclusion of Law 2) with the determination that plaintiff is not entitled to any compensation for permanent partial disability (Finding of Fact 23, Conclusion of Law 6).

In the amended opinion and award, the Commission also added Finding of Fact 29, which reads in pertinent part: "[O]n 30 January 2009, plaintiff was assigned work restrictions of no lifting greater than twenty (20) pounds and no reaching overhead. Those restrictions rendered plaintiff's pre-injury job unsuitable as it would exceed both the lifting restriction and the prohibition on reaching overhead."

Plaintiff again appealed the Commission's decision to the Court of Appeals, which, in an unpublished, divided opinion filed on 3 May 2016, affirmed the amended opinion and award. *Harrison v. Gemma Power Sys., LLC*, ___ N.C. App. ___, 786 S.E.2d 433, 2016 WL 1744423 (2016) (unpublished) (*Harrison II*). The majority considered plaintiff's

argument that the Commission made an additional finding of fact in the amended opinion and award that plaintiff was assigned work restrictions on 30 January 2009, and therefore, the Commission's finding "recogniz[ed] a loss of functional ability due to injury" that amounted to a " 'functional abnormality' after maximum medical improvement because he can no longer perform his pre-injury job due to accident-related restrictions." *Harrison II*, 2016 WL 1744423, at *5. Therefore, according to plaintiff, the Commission's new finding establishes that he "has permanent partial impairment due to his injury," which finding is "irreconcilable with" a finding of fact and conclusion of law in the original opinion and award of the Commission. *Id.*

The majority found plaintiff's arguments unconvincing. *Id.* at *6. The majority concluded that although "competent record evidence . . . support[ed] the finding that" an examining physician imposed work restrictions on plaintiff on 30 January 2009, "the evidence does not indicate whether these restrictions were related to his 2 March 2001 injury in any way." *Id.*

The majority also noted that the Commission made an amended finding that "assigned greater weight to the opinion of Dr. Gerber regarding plaintiff's permanent partial disability, as opposed to the opinion of Dr. Rhyne." *Id.* at *7. Recognizing that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony," the majority held that the Commission "was entitled to place greater weight on the substance of Dr. Gerber's opinion." *Id.* Therefore, the Court of Appeals affirmed the amended opinion and award, holding that the Commission did not err in concluding that plaintiff is not entitled to any compensation for permanent partial disability. *Id.*

In contrast, the dissenting opinion concluded that the Commission again failed to properly determine whether plaintiff is entitled to compensation under N.C.G.S. § 97-31. *Id.* (Geer, J., dissenting). The dissent observed that the Commission found as fact that "as of 30 January 2009, plaintiff had a loss of function—a substantial limitation on his ability to lift a relatively modest weight and an inability to reach overhead." *Id.* at *8. The dissent did not agree "that the record contains no evidence that the 30 January 2009 restrictions were due to the 2 March 2001 compensable neck injury." *Id.* Rather, the dissent would conclude that, when read as a whole, the Commission's opinion and award establishes that "the Commission understood that the restrictions . . . assigned were due to plaintiff's compensable neck condition." *Id.* The dissent agreed with plaintiff that "the Commission's findings of fact do not support its

conclusion that plaintiff suffers no permanent partial disability within the meaning of [section] 97-31"; therefore, the dissent would reverse the Commission's opinion and award on this issue and, to the extent necessary, remand this case "so that the Commission can clarify its findings" "regarding the source of the physical restrictions" placed on plaintiff. *Id.* at *9.

Plaintiff appealed based on the dissenting opinion. Plaintiff argues that the Commission's detailed findings of fact compel a conclusion that he suffers from permanent partial impairment as a result of his compensable injury and is therefore entitled to collect scheduled benefits under N.C.G.S. § 97-31.

We decline plaintiff's invitation to hold that the findings of fact in the amended opinion and award compel the conclusion that plaintiff retains permanent partial impairment as a result of his injury. "[T]he Commission is the sole judge of the credibility of the witnesses and the weight of the evidence. . . . 'Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight.' " *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citations omitted) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). But, because we conclude that again the Commission has failed to adequately address the Court of Appeals' mandate that it make "additional findings of fact and conclusions of law on the issue of Plaintiff's entitlement to permanent partial impairment benefits under N.C. Gen. Stat. § 97-31," *Harrison I*, 2014 WL 2993853, at *11, we reverse the decision currently on appeal and remand this case to the Court of Appeals for further remand to the Commission to comply with the 2014 mandate of the Court of Appeals.

"In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the [Commission's] legal conclusions are fully reviewable." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000) (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). Moreover, "[t]o enable the appellate courts to perform their duty of determining whether the Commission's legal conclusions are justified, the Commission must support its conclusions with sufficient findings of fact." *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 761, 688 S.E.2d 431, 439 (2010) (citing *Pardue v. Blackburn Bros. Oil & Tire Co.*, 260 N.C. 413, 415-16, 132 S.E.2d 747, 748-49 (1963)). "Although the Commission need not find facts on every issue raised by the evidence, it is 'required to make findings on *crucial* facts upon which the right to compensation depends.' "

Cardwell v. Jenkins Cleaners, Inc., 365 N.C. 1, 2-3, 704 S.E.2d 898, 899 (2011) (per curiam) (quoting *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719 (emphasis added), *aff'd per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005)). "Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Watts*, 171 N.C. App. at 5, 613 S.E.2d at 719 (quoting *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987)).

Under the Workers' Compensation Act, an injured employee who suffers some degree of loss or permanent injury to a body part, as enumerated in N.C.G.S. § 97-31,[1] is entitled to collect permanent disability compensation for a "statutorily-prescribed period of time . . . which begins when the healing period ends and runs for the specific number of weeks set forth in the statute." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11, 562 S.E.2d 434, 442 (2002), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003); *see also* N.C.G.S. § 97-31 (2015). "[T]he healing period . . . ends at the point when the injury has stabilized, referred to as the point of 'maximum medical improvement'. . . ." *Knight*, 149 N.C. App. at 12, 562 S.E.2d at 442 (citations omitted).

At that point, a treating or evaluating physician typically assigns to the injured employee a "permanent partial impairment rating," which corresponds to the degree of permanent impairment to the body part. *See generally North Carolina Workers' Compensation Law: A Practical Guide to Success at Every Stage of a Claim* 167-68 (Valerie A. Johnson & Gina E. Cammarano eds., 3d ed. 2016) [hereinafter *Workers' Compensation Law*]; *see also* N.C.G.S. § 97-31; N.C. Indus. Comm'n, *N.C. Industrial Commission Rating Guide* sec. 1, http://www.ic.nc.gov/ncic/pages/ratinggd.htm http://www.ic.nc.gov/ncic/pages/ratinggd.htm (last updated July 8, 2016) (last visited June 3, 2017) [hereinafter *Indus. Comm'n Rating Guide*] ("Permanent physical impairment is any anatomical or functional abnormality or loss after maximum medical rehabilitation has been achieved and which abnormality or loss the physician considers stable or non-progressive at the time the evaluation is made."). This rating often determines the benefits to which the injured employee is entitled. *See generally Workers' Compensation Law* 167-68; *see also* N.C.G.S. § 97-31; *Indus. Comm'n Rating Guide*.

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1. N.C.G.S. § 97-31 lists a schedule of injuries and the rate and period of compensation for each, and specifically indicates that: "In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation . . . ." N.C.G.S. § 97-31 (2015).

The *N.C. Industrial Commission Rating Guide* is an Industrial Commission publication "made available to the physicians of the State of North Carolina" that is intended to be used "as a guide and basic outline for physicians making rating examinations of individuals who have had industrial injuries." *Indus. Comm'n Rating Guide* sec. 2. In addition to the specific impairment descriptions provided in the *Guide* for various body parts, the *Guide* recognizes that "in many cases there are intangible factors which cannot be stereotyped but must be considered," including but not limited to "pain, weakness, and dexterity." *Id.*

Additionally, an injured employee is eligible for compensation under N.C.G.S. § 97-31 "regardless of whether the employee has, in fact, suffered a loss of wage-earning capacity," because unlike all other types of disability benefits, "disability is presumed from the fact of the injury itself." *Knight*, 149 N.C. App. at 11, 562 S.E.2d at 442 (citation omitted).

Thus, to receive benefits for permanent injury under N.C.G.S. § 97-31, ordinarily, the plaintiff must establish that he or she has reached the point of maximum medical improvement and has a permanent impairment. A showing of maximum medical improvement indicates that the healing period has ended, and the "permanent partial impairment rating" indicates the degree of permanent damage or loss sustained to a body part.

Here the findings of fact are insufficient to enable this Court to determine the plaintiff's right to benefits under N.C.G.S. § 97-31. In *Harrison I* the Court of Appeals remanded this case to the Commission, mandating that the Commission make "additional findings of fact and conclusions of law on the issue of Plaintiff's entitlement to permanent partial impairment benefits under N.C. Gen. Stat. § 97-31." *Harrison I*, 2014 WL 2993853, at *11. Although the Commission bolstered its reasoning for assigning greater weight to the opinion of Dr. Gerber over that of Dr. Rhyne regarding the permanent partial disability rating in Finding of Fact 23 of the amended opinion and award, we conclude that the Commission has still failed to address adequately whether plaintiff retains any permanent impairment compensable under N.C.G.S. § 97-31.

The record here contains indications in medical records and treatment notes that plaintiff's injury may be permanent and ongoing. Various medical providers entered these notes well past the date of Dr. Gerber's 27 June 2001 medical evaluation. The record contains, *inter alia*, the following: (1) in 2003 Dr. Rice indicated that "at this juncture, [he] feel[s] [plaintiff] continues to have symptoms from his injuries which need to be addressed through the VA"; (2) in 2004 an evaluation from Carolina

Complete Rehabilitation Center recommends therapy and indicates that plaintiff has "decreased mobility of [the] cervical region" and "continues to experience neck pain that increases with quick movements of [his] head and forward bending[, with his pain] rated at 7/10 in the scale of 0-10"; (3) in 2006 a report from Neurology Consultants of the Carolinas indicates that plaintiff "is a patient [they] have been following for headaches, neck pain, and painful paresthesias on the right upper extremity resulting from an accident at work," that plaintiff has "a mild disk bulge at the C6-77 level," and that plaintiff "has already been treated for this conservatively, but has not improved" so they will "refer him for a surgical opinion"; (4) in 2009 a medical record by Dr. Rhyne indicates that plaintiff's "MRI was conclusive for a mild broad-based disk bulge at C6-C7 without evidence of spinal stenosis"; (5) in 2010 a progress note from the Fayetteville, North Carolina, Veterans Affairs Medical Center indicates that a "multilevel cervical spondylosis [is] seen in the lower cervical spine"; and (6) in 2012 Chiropractor Stogner's visit note indicates that "it is conclusive that [plaintiff] has some serious neck issues to consider," that "the combination of degenerative changes and ongoing restriction to movement . . . suggest that the accident is the cause of his ongoing problems," and that Chiropractor Stogner does "not expect to see any significant improvement with [plaintiff's] injury status and [he] suspect[s] that [plaintiff's] condition is permanent."

Despite these indications, the amended opinion and award does not contain adequate findings and conclusions on whether plaintiff has a permanent injury, taking into account all pertinent evidence. Without such findings, we are unable to review any determination regarding whether plaintiff is, in fact, entitled to benefits for permanent partial impairment under N.C.G.S. § 97-31.

Additionally, we hold that the Commission must modify Finding of Fact 23 and Conclusion of Law 6. Finding of Fact 23 either fails to adequately address the necessary issue, *Cardwell*, 365 N.C. at 2-3, 704 S.E.2d at 899, or it contains a mere recitation of the evidence rather than true findings. To the extent that the finding is simply a recitation of the evidence, it does not constitute a finding of fact sufficient to comply with the Act. *See, e.g.*, N.C.G.S. § 97-84 (2015); *Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) ("This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony." (citations omitted)), *disc. rev. denied*, 362 N.C. 236, 659 S.E.2d 735 (2008); *Davis v. Weyerhaeuser Co.*, 132 N.C. App. 771, 776, 514 S.E.2d 91, 94 (1999) ("Although we 'interpret the Commission's

practice of reciting testimony to mean that it does find the recited testimony to be a fact,' *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 442 n.7, 342 S.E.2d 798, 808 n.7 (1986), it is the Commission's duty to find the ultimate determinative facts, not to merely recite evidentiary facts and the opinions of experts."). Further, the Commission must explain its finding of no permanent impairment, given the nearly eight years of treatment between Dr. Gerber's medical opinion in June 2001 and 18 May 2009, when the condition was found compensable (Findings of Fact 25 and 26).

We conclude that the Commission has failed to carry out the Court of Appeals' mandate that it make additional findings of fact and conclusions of law on the issue of plaintiff's entitlement to benefits under N.C.G.S. § 97-31. For this reason, we reverse the decision of the Court of Appeals and remand this matter to that court for further remand to the Commission to comply with the 2014 mandate of the Court of Appeals in *Harrison I* and enter a new opinion and award not inconsistent with this opinion.

REVERSED AND REMANDED.

MURRAY v. UNIV. OF N.C. AT CHAPEL HILL

[369 N.C. 585 (2017)]

JILLIAN MURRAY
v.
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 124A16

Filed 9 June 2017

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. ___, 782 S.E.2d 531 (2016), dismissing an appeal from an order entered on 6 November 2014 by Judge Carl R. Fox in Superior Court, Orange County, and remanding the case for further proceedings. On 9 June 2016, the Supreme Court allowed defendant's petition for discretionary review as to an additional issue. Heard in the Supreme Court on 21 March 2017.

Law Firm of Henry Clay Turner, PLLC, by Henry Clay Turner, for plaintiff-appellee.

Joshua H. Stein, Attorney General, by Elizabeth A. Fisher, Assistant Solicitor General, and Laura Howard McHenry, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to the additional issue was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
WILLIAM MILLER BAKER

No. 35PA16

Filed 9 June 2017

1. Rape—attempted—evidence sufficient—completed rape

Evidence tending to show that a completed rape occurred in the victim's bedroom was sufficient to support defendant's conviction for attempted rape of a child, and the trial court did not err in denying defendant's motion to dismiss the attempted rape charge for insufficiency of the evidence.

2. Appeal and Error—preservation of issues—appeal by State

Where the State failed to advance an argument prior to filing its discretionary review petition in the Supreme Court, the State did not waive the right to make the argument on appeal. The question was whether the ruling of the trial court was correct rather than whether the reason given was sound or tenable, and the State had consistently maintained its position.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 781 S.E.2d 851 (2016), vacating in part defendant's convictions after appeal from a judgment entered on 8 August 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County, and remanding for resentencing. Heard in the Supreme Court on 22 March 2017.

Joshua H. Stein, *Attorney General*, *by Anne M. Middleton*, *Special Deputy Attorney General*, *for the State-appellant.*

Jennifer Harjo, *Public Defender*, *New Hanover County*, *by Brendan O'Donnell*, *Assistant Public Defender*, *for defendant-appellee.*

ERVIN, Justice.

The issue presented for our consideration in this case is whether the record contains sufficient evidence to support defendant's conviction for attempted first-degree rape of a child in violation of N.C.G.S.

§ 14-27.2A(a).[1] In vacating defendant's attempted rape conviction, the Court of Appeals held that "[t]he State failed to present substantial evidence of all elements of" that offense. *State v. Baker*, ___ N.C. App. ___, ___, 781 S.E.2d 851, 856 (2016). After examining the record in light of the applicable legal standard, we conclude that the evidence adequately supported the jury's determination that defendant had committed the offense of attempted first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a) and reverse the Court of Appeals' decision with respect to this issue.

According to the State, defendant committed two specific sexual assaults against Amanda[2] between the dates of 1 April 2008 and 21 October 2009, one of which allegedly occurred in Amanda's bedroom and the other of which allegedly occurred on a couch in the family residence. At the time of these incidents, defendant, who had been born in 1981, was the boyfriend of Amanda's mother and lived in the family home with Amanda, her mother, and Amanda's two brothers, the younger of whom was defendant's son.

Amanda claimed that, during the summer of 2009, defendant entered her bedroom, in which she was lying on the bed; removed his own shorts and Amanda's shorts and underwear; and began touching her vagina. Although Amanda was "kicking and screaming" as he did so, defendant "put his penis in [her] vagina." Defendant's assaultive conduct ended when Amanda's mother, who had been sleeping downstairs, entered the bedroom and discovered defendant, who was unclothed, with Amanda, whose shorts and underwear were around her knees. After making this discovery, Amanda's mother told Amanda to keep her door locked.

Amanda's mother described the bedroom incident in somewhat different terms. While sleeping on a downstairs couch during the summer of 2009, Amanda's mother heard what she believed to be her youngest child falling out of bed, as he had a habit of doing. After checking on the child and his brother, who were both asleep, Amanda's mother opened the door to Amanda's bedroom, in which she found defendant, who was asleep and clad in nothing other than his underwear, lying partially on Amanda's bed. Amanda's mother could not determine whether Amanda

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1. The General Assembly recodified this offense as N.C.G.S. § 14-27.23(a), effective 1 December 2015. Act of July 29, 2015, ch. 181, secs. 5(a), 48, 2015 N.C. Sess. Laws 460, 461, 472.

2. "Amanda" is a pseudonym that we, like the Court of Appeals, have employed for ease of reading and to protect the identity of the child.

was clothed because she was lying face down on the bed beneath a blanket. According to Amanda's mother, defendant had a history of "blood sugar" problems and would, on occasion, get up in the night, act in an angry or disoriented manner, and pass out. Amanda's mother thought that defendant's presence in Amanda's room on the occasion in question resulted from just such a "low blood sugar" episode. Although Amanda told her mother that defendant had hurt her, she understood Amanda's statement to be focused upon the fact that defendant had collapsed on top of her, and she told Amanda to lock her bedroom door to prevent the recurrence of such an injury. Defendant, on the other hand, told Amanda's mother that he had no memory of what had caused him to be in Amanda's bedroom or what had happened there.

In the autumn of 2009, Amanda arrived home from school to find defendant in an intoxicated condition. As Amanda sat down on the couch to do her homework, defendant began touching Amanda's chest. Although defendant attempted to have Amanda lie down on the couch, she was able to move away from him after he appeared to have fallen asleep. When defendant sat up, Amanda grabbed a phone, fled to her bedroom, entered the closet, and telephoned her mother with a request that her mother have someone come get her. Amanda was subsequently picked up by her grandparents.

Amanda's mother, on the other hand, remembered that Amanda had called her at work in the autumn of 2009 and told her that defendant's conduct was frightening her. Although Amanda did not specify what defendant had done to frighten her, Amanda's mother honored her daughter's request that she be picked up.

Amanda claimed that, prior to the bedroom incident, defendant had committed repeated sexual assaults against her. According to Amanda, defendant had touched her, put his penis in her vagina, and "grabbed [her] from [her] arms and told [her] not to tell anybody." Although Amanda could not recall how old she was when these earlier incidents occurred, she knew that she "was little."

Amanda initially disclosed that she had been sexually abused during a conversation with some school friends during the fall of 2009. Even though a school counselor reported Amanda's allegations to Wake County Child Protective Services, Amanda told both Danielle Doyle, an investigator with Wake County Child Protective Services, and Detective Peggy Marchant of the Cary Police Department that no sexual abuse had occurred. After receiving a new report that defendant had abused Amanda, Ms. Doyle and Detective Marchant spoke with Amanda again.

Although she was initially hesitant to discuss sexual abuse-related issues during this interview, Amanda admitted that she was having nightmares, that she had not been sleeping well, and that her level of nightmares, including flashbacks about being touched, had been increasing as the date upon which defendant was scheduled for release from prison (in which he was serving a sentence based upon an unrelated conviction) neared. When Amanda disclosed incidents involving attempted penile-vaginal contact and the fondling of her breasts and genital area, Ms. Doyle terminated the interview and made an appointment for Amanda to be evaluated by SafeChild Advocacy Center.

On 21 November 2011, Sara Kirk, a child abuse evaluation specialist at the Center, interviewed Amanda. During that interview, Amanda stated that, a couple of years earlier, defendant had touched her in an inappropriate manner and attempted to put his penis in her vagina. In describing the bedroom incident, Amanda replied, "I don't think it did," when asked if defendant's penis had entered her private part. Amanda did not claim that defendant's penis had penetrated her vagina at the time of the bedroom incident until a 14 July 2013 meeting with investigating officers and representatives of the District Attorney's office.

Holly Warner, a nurse practitioner at the Center, found "no signs of acute, meaning recent, or healed trauma to [Amanda's] vaginal area." However, Ms. Warner also stated that such results were not uncommon even if vaginal penetration had occurred.

Jeanine Bolick, a licensed clinical social worker, conducted counseling sessions with Amanda from 8 May 2012 through 11 June 2013. In light of Amanda's reluctance to discuss sexual abuse-related issues and her tearful affect when the subject of sexual abuse was mentioned, Ms. Bolick diagnosed Amanda as suffering from post-traumatic stress disorder. On the other hand, Ms. Bolick admitted that she had not observed specific symptoms of sexual abuse during her sessions with Amanda and that post-traumatic stress disorder can have a number of causes.

Defendant denied that he had ever attempted to insert his penis into Amanda's vagina, that he had ever entered Amanda's bedroom for that purpose, or that he had ever touched Amanda inappropriately. In addition, defendant denied that there had ever been a time in the autumn of 2009 in which Amanda had been alone with defendant after returning home from school. Finally, defendant denied having ever passed out in Amanda's bedroom for reasons relating to his diabetic condition.

On 24 January 2012, the Wake County grand jury returned a bill of indictment charging defendant with attempted first-degree rape of a

child in violation of N.C.G.S. § 14-27.2(a)(1) and taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(1). On 6 August 2013, the Wake County grand jury returned a superseding indictment charging defendant with three counts of attempted first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a), one count of first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a), and three counts of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(1). On 29 October 2013, the Wake County grand jury returned superseding indictments charging defendant with first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a), attempted first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a), and taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(1), with all three offenses allegedly having occurred on or about 1 April 2008 through 21 October 2009. The charges against defendant came on for trial before the trial court and a jury at the 4 August 2014 criminal session of the Superior Court, Wake County. At the conclusion of the State's evidence and at the close of all of the evidence, defendant unsuccessfully sought to have the charges that had been lodged against him dismissed for insufficiency of the evidence.

At the jury instruction conference, the trial court indicated, without objection from either party, that it intended to inform the jury that, before the jury could convict defendant of any of the three charges that had been lodged against him, it had to find that each charge was supported by evidence relating to a separate, discrete event and that the verdict sheet would set forth "three counts," with there being "no lesser-included offenses that [the court was] aware of." The trial court began and ended its instructions with respect to each of the substantive offenses that defendant had been charged with committing by stating that, in order to find defendant guilty, the jury had to find beyond a reasonable doubt that the conduct supporting the offense in question involved a discrete event that was separate from any of the events upon which the jury relied in convicting defendant of having committed any other offense. For example, the trial court instructed the jury with respect to the issue of defendant's guilt of attempted first-degree rape of a child that:

> The defendant has been charged with attempted rape of a child. For you to find the defendant guilty of attempted rape of a child the state must prove four things beyond a reasonable doubt:
>
> If you have found the defendant guilty of rape of a child in count one and/or indecent liberties with a child in count three, then the state must prove beyond

a reasonable doubt that these four things in count two occurred on an occasion separate from the event you found to have occurred in count one and separate from the event you found to have occurred in count three.

The state must prove beyond a reasonable doubt that, first, defendant intended to engage in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male organ.

Second, that at the time of the act alleged the victim was a child under the age of thirteen years.

Third, that at the time of the act alleged the defendant was at least eighteen years of age.

And fourth, the defendant performed an act that was calculated and designed to accomplish vaginal intercourse with the victim and that such conduct came so close to bringing about vaginal intercourse that in the ordinary course of events the defendant would have completed the act with the victim had he not been stopped or prevented. Mere preparation or planning is not enough to constitute such an act, but the act need not necessarily be the last act required to complete the offense.

If you find from the evidence beyond a reasonable doubt that . . . in or about the period from April 1, 2008 through October 21, 2009 but if you have found the defendant guilty of rape of a child in count one separate from that occasion or if you have found the defendant guilty of indecent liberties with a child in count three separate from that occasion, the defendant intended to engage in vaginal intercourse with the victim and that at that time the victim was a child under the age of thirteen years and that the defendant was at least eighteen years of age and that the defendant performed an act . . . which in the ordinary course of events would have resulted in vaginal intercourse by the defendant with the victim . . . had not the defendant been stopped or prevented from completing this apparent course of action, 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.

On 8 August 2014, the jury returned a verdict finding defendant guilty of attempted first-degree rape of a child and taking indecent liberties with a child. In light of the jury's inability to reach a unanimous verdict with respect to the issue of defendant's guilt of first-degree rape of a child, the trial court declared a mistrial with respect to that count of the superseding indictment. After accepting the jury's verdict, the trial court consolidated defendant's convictions for judgment and sentenced defendant to a term of 240 to 297 months of imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

[1] In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued, among other things, that the trial court had erred by denying his motion to dismiss the attempted rape charge for insufficiency of the evidence.[3] More specifically, defendant contended that the evidence concerning the couch incident did not suffice to support an attempted rape conviction and that the evidence concerning the bedroom incident, when taken in the light most favorable to the State, showed that defendant had committed a completed, rather than an attempted, rape. In addition, defendant argued that, to the extent that "the trial court's instruction permitted the jury to find the defendant guilty of attempted rape as a lesser included offense of rape," the delivery of that instruction constituted plain error.

Although the State argued that the record contained sufficient evidence to support defendant's attempted rape conviction, it appeared to concede that the testimony regarding the various statements that Amanda had made during the investigative process had not been admitted for substantive purposes and could not be considered in analyzing the sufficiency of the evidence to support defendant's attempted rape conviction. In addition, the State acknowledged that, with respect to the bedroom incident, Amanda "did, in fact, testify to a completed act of vaginal intercourse." Even so, however, the State maintained that the record evidence concerning both the bedroom and the couch incidents was sufficient to support defendant's attempted rape conviction. Finally, the State argued that the trial court had not erred, much less committed plain error, in the course of instructing the jury.

In the course of vacating defendant's attempted rape conviction, the Court of Appeals noted that the parties agreed that defendant's conviction could only be sustained on the basis of evidence concerning either

3. Defendant did not challenge the validity of his conviction for taking indecent liberties with a child before the Court of Appeals.

the bedroom incident or the couch incident. *Baker*, ___ N.C. App. at ___, 781 S.E.2d at 855. Moreover, the Court of Appeals determined that the substantive evidence contained in the present record concerning the bedroom incident "could support a conviction for a completed rape" but did not constitute "substantive evidence of attempted rape." *Id.* at ___, 781 S.E.2d at 855 (citing *State v. Batchelor*, 190 N.C. App. 369, 373-75, 660 S.E.2d 158, 162 (2008)). Finally, the Court of Appeals determined that the evidence concerning the couch incident did not suffice to show that defendant had "intended to rape Amanda." *Id.* at ___, 781 S.E.2d at 856. As a result, the Court of Appeals concluded that the trial court had erred by denying defendant's motion to dismiss the attempted rape charge, declined to address defendant's challenge to the trial court's jury instructions, vacated defendant's attempted rape conviction, and remanded this case to the trial court for resentencing. *Id.* at ___, 781 S.E.2d at 856. On 9 June 2016, we allowed the State's discretionary review petition.

In the brief that it filed before this Court, the State argues that the Court of Appeals erred by vacating defendant's attempted rape conviction on sufficiency of the evidence grounds given that prior decisions from both this Court and the Court of Appeals establish that evidence reflecting a completed rape can support an attempt conviction.[4] In response, defendant argues, among other things, that the decisions upon which the State relies "do not actually stand for the proposition that legally sufficient evidence of a completed crime will necessarily support a verdict of a lesser included crime" and that the State's contention "that evidence of the greater offense supports a verdict of guilt on the lesser offense cannot be squared with" this Court's decisions to the effect that, "where the evidence of the greater offense is positive and there is no evidence of the lesser included offense, the lesser included offense may not be considered by the jury and the defendant may not be convicted of it." In addition, defendant argues that the attempted rape charge was not submitted to the jury as a lesser included offense of rape and that the jury's inability to reach a unanimous verdict with respect to the completed rape charge shows that the jury had doubts about the veracity

4. In addition, the State argued that the non-specific evidence concerning the history of defendant's assaults upon Amanda set out in Amanda's trial testimony and the evidence concerning the couch incident both provide independent support for defendant's attempted rape conviction. However, given our determination that the substantive evidence concerning the bedroom incident adequately supported defendant's attempted rape conviction, we need not address either of these additional arguments any further in this opinion.

of Amanda's testimony. Furthermore, to the extent that the prior decisions of this Court and the Court of Appeals suggest that, despite the absence of any evidence tending to show that an attempted rape had occurred, any error in submitting the issue of a defendant's guilt of a lesser included offense was favorable, rather than adverse to, the defendant, this Court has retreated from such statements in subsequent decisions. In defendant's view, a verdict convicting defendant of a crime for which there is no evidentiary support violates defendant's fundamental rights to due process and a unanimous verdict. Finally, defendant argues that, if the attempted rape charge had not been submitted to the jury, there is a reasonable possibility that the jury would have been unable to reach a unanimous verdict with respect to the completed rape charge or found defendant not guilty of that offense.[5]

> "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.

State v. Mann, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citations omitted) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)),

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5. **[2]** In addition to the arguments discussed in the text of this opinion, defendant has asserted, in reliance upon this Court's decisions in *North Carolina School Boards Ass'n v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005), and *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836 (1934), that the State waived the right to argue that evidence tending to show that a completed rape occurred sufficed to support defendant's attempted rape conviction given that the State failed to advance this argument prior to filing its discretionary review petition. However, neither of the decisions upon which defendant relies provides adequate support for this argument given that *Weil* involved a direct appeal from the trial court to this Court in which the appellant sought to raise an argument which had not been presented for the trial court's consideration, 207 N.C. at 10, 175 S.E. at 838, and *Moore* involved a situation in which the defendant-appellants sought to advance an argument based upon a state constitutional provision that they had failed to present before either the trial court or the Court of Appeals, 359 N.C. at 481, 510, 614 S.E.2d at 508, 526. In this case, however, the State, which was the appellee before the Court of Appeals, is challenging a decision of the Court of Appeals overturning a trial court decision in its favor. As a result of the fact that "[t]he question for review is whether the ruling of the trial court was correct" rather than "whether the reason given therefor is sound or tenable," *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)), *cert. denied*, 484 U.S. 916, 98 L. Ed.2d 224 (1987), and the fact that the State has consistently taken the position that the record evidence sufficed to support the submission of the issue of defendant's guilt of attempted rape to the jury, we do not believe that the State has waived the right to argue in support of the trial court's decision to deny defendant's dismissal motion that evidence that defendant committed a completed rape sufficed to support his conviction for attempted rape.

cert. denied, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In making this determination:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted).

"A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years." N.C.G.S. § 14-27.2A(a) (2013). " '[V]aginal intercourse' . . . means the slightest penetration of the sexual organ of the female by the sexual organ of the male." *State v. Johnson*, 317 N.C. 417, 435, 347 S.E.2d 7, 18 (1986) (citations omitted), *superseded by statute*, N.C.G.S. § 8C-1, Rule 404(b), *on other grounds as recognized in State v. Moore*, 335 N.C. 567, 594-96, 440 S.E.2d 797, 812-14, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994). "The elements of an attempt to commit a crime are: '(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (quoting *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996), and citing *State v. Ball*, 344 N.C. 290, 305, 474 S.E.2d 345, 354 (1996), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997))).

In *State v. Roy*, defendant Roy was indicted for rape. 233 N.C. 558, 558, 64 S.E.2d 840, 840 (1951). However, the prosecutor elected to proceed against defendant Roy based solely upon a charge of assault with intent to commit rape at the time that the case was called for trial. *Id.* at 558, 64 S.E.2d at 840-41. In rejecting defendant Roy's challenge to the denial of his motion for nonsuit on appeal, which was predicated on the fact that all of the evidence showed a completed rape rather than an attempt, *id.* at 559, 64 S.E.2d at 841, we noted that "it is well settled that an indictment for an offense includes all the lesser degrees of the same crime," *id.* at 559, 64 S.E.2d at 841 (citations omitted); indicated that, "although all the evidence may point to the commission of the graver crime charged in a bill of indictment, the jury's verdict for an offense of a lesser degree will not be disturbed, since it is favorable to

the defendant," *id.* at 559, 64 S.E.2d at 841 (citations omitted); and concluded that "[t]he evidence adduced in the trial below was ample to support the verdicts rendered," *id.* at 560, 64 S.E.2d at 841. As a result, this Court clearly held in *Roy* that evidence of a completed rape sufficed to support an attempted rape conviction.

Similarly, in *State v. Canup*, the prosecuting witness testified at trial that the defendant had "stuck his penis in her vagina" despite the fact that the grand jury had indicted the defendant for attempted second-degree rape. 117 N.C. App. 424, 426, 451 S.E.2d 9, 10 (1994). In response to the defendant's argument that the evidence did not suffice to support his attempted rape conviction, the Court of Appeals stated that "[e]vidence that this defendant continued to pursue his malevolent purpose and achieved penetration does not decriminalize his prior overt acts" since "[t]he completed commission of a crime must of necessity include an attempt to commit the crime." *Id.* at 428, 451 S.E.2d at 11. According to the Court of Appeals, "nothing in the philosophy of juridical science requires that an attempt must fail in order to receive recognition." *Id.* at 428, 451 S.E.2d at 11 (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 612 (3d ed. 1982) [hereinafter *Criminal Law*]). However,

> [a] successful attempt to commit a crime will not support two convictions and penalties,[—]one for the attempt and the other for the completed offense. This is for the obvious reason that whatever is deemed the appropriate penalty for the total misconduct can be imposed upon conviction of the offense itself, but this does not require the unsound conclusion that proof of the completed offense disproves the attempt to commit it.

Id. at 428, 451 S.E.2d at 11-12 (quoting *Criminal Law* 612 (emphasis added and footnotes omitted)). As a result, the Court of Appeals determined that the record evidence "would have supported the defendant's being charged with either second degree rape or attempted second degree rape and convicted of either offense." *Id.* at 428, 451 S.E.2d at 12.

Approximately two decades later, the Court of Appeals held, in reliance upon *Canup*, that the evidence sufficed to preclude allowance of the defendant's motion to dismiss an attempted larceny charge for insufficiency of the evidence in a case in which the State had indicted the defendant for attempted larceny while all the evidence tended to show that a completed larceny had occurred. *State v. Primus*, 227 N.C. App. 428, 430-32, 742 S.E.2d 310, 312-13 (2013). In doing so, the court rejected the defendant's argument that guilt of the crime of attempted larceny

requires that the defendant's act supporting the attempt charge fall short of the competed offense in order to be sufficient to support an attempt conviction, *id.* at 429-32, 742 S.E.2d at 312-13, a conclusion that accords with the modern view concerning criminal liability for attempt. 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5, at 230 (2d ed. 2003) (stating that, "[a]lthough the crime of attempt is sometimes defined as if failure were an essential element, the modern view is that a defendant may be convicted on a charge of attempt even if it is shown that the crime was completed"). As a result, a careful review of the relevant decisions of this Court and the Court of Appeals demonstrates that evidence of a completed rape is sufficient to support an attempted rape conviction.

As defendant emphasizes, this Court has held that

> [w]here there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence.* If the lesser included offense is not supported by the evidence, it should not be submitted, regardless of conflicting evidence.

State v. Jones, 304 N.C. 323, 331, 283 S.E.2d 483, 488 (1981). For that reason, in the event that the State has elicited positive evidence of every element of the completed crime of rape and the defendant claims that his encounter with the alleged victim was consensual or never occurred, the trial court should not allow the jury to consider the issue of the defendant's guilt of the lesser included offense of attempted rape. *State v. Nelson*, 341 N.C. 695, 698, 462 S.E.2d 225, 226 (1995). "The rule that a jury can believe all, part, or none of a party's evidence," *id.* at 698, 462 S.E.2d at 226 (citing *State v. Faircloth*, 297 N.C. 388, 255 S.E.2d 366 (1979), *superseded by statute*, N.C.G.S. § 15A-924, *on other grounds as recognized in State v. Silas*, 360 N.C. 377, 627 S.E.2d 604 (2006)), "does not apply when to let it do so could result in the jury's finding of guilt of a crime which is not supported by the evidence of either party," *id.* at 698, 462 S.E.2d at 226. However, the decisions upon which defendant relies, including *Nelson*, 341 N.C. at 698, 462 S.E.2d at 226; *State v. Smith*, 315 N.C. 76, 102, 337 S.E.2d 833, 850 (1985); *State v. Horner*, 310 N.C. 274, 283, 311 S.E.2d 281, 287-88 (1984); *State v. Strickland*, 307 N.C. 274, 287, 298 S.E.2d 645, 654 (1983), *abrogated in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); and *State v. Jones*, 249 N.C. 134, 139, 105 S.E.2d 513, 517 (1958), address whether the defendant was entitled to the submission of the issue of his or her guilt of a lesser included offense to the jury rather than the entirely separate issue

of whether the evidence sufficed to support the defendant's conviction. For that reason, the proper resolution of defendant's challenge to the sufficiency of the evidence to support his attempted rape conviction hinges upon cases such as *Roy*, *Canup*, and *Primus* rather than upon the decisions on which defendant relies.

Defendant's reliance upon this Court's opinions in *State v. Ray*, 299 N.C. 151, 261 S.E.2d 789 (1980), and *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991), which deal with the extent to which the erroneous submission of the issue of the defendant's guilt of a lesser included offense that lacked adequate evidentiary support constituted prejudicial error, is equally misplaced. As was the case with defendant's argument in reliance upon *Nelson*, *Smith*, *Horner*, *Strickland*, and *Jones*, the present case involves the issue of whether evidence of the defendant's guilt of the completed offense suffices to support an attempt conviction rather than the issue of whether the jury should have been allowed to consider the issue of the defendant's guilt of a lesser included offense that lacked adequate evidentiary support. As if that were not enough to render this case distinguishable from *Ray* and *Arnold*, neither of those decisions involved a situation in which the issue of the defendant's guilt of attempt was erroneously submitted to the jury despite the fact that all of the evidence showed the commission of a completed offense. Finally, although its decision is obviously not binding upon us, the Court of Appeals held in *State v. Wade*, 49 N.C. App. 257, 271 S.E.2d 77 (1980), *cert. denied*, 315 N.C. 596, 341 S.E.2d 37 (1986), that the defendant was not entitled to relief on appeal based upon the trial court's erroneous decision to instruct the jury concerning the issue of the defendant's guilt of the lesser included offense of attempted rape in a case in which all the evidence tended to show that the defendant was guilty of a completed rape on the grounds that, "[i]f there were error from the instruction complained of, such was favorable to [the] defendant and harmless." *Id.* at 261-62, 271 S.E.2d at 80. As a result, *Ray* and *Arnold*, which address an issue that is not before the Court in this instance, have no bearing on the proper resolution of this case either.

Thus, for all these reasons, we conclude that the record evidence tending to show that a completed rape had occurred in Amanda's bedroom sufficed to support defendant's conviction for attempted rape and that the trial court did not, for that reason, err in denying defendant's motion to dismiss the attempted rape charge for insufficiency of the evidence. In addition, given the fact that the issue of defendant's guilt of attempted rape was not submitted to the jury as a lesser included offense of first-degree rape of a child, there is no need for further consideration

of defendant's argument that the trial court committed plain error by allowing the jury to convict him of attempted rape as a lesser included offense of first-degree rape of a child. As a result, the Court of Appeals' decision vacating the judgment that the trial court entered based upon defendant's conviction for attempted first-degree rape of a child is reversed.

REVERSED.

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL

No. 252PA14-2

Filed 9 June 2017

Appeal and Error—Rule of Appellate Procedure 2—invoked by Court of Appeals without discussion of merits

The Court of Appeals erred in this case (*Campbell II*) by invoking Rule 2 of the Rules of Appellate Procedure to review defendant's fatal variance argument. The panel in *Campbell II* merely noted that a previous panel of that court had, for the same case (*Campbell I*), invoked Rule 2 to review a similar fatal variance argument and then, without further discussion or analysis regarding Rule 2, the *Campbell II* panel addressed the merits of defendant's argument. The panel failed to exercise its discretion when it did not consider whether defendant's case was one of the rare instances meriting exercise of the court's supervisory power under Rule 2. The case was reversed and remanded to the Court of Appeals for an independent determination of whether the facts and circumstances merited the exercise of the court's discretion to review the case under Rule 2.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 525 (2015), finding no error in part, but vacating in part and remanding a judgment entered on 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County, after the Supreme Court of North Carolina reversed and remanded the Court of Appeals' prior decision in this case, *State v. Campbell*, 234 N.C. App. 551, 759 S.E.2d 380 (2014). Heard in the Supreme Court on 20 March 2017.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Hannah Hall Love, Assistant Appellate Defender, for defendant-appellee.

MORGAN, Justice.

This is the second time that this case has made its way to this Court, and yet our resolution of the present appeal does not represent a final ruling on the merits. Instead, for the reasons discussed herein, we reverse and remand this case to the Court of Appeals for an independent assessment of whether that court need and should invoke its discretion under Rule 2 of the North Carolina Rules of Appellate Procedure in order to reach the merits of one of defendant's substantive issues on appeal.

In light of the several previous opinions from this Court and the Court of Appeals in this matter, we will not recount the factual background of this case in detail. The evidence at trial tended to show the following: Overnight on 15 August 2012, certain sound equipment disappeared from Manna Baptist Church in Shelby, North Carolina, and defendant's wallet was found in the area of the church near where some of the missing equipment was kept. Defendant testified that, in the throes of a personal crisis, he entered the unlocked church seeking comfort and sanctuary, spent the night there praying and sleeping, and left the following morning without taking anything except some water. After defendant left the church, he experienced symptoms that led him to believe he was having a heart attack, so he called for emergency services. The emergency medical technician (EMT) who responded to defendant's call for help testified that defendant did not have any sound equipment with him when the EMT arrived. Nonetheless, defendant was subsequently indicted for (1) breaking or entering a place of religious worship with intent to commit a larceny therein and (2) larceny after breaking or entering.

The procedural history of this case warrants lengthier review. The matter came on for trial at the 10 June 2013 session of Superior Court, Cleveland County, the Honorable Linwood O. Foust, Judge presiding. Defendant moved to dismiss the charges against him at the close of the State's evidence and again at the close of all the evidence. The trial court denied each motion, and the jury returned guilty verdicts on both charges. Defendant appealed, making six arguments of error. The Court of Appeals addressed only two of defendant's contentions, but vacated

his larceny conviction and reversed his conviction for breaking or entering. *See State v. Campbell*, 234 N.C. App. 551, 759 S.E.2d 380 (2014), *rev'd and remanded*, 368 N.C. 83, 772 S.E.2d 440 (2015). The bases for the Court of Appeals' holdings were its determinations that: (1) when a larceny "indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment," such that the larceny indictment was "fatally flawed" for failing to "allege that Manna Baptist Church is a legal entity capable of owning property;" and (2) the State presented insufficient evidence of an essential element of felony breaking or entering a place of worship, to wit: intent to commit larceny. *Id.* at 555-56, 759 S.E.2d at 384. This Court allowed the State's first petition for discretionary review. *See State v. Campbell*, 367 N.C. 792, 766 S.E.2d 635 (2014).

In that initial appeal, this Court held

> that the larceny indictment alleging ownership of stolen property of Manna Baptist Church sufficiently alleged ownership in a legal entity capable of owning property[,] . . . . that the State presented sufficient evidence of defendant's criminal intent to sustain a conviction for felony breaking or entering a place of religious worship, and [thus] the trial court properly denied defendant's motions to dismiss.

State v. Campbell, 368 N.C. 83, 88, 772 S.E.2d 440, 444-45 (2015). Accordingly, we reversed the decision below and remanded the case to the Court of Appeals for consideration of defendant's four remaining issues on appeal. *Id.* at 88, 772 S.E.2d at 445.

Defendant's remaining issues were that

> he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; [that] the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; [that] insufficient evidence supports his larceny conviction; and [that] the trial court violated his constitutional right to a unanimous jury verdict with respect to the larceny charge.

See State v. Campbell, ___ N.C. App. ___, 777 S.E.2d 525, 528 (2015) (*Campbell II*). The court found "that the trial court committed no error in convicting defendant of breaking or entering a place of religious

worship with intent to commit a larceny therein[,]" *id.* at ___, 777 S.E.2d at 534. After rejecting defendant's ineffective assistance of counsel claim, the court turned to defendant's contention that a fatal variance existed between the allegations in the indictment and the evidence at trial regarding who owned the sound equipment that was stolen.[1]

The Court of Appeals first observed that, because his trial counsel had failed to raise the fatal variance issue in the trial court, defendant sought review under North Carolina Rule of Appellate Procedure 2. *Id.* at ___, 777 S.E.2d at 530. Ordinarily, "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). Nevertheless, "[t]o prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of [the appellate] rules in a case pending before it." *Id.* at R. 2. The court in *Campbell II* noted that a previous panel of that court had "invoked Rule 2 to review a similar fatal variance argument and held that this type of error is 'sufficiently serious to justify the exercise of our authority under [Rule 2].' " *Campbell*, ___ N.C. App. at ___, 777 S.E.2d at 530 (alteration in original) (quoting *State v. Gayton – Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009), *appeal denied sub nom. Gayton – Barbosa v. Sapper*, No. 5:10-HC - 2218 BO, 2012 WL 174 299 (E.D.N.C. Jan. 20. 2012)). Without further discussion or analysis regarding Rule 2, the court then addressed the merits of defendant's argument, determining that a fatal variance indeed existed between the indictment—which alleged the stolen sound equipment was owned by both the church and its pastor—and the evidence at trial—which showed that the equipment belonged to the church alone. *Id.* at ___, 777 S.E.2d at 534. Accordingly, the court vacated defendant's larceny conviction.[2] The State again petitioned this Court for discretionary review, and on 9 June 2016, the State's petition was allowed "only as to whether the Court of Appeals erred in invoking Rule 2 of the North Carolina Rules of Appellate Procedure under the

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1. As has already been discussed, defendant previously raised, and this Court rejected, a different challenge to the larceny indictment, to wit: whether that indictment sufficiently alleged ownership in a legal entity capable of owning property. For clarity, we refer to the current challenge to the larceny indictment as the "fatal variance" issue or argument.

2. In light of this result, the court did not address defendant's final two arguments of error in connection with the larceny conviction. *Id.* at ___, 777 S..2d at 534.

circumstances of this case." *See State v. Campbell*, 368 N.C. 904, 794 S.E.2d 800 (2016).

As this Court has repeatedly stated, "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)) (emphases added); *see also Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). This assessment—whether a particular case is one of the rare "instances" appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether "substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citing, *inter alia*, *State v. Sander*s, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam) ("*In view of the gravity of the offenses for which defendant was tried and the penalty of death which was imposed*, we choose to exercise our supervisory powers under Rule 2 of the Rules of Appellate Procedure and, in the interest of justice, vacate the judgments entered and order a new trial." (emphasis added)). In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.[3] *See Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 196, 657 S.E.2d at 364; *Hart*, 361 N.C. at 315-17, 644 S.E.2d at 204-06; *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.

Here, the Court of Appeals did not reach the merits of defendant's fatal variance argument after an independent determination of whether the specific circumstances of defendant's case warranted invocation of Rule 2, but rather, based upon a belief that "this type of error" automatically entitles an appellant to review via Rule 2. *See Campbell*, ___ N.C. App. at ___, 777 S.E.2d at 530. The court thus acted under the erroneous belief that, because defendant presented a fatal variance argument, the court lacked the ability to act otherwise than to reach the merits of

3. Notably, the Court of Appeals panel in *Gayton–Barbosa*, the case cited by the *Campbell II* panel, employed exactly such an individualized analysis in deciding to invoke Rule 2. *Gayton–Barbosa*, 197 N.C. App. 129, 135 & n.4, 676 S.E.2d 586, 590 & n.4 (discussing the specific circumstances and then determining that, "*given the peculiar facts of this case*, it is appropriate to address [the] defendant's variance-based challenge on the merits"(emphasis added)).

defendant's contention. In doing so, the lower court failed to recognize its discretion to refrain from undertaking such a review if it so chose. Because the Court of Appeals proceeded under this misapprehension of law, it failed to exercise the discretion inherent in the "residual power of our appellate courts." *See Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.

Accordingly, we reverse and remand this case to the Court of Appeals so that it may independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rule 10(a)(1), and consider the merits of defendant's fatal variance argument. The remaining issue addressed by the Court of Appeals is not before this Court, and that court's decision as to that matter remains undisturbed.

REVERSED and REMANDED.

STATE OF NORTH CAROLINA
v.
WILLIAM EDWARD GODWIN III

No. 167PA16

Filed 9 June 2017

1. Witnesses—expert—officer implicitly qualified

The trial court did not err in an impaired driving prosecution by allowing a police officer to testify about the Horizontal Gaze Nystagmus (HGN) test and about defendant's impairment even though the officer was not explicitly qualified as an expert. The trial court implicitly found that the officer was qualified to give expert testimony. Moreover, it is evident that the General Assembly envisioned this scenario and made clear provision to allow testimony from an individual who has successfully completed training in HGN and meets the criteria set forth in Rule of Evidence 702(a).

2. Motor Vehicles—driving while impaired—instructions

The standard jury instruction on credibility was sufficient in an impaired driving prosecution, and the trial court adequately conveyed the substance of defendant's requested instructions.

Defendant's proposed instructions were meant to ensure that the jury realized it could consider the evidence presented by defendant of his lack of impairment, notwithstanding the evidence provided by the chemical analysis.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 34 (2016), finding prejudicial error in a judgment entered on 15 November 2013 by Judge Gary M. Gavenus in Superior Court, Mecklenburg County, and ordering that defendant receive a new trial. On 22 September 2016, the Supreme Court allowed defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 22 March 2017.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellant/appellee.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant/appellee.

JACKSON, Justice.

In this appeal we consider whether North Carolina Rule of Evidence 702(a1) requires a law enforcement officer to be recognized explicitly as an expert witness pursuant to Rule 702(a) before he may testify to the results of a Horizontal Gaze Nystagmus (HGN) test. Because we conclude that such explicit recognition is not required and that the trial court implicitly recognized the law enforcement officer in this case as an expert prior to allowing him to testify as to the issue of defendant's impairment, we reverse that portion of the decision of the Court of Appeals that is inconsistent with this determination. Because we also conclude that the trial court did not err in denying defendant's request for a special jury instruction to explain that results of a chemical breath test are not conclusive evidence of impairment, we affirm that part of the decision of the Court of Appeals holding there was no error in the trial court's decision to deny defendant's request for special jury instructions.

The State's evidence at trial tended to show the following: On the evening of 18 January 2011, Officer Daniel R. Kennerly of the Charlotte-Mecklenburg Police Department initiated a traffic stop of a vehicle once he confirmed by radar that the vehicle was travelling fourteen miles per hour faster than the posted speed limit. The driver of the vehicle, defendant William Edwin Godwin III, subsequently pulled over and stopped

his vehicle on the side of the road. After approaching defendant, who was still seated in his vehicle, Officer Kennerly detected an odor of alcohol and observed that defendant's eyes were red and glassy. Officer Kennerly asked defendant from where he had driven and whether he had been drinking. Defendant responded that he was coming from a restaurant and had consumed three beers that evening.

Based on his observations, training, and experience, Officer Kennerly then requested that defendant exit the vehicle in order to perform three standardized field sobriety tests: the HGN, the walk-and-turn, and the one-leg stand. Officer Kennerly administered the HGN test to defendant twice in order to ascertain whether his eyes "jerked" during the test, which is an indication of impairment. After observing four out of six possible indicators of impairment during the HGN test, Officer Kennerly determined that defendant might be impaired and proceeded with the remaining two field sobriety tests.

Officer Kennerly observed two out of four possible indicators of impairment during the one-leg stand test and six out of eight possible indicators during the walk-and-turn test. At the conclusion of the three field sobriety tests, Officer Kennerly placed defendant under arrest for driving while impaired, transported him to the police station, and administered a breathalyzer test to defendant. Defendant's blood alcohol concentration (BAC) measured at 0.08 grams of alcohol per 210 liters of air. Defendant was charged with driving while subject to an impairing substance. After being convicted in district court, defendant appealed his conviction. Defendant was then tried during the 12 November 2013 criminal session of the Superior Court, Mecklenburg County.

When Officer Kennerly testified at trial regarding his administration of the HGN test, defendant objected, arguing that pursuant to the 2011 amendment to North Carolina Rule of Evidence 702(a), the State should not be permitted to present testimony regarding the HGN test without qualifying the testifying officer as an expert. In response, the State argued that Officer Kennerly did not need to be found explicitly to be an expert because he was merely testifying to the administration of the field sobriety tests and his resulting observations. The State also argued that Officer Kennerly had completed the requisite training to administer field sobriety tests; therefore, he was qualified to testify regarding the subject. At the conclusion of its own voir dire of the officer and a voir dire by both attorneys, the trial court concluded that Officer Kennerly could testify based upon his training and experience, regarding his administration of the three field sobriety tests as well as his observations of defendant during the tests. Officer Kennerly then testified that

he had received training as to how to administer the HGN test and how to identify indicators of impairment based upon the test. He also testified that, after administering the three field sobriety tests to defendant, he concluded from his training, experience, and observations that defendant's "mental and physical faculties were appreciably impaired."

At the close of the evidence, defendant proposed two relatively similar jury instructions concerning the results of the breathalyzer test and how the jury should analyze those results. The proposed instructions suggested to the jury that it was not compelled to find defendant's BAC to be 0.08 or more based upon the result of the chemical analysis. In response, the State argued that such an instruction would merely draw attention to the 0.08 BAC and confuse the jury. The State also asserted that it would be sufficient for the trial court to instruct the jury that it was the sole judge of the weight of the evidence and the credibility of the witnesses. After consideration of the applicable case law and the arguments of counsel, the trial court refused to give defendant's requested jury instructions and gave the pattern jury instructions on credibility and impaired driving.

On 15 November 2013, the jury convicted defendant of driving while impaired. Defendant appealed his conviction to the Court of Appeals, arguing, *inter alia*, that the trial court failed to comply with the standards of Rule 702 in allowing Officer Kennerly's testimony without requiring the State to tender the officer as an expert witness. Defendant also argued that Rule 702(a1) obligated the trial court to find explicitly that Officer Kennerly was qualified to present expert testimony as an expert pursuant to Rule 702(a) before allowing him to testify about the HGN test results. Defendant further maintained that the trial court erred in rejecting his proposed jury instructions. Defendant contended that the proposed instructions were necessary to inform the jury that, although the breathalyzer results were sufficient to support a finding of driving while impaired, they did not compel a finding that defendant was guilty of impaired driving beyond a reasonable doubt.

In response, the State argued before the Court of Appeals that the trial court properly limited Officer Kennerly's testimony to the administration of the field sobriety tests and his observations of defendant during those tests. The State further contended that if defendant believed that Officer Kennerly was not qualified to testify, it was defendant's responsibility to refute the officer's training and experience. Noting that defendant tendered two experts to counter Officer Kennerly's evidence at trial, the State highlighted that the jury still determined that defendant was guilty. Regarding the trial court's refusal to deliver defendant's

proposed jury instructions, the State argued that the requested instructions were given in substance, and that the jury was not misled or misinformed in receiving the pattern instructions.

Concluding that Rule 702(a1) requires that a witness explicitly be found to be an expert before testifying to the results of an HGN test, the Court of Appeals determined that the trial court erred in failing to recognize Officer Kennerly as an expert pursuant to Rule 702(a). *See State v. Godwin*, ___ N.C. App. ___, ___, 786 S.E.2d 34, 37-38 (2016). In reaching its decision, the Court of Appeals relied on *State v. Helms*, in which this Court held that the HGN test "represents specialized knowledge that must be presented to the jury by a qualified expert." *Id.* at ___, 786 S.E.2d at 36 (emphasis omitted) (quoting *State v. Helms*, 348 N.C. 578, 581, 504 S.E.2d 293, 295 (1998)). The Court of Appeals also highlighted potentially conflicting evidence regarding defendant's performance on the other field sobriety tests and concluded that such evidence created "a reasonable possibility" that, "had the HGN test results not been admitted, a different result would have been reached at trial." *Id.* at ___, 786 S.E.2d at 39. Based upon its holding on this issue, the Court of Appeals awarded defendant a new trial. *Id.* at ___, 786 S.E.2d at 40. As to the jury instructions, the Court of Appeals rejected defendant's argument, noting that the pattern jury instructions given by the trial court "informed the jury, in substance, that it was not compelled to return a guilty verdict based simply on the chemical analysis results." *Id.* at ___, 786 S.E.2d at 39 (quoting *State v. Beck*, 233 N.C. App. 168, 171-72, 756 S.E.2d 80, 83, *disc. rev. denied*, 367 N.C. 508, 759 S.E.2d 94 (2014)).

On appeal to this Court, the State argues that the trial court implicitly found that the witness was qualified as an expert. Therefore, the State contends that the Court of Appeals erred by holding that the expert testimony was erroneously admitted. We agree. On conditional appeal, defendant argues that the Court of Appeals erred in affirming the trial court's refusal to give his requested jury instructions. Defendant contends that without his proposed instructions, the jury would feel compelled to find he was impaired. We disagree. We now address these two issues in turn.

[1] According to Rule 702(a):

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education,

> may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a) (2015). The three numbered requirements for admission of expert testimony were added to Rule 702(a) by amendment in 2011 to incorporate the standard from the line of United States Supreme Court cases beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc. See State v. McGrady*, 368 N.C. 880, 884, 888, 787 S.E.2d 1, 5, 7-8 (2016). Also relevant to the subject matter of this case, Rule 702(a1) provides, in relevant part:

> A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administrated by a person who has successfully completed training in HGN.

N.C.G.S. § 8C-1, Rule 702(a1) (2015). Reading these subsections together, it is evident that the General Assembly envisioned the precise scenario we address today and made clear provision to allow testimony from an individual "who has successfully completed training in HGN" and meets the criteria set forth in Rule 702(a), as Officer Kennerly has done. *Id.* § 8C-1, Rule 702(a1)(1).

In assessing how a witness may be qualified as an expert, we have held that when the record contains sufficient evidence upon which the trial court could have based an explicit finding that the witness was an expert, an appellate court may conclude that the trial court found the witness to be an expert. *Apex Tire & Rubber Co. v. Merritt Tire Co.*, 270 N.C. 50, 53, 153 S.E.2d 737, 739 (1967). In *Apex Tire* the trial court explicitly denied counsel's motion to declare a witness was an expert. *Id.* at 54, 153 S.E.2d at 740. The trial court then permitted the witness to testify in detail, as well as offer an opinion in the case. *Id.* at 54, 153 S.E.2d at 740. We concluded that, notwithstanding the trial court's denial

of the motion to recognize explicitly the witness as an expert, the record contained evidence on which the trial court could have based a finding that the witness was an expert. *Id.* at 54, 153 S.E.2d at 740. Accordingly, we inferred from its actions that the trial court made an implicit finding that the witness was an expert. *Id*. at 53-54, 153 S.E.2d at 739-40.

Since our decision in *Apex Tire*, we have reiterated the concept of implicit recognition of expert witnesses in several opinions. We have held:

> In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness.

State v. Perry, 275 N.C. 565, 572, 169 S.E.2d 839, 844 (1969) (citations omitted). Similarly, we have held that a trial judge implicitly recognized a witness as an expert by overruling defense counsel's objection to the witness's qualifications. *State v. Bullard*, 312 N.C. 129, 143-44, 322 S.E.2d 370, 378 (1984) (citing *Perry*, 275 N.C. 565, 169 S.E.2d 839). In addition, we have determined that when a defendant interposed only general objections to trial testimony and never requested a finding by the trial court as to the witnesses' qualifications as experts, the recognition that the witnesses were qualified to testify as experts was "implicit in the trial court's ruling admitting the opinion testimony." *State v. Aguallo*, 322 N.C. 818, 821, 370 S.E.2d 676, 677 (1988) (citing *State v. Phifer*, 290 N.C. 203, 213-14, 225 S.E.2d 786, 793 (1976), *cert. denied*, 429 U.S. 1123 (1977)). More recently, we ruled that a "trial court's overruling of defense counsel's objection to the opinion testimony constituted an implicit finding that the witness was an expert." *State v. Wise*, 326 N.C. 421, 430, 390 S.E.2d 142, 148 (citing *Bullard*, 312 N.C. 129, 322 S.E.2d 370), *cert. denied*, 498 U.S. 853 (1990).

Although we decided the aforementioned cases prior to the amendment to Rule 702, the 2011 amendment did not categorically overrule all North Carolina judicial precedents interpreting that rule. *See McGrady*, 368 N.C. at 888, 787 S.E.2d at 8 ("Our previous cases are still good law if they do not conflict with the *Daubert* standard."). Relevant to the issue in this case, the 2011 amendment did not change the basic structure for a trial court's exercise of its gatekeeping function over expert testimony. *See id.* at 892, 787 S.E.2d at 10. Moreover, our precedents continue to dictate that a trial court's ruling on the admissibility of expert testimony

"will not be reversed on appeal absent a showing of abuse of discretion." *See id.* at 893, 787 S.E.2d at 11 (quoting *Howerton v. Arai Helme*t, *Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), *superseded by statute*, Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws 1048, 1049 (codified at N.C.G.S. § 8C-1, Rule 702(a)(1)-(3)), *as stated in McGrady*, 368 N.C. at 888, 787 S.E.2d at 8). Here we can detect no such abuse of discretion by the trial court.

During both the pretrial hearing and the trial in this case, Officer Kennerly was "qualified as an expert by knowledge, skill, experience, training, or education." N.C.G.S. § 8C-1, Rule 702(a). Officer Kennerly testified that he had completed training on how to administer the HGN test and other standardized field sobriety tests that he administered to defendant. During direct examination, Officer Kennerly explained that he attended a thirty-four hour course in standardized field sobriety testing and DWI detection in 2006. Officer Kennerly's certificate of completion for this course was admitted into evidence. He also testified that he attended an eight hour refresher course in 2009. Both courses were approved by the National Highway Traffic Safety Administration (NHTSA). Prior to the date he administered the HGN test to defendant, Officer Kennerly had conducted approximately three hundred impaired driving offense investigations.

The trial court also established that Officer Kennerly's testimony met the three-pronged test of reliability pursuant to the amended rule. The trial court conducted its own voir dire of Officer Kennerly, which elicited testimony that the HGN test he administered to defendant on the day in question was given in accordance with the standards set by the NHTSA, and that those standards were derived from the results of a specific scientific study. Additionally, the trial court's voir dire confirmed that the principles and methods utilized in the HGN test were found to be reliable indicators of impairment, and that Officer Kennerly applied those principles and methods to defendant in this case.

Defendant objected to Officer Kennerly's testimony on the grounds that he was neither formally tendered as an expert witness by the State nor recognized as such by the trial court. Yet we note that defendant did not object to any of Officer Kennerly's actual qualifications, even clarifying his general objection by stating, "I'm not saying Officer Kennerly could not be qualified, but I think the State's going to have to go through that." Defendant eventually narrowed his objection by acknowledging that if the State were to limit the officer's testimony to his observations and the indications of impairment, then defendant

had "less problem with it." The trial court then overruled defendant's objection; however, as the colloquy between the trial court and the defense attorney indicates, Officer Kennerly *only* was permitted to offer testimony regarding his *observations* of defendant's impairment as he administered the HGN test and was not permitted to comment on the HGN test's *reliability*. These distinctions are critical.

> TRIAL COURT: . . . I will allow this officer to testify that he administered the HGN test, the walk-and-turn test, and the one-legged test. He will be allowed to testify as to the indicators of impairment he observed of this defendant in giving these tests.
>
> Anything else?
>
> DEFENSE COUNSEL: I'd ask the Court to note my exception. Is the Court disqualifying him as an expert on the HGN?
>
> TRIAL COURT: I'm not -- he doesn't have to be qualified as an expert. I'm not going to make that requirement. I'm just going to let him testify based on his training and experience, what -- how the HGN should be administered and what the indicators are and what indicators he observed.

In overruling defendant's objection, the trial court implicitly found that Officer Kennerly was qualified to testify as an expert, and as such, in accordance with the guidance in Rule 702(a1), Officer Kennerly could "give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level." N.C.G.S. § 8C-1, Rule 702(a1).

Although the Court of Appeals relied on our prior decision in *Helms* to reach its conclusion that the expert testimony was erroneously admitted, several important facts render *Helms* distinguishable from the present case. At issue in *Helms* was the *reliability* of the HGN test, not the *observed impairment* of the individual being subjected to the HGN test. *Helms*, 348 N.C. at 582, 504 S.E.2d at 295. Furthermore, although the officer in *Helms* testified that he had taken a forty hour training course in the use of the HGN test, the State presented no evidence regarding—and the court conducted no inquiry into—the reliability of the HGN test. *Id.* at 582, 504 S.E.2d at 295. We also noted in *Helms* that nothing in the record of the case indicated that the trial court took judicial notice of

the reliability of the HGN test. *Id.* at 582, 504 S.E.2d at 295. Accordingly, we concluded that because no sufficient scientifically reliable evidence existed as precedent to show the correlation between intoxication and nystagmus, "it [was] improper to permit a lay person to testify as to the meaning of HGN test results." *Id.* at 582, 504 S.E.2d at 295. Additionally, the trial court permitted the law enforcement officer to testify as a lay person regarding the meaning of HGN test results, and there was no evidence in the record to support a finding that the trial court had implicitly found the officer to be an expert. *Id.* at 582, 504 S.E.2d at 295. This scenario plainly contrasts with the present case in which the trial court made a finding of reliability of the HGN test and an implicit finding that Officer Kennerly was qualified as an expert. Furthermore, with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State. *See* The Motor Vehicle Driver Protection Act of 2006, ch. 253, sec. 6, 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1178, 1183 (codified at N.C.G.S. § 8C-1, Rule 702(a1) (Supp. 2006)). Based on these distinguishing factors, our decision in *Helms* is not dispositive of the present case.

Notwithstanding our decision in this case, the better practice would have been for the trial court to refrain from stating, "[Officer Kennerly] doesn't have to be qualified as an expert. I'm not going to make that requirement." Furthermore, in light of the aforementioned findings regarding Officer Kennerly's knowledge, skill, experience, and training, the appellate division's ability to review the trial court's oral order would have benefited from the inclusion of additional facts supporting its determination that Officer Kennerly was qualified to testify as an expert regarding his observations of defendant's performance during the HGN test.

[2] Next, we turn to the issue of defendant's proposed jury instructions. When a defendant requests a special jury instruction that is correct in law and supported by the evidence, the court must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976) (citation omitted). Yet, "[e]ven if a defendant is entitled to requested instructions, the court is not required to give them verbatim. It is sufficient if they are given in substance." *State v. Howard*, 274 N.C. 186, 199, 162 S.E.2d 495, 504 (1968) (citation omitted). If "[t]he instructions given by the trial court adequately convey[ ] the substance of defendant's proper request[,] no further instructions [are] necessary." *State v. Green*, 305 N.C. 463, 477, 290 S.E.2d 625, 633 (1982) (citation omitted).

Here one of defendant's two proposed instructions stated:

> A chemical analysis of defendant's breath obtained from an EC/IR-II which shows an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath is deemed sufficient to prove defendant's alcohol concentration. However, such chemical analysis does not compel you to so find beyond a reasonable doubt. You are still at liberty to consider the credibility and/or weight to give such chemical analysis when considering whether defendant's guilt has been proven beyond a reasonable doubt.

Though worded slightly differently, the second proposed instruction also suggested to the jury that it was not compelled to find defendant's alcohol concentration to be 0.08 or more based on the result of the chemical analysis.[1]

Defendant asserted at trial that without either of the requested instructions, the jury would be required to presume that the reading of 0.08 was conclusive proof of impairment. Defendant argued that the purpose of his proposed instructions was to ensure that the jury realized it could consider the evidence presented by defendant of his lack of impairment, notwithstanding the evidence provided by the chemical analysis. Following the pattern jury instruction on impaired driving, the trial court explained to the jury that impairment could be proved by an alcohol concentration of 0.08 or more, and that this chemical analysis was "deemed sufficient evidence to prove a person's alcohol concentration." The trial court also explained to the jurors that they were "the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness," and that if they decided that certain evidence was believable, they "must then determine the importance of that evidence in light of all other believable evidence in the case." These statements signaled to the jury that it was free to analyze and weigh the effect of the breathalyzer evidence along with all the evidence presented during the trial. Therefore, we hold that the standard jury instruction on

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1. In its entirety the second proposed instruction stated:

> The results of the chemical analysis of the Defendant's breath do not create a presumption that the Defendant had, at a relevant time after driving, an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. You may find the Defendant's alcohol concentration to be 0.08 or more. You may find the Defendant's alcohol concentration to be 0.08 or more based upon the result, but you are not compelled to do so.

credibility was sufficient in this case and that the trial court adequately conveyed the substance of defendant's requested instructions to the jury. Accordingly, we affirm the holding of the Court of Appeals that the jury instructions were proper.

For the reasons stated above, we also hold that the trial court implicitly found that Officer Kennerly was qualified to give expert testimony, and therefore did not abuse its discretion by allowing Officer Kennerly to testify as an expert regarding defendant's impairment. The trial court overruled defendant's objection to Officer Kennerly's testimony, determined that his testimony was relevant and reliable, and ascertained that he was qualified to testify as an expert. Consequently, we conclude that the Court of Appeals erroneously determined that the trial court did not find Officer Kennerly to be an expert pursuant to Rule 702(a).

Accordingly, as explained above, we hold that the trial court made no error in the trial of defendant's case. Therefore, we reverse the decision of the Court of Appeals awarding defendant a new trial and instruct that court to reinstate the trial court's judgment.

AFFIRMED IN PART; REVERSED IN PART.

STATE OF NORTH CAROLINA
v.
JOSHUA EARL HOLLOMAN

No. 208PA16

Filed 9 June 2017

Criminal Law—self-defense—aggressor regaining the right

The trial court did not err, on the evidence, in its self-defense instruction in a prosecution for assault with a deadly weapon inflicting serious injury in a case where both the defendant and the victim pulled guns in an argument over a woman. Historically, North Carolina law did not allow an aggressor using deadly force to regain the right to self-defense when the other responded by using deadly force. However, the General Assembly, by passing N.C.G.S. § 14-51.4, appears to have allowed an aggressor to regain the right to utilize defensive force under certain circumstances (use of non-deadly force). A careful review of the record evidence in this case

demonstrates, however, the complete absence of any evidence tending to show that defendant was the aggressor using non-deadly, as compared to deadly, force.

Justice MORGAN 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. ___, 786 S.E.2d 328 (2016), finding prejudicial error in a judgment entered on 27 April 2015 by Judge Donald W. Stephens in Superior Court, Wake County, and awarding defendant a new trial. Heard in the Supreme Court on 11 April 2017.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Amanda S. Zimmer, Assistant Appellate Defender, for defendant-appellee.

ERVIN, Justice.

The issue before this Court is whether the Court of Appeals erred by determining that the trial court committed prejudicial error in the course of instructing the jury concerning the right of self-defense. After carefully considering the record in light of the applicable law, we hold that the trial court's self-defense instructions were not erroneous, reverse the decision of the Court of Appeals to the contrary, and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

During the early morning hours of 1 January 2014, defendant Joshua Earl Holloman shot Darryl Anthony Bobbitt a number of times using a .45 caliber handgun at the corner of Rock Quarry Road and Martin Luther King Boulevard in Raleigh. According to Mr. Bobbitt, he and Mariah Mann, whom he believed to be his girlfriend, went to a bar to celebrate the imminent arrival of the New Year on the evening of 31 December 2013. Shortly after midnight, Mr. Bobbitt decided to wait in his vehicle until the time that the bar closed and Ms. Mann was ready to leave given that relations between the two of them had become strained during the course of the evening. After Ms. Mann left the bar, the two of them returned to Mr. Bobbitt's home, where they began to argue. Eventually, Ms. Mann left Mr. Bobbitt's home on foot. After his mother

and stepfather failed to induce Ms. Mann to return to the family home, Mr. Bobbitt began searching for Ms. Mann and eventually located her near some woods along Martin Luther King Boulevard in Raleigh.

Upon locating Ms. Mann, Mr. Bobbitt exited his car and crossed the road for the purpose of attempting to persuade Ms. Mann to enter his vehicle. In view of the fact that Ms. Mann appeared to be adhering to his request, Mr. Bobbitt reversed course and began walking back to his vehicle. As he did so, Mr. Bobbitt heard someone say, "Oh, you put your hands on her." According to Mr. Bobbitt:

> Once I heard that, I turned around. I looked back, saw the gun, so of course I had my gun. I turned back around, reached for my gun, and once I turned back around, I was already shot.
>
> . . . .
>
> I got shot, stumbled. Next thing I know, I'm looking at the pavement, and I just see somebody standing over me.

Mr. Bobbitt denied having fired any shots from his own weapon. Mr. Bobbitt sustained four gunshot wounds, two of which entered his stomach, one of which entered his left leg, and one of which pierced his right arm.

After confirming Mr. Bobbitt's account of the events leading up to the confrontation, Ms. Mann testified that, while Mr. Bobbitt was trying to get her to enter his car, she was attempting to call defendant, with whom she had also been romantically involved and with whom she had been in contact earlier in the evening for the purpose of requesting that he come get her. As she attempted to contact defendant, Mr. Bobbitt took her phone out of her hand. Upon arriving at the location at which Ms. Mann and Mr. Bobbitt were standing, defendant parked his car, got out of his vehicle, and told Ms. Mann to get inside. After complying with defendant's request, Ms. Mann lowered her head and began crying. As she wept, Ms. Mann heard defendant ask Mr. Bobbitt if "he [had] put his hands on [Ms. Mann]" before hearing the firing of several gunshots. After the firing of these gunshots, defendant returned to the car, told Ms. Mann that he thought that he had shot Mr. Bobbitt, and drove away.

Anna Dajui was driving her daughter, Roxana, home from a New Year's Eve party when a vehicle sped in front of them and stopped in the middle of the street. At that point, the Dajuis saw the driver of the vehicle get out of the car, reach for a firearm, and begin shooting at a second individual who was standing at the intersection of Rock Quarry Road

and Martin Luther King Boulevard. After the man fired several shots, the Dajuis saw the second man lying in the roadway.

Fortuitously, Sergeant Jennings Bunch of the Raleigh Police Department was patrolling in the area and happened to be at the intersection of Rock Quarry Road and Martin Luther King Boulevard at the time that the shooting occurred. Like the Dajuis, Sergeant Bunch saw the driver emerging from a vehicle that had stopped at the intersection. After hearing angry voices and a series of gunshots, Sergeant Bunch saw the driver of the stopped vehicle standing over and pointing a handgun at a second man, who was lying on the ground. Upon making these observations, Sergeant Bunch fired several shots into the air, an action that caused the driver of the vehicle to leave the scene.

On the other hand, defendant testified that in the early morning hours of 1 January 2014, he received a voice mail and a phone call from Ms. Mann, who appeared to be in a distressed condition, asking defendant to pick her up on Martin Luther King Boulevard. After arriving at the indicated location, defendant observed Ms. Mann walking on the sidewalk while being followed by another individual. Upon reaching Ms. Mann's location, defendant stopped his vehicle beside her, exited his vehicle while holding his gun by his side, and told Ms. Mann to get into his vehicle. When he noticed that Ms. Mann was crying and that there was blood on her face, defendant asked the man walking behind her whether "he [had] put his hands on her," stepped closer to the man after failing to hear any response, and repeated his question. By the time that he stepped toward the man, that individual turned around towards him and "open[ed] fire" upon defendant. In light of the fact that he feared for his life, defendant fired his weapon "[m]aybe three to five times" in an attempt to defend himself. After the man fell to the ground, defendant stood over him for a brief period of time. Upon hearing gunfire, defendant left the scene and went to the residence of his mother, where he was apprehended later that morning.

On 1 January 2014, an arrest warrant charging defendant with assault with a deadly weapon with the intent to kill and inflicting serious injury was issued. On 24 February 2014, the Wake County grand jury returned a bill of indictment charging defendant with assault with a deadly weapon with the intent to kill and inflicting serious injury. The charge against defendant came on for trial before the trial court and a jury at the 20 April 2015 criminal session of the Superior Court, Wake County.

At the jury instruction conference, defendant's trial counsel requested the trial court to instruct the jury concerning the law of

self-defense and defense of another, among other subjects.[1] More specifically, defendant requested the trial court to instruct the jury that:

> The defendant would be excused of assault with a deadly weapon with intent to kill inflicting serious injury on the ground of self-defense if:
>
> First, it appeared to the defendant and the defendant believed it to be necessary to assault the victim in order to save the defendant from death or great bodily harm.
>
> And Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time.
>
> And Third, [i]f the defendant was not the aggressor and the defendant was at a place the defendant had a lawful right to be, the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant except deadly force unless he reasonably believed that such force was necessary to prevent imminent death or great bodily harm to himself or another.
>
> However, the defendant would not be excused if the defendant used excessive force.
>
> . . . .
>
> The defendant would not be guilty of any assault if the defendant acted in self-defense, and if the defendant was not the aggressor in provoking the fight and did not use excessive force under the circumstances.
>
> One enters a fight voluntarily if one uses toward one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a

1. The trial court declined to instruct the jury concerning the right of one person to defend another on the grounds that "[t]here's no evidence to suggest that this defendant acted to defend anyone other than himself." Defendant has not challenged the trial court's refusal to deliver a defense of another instruction before either the Court of Appeals or this Court.

> fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. . . . A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger. The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased.

Instead of delivering the exact instruction that defendant requested, however, the trial court instructed the jury with respect to the issue of self-defense using a modified version of the pattern jury instruction relating to felonious assaults in which the defendant claimed to have acted in self-defense, stating that:

> If the State has satisfied you beyond a reasonable doubt that the defendant assaulted Darryl Bobbitt with a deadly weapon with intent to cause death or serious bodily injury, then you would consider whether the defendant's actions are excused and the defendant is not guilty because the defendant acted in lawful self-defense. . . .
>
> If the circumstances which the defendant encountered at the time would have created a reasonable belief in the mind of a person of ordinary firmness that an assault upon Darryl Bobbitt with a firearm was necessary or appeared to be necessary to protect the defendant from imminent death or great bodily harm, and the circumstances did create such a belief in the defendant's mind at the time the defendant acted, such assault with a firearm upon Darryl Bobbitt would be justified by self-defense. . . .
>
> A person is justified in using defensive force to defend himself when the force used against him is so serious that the person using defensive force reasonably believes that he is in imminent danger of death or serious bodily harm, the person using defensive force has no reasonable means

> to avoid the use of that force, and his use of force likely to cause death or serious bodily harm is the only way to escape the danger. . . .
>
> Furthermore, self-defense is justified only if the defendant was not himself the aggressor. Justification for lawful self-defense is not present if the person who uses defensive force voluntarily enters into a fight with the intent to use deadly force. In other words, if one initially displays a firearm to his opponent, intending to engage in a fight and intending to use deadly force in that fight and provokes the use of deadly force against himself by an alleged victim, he is himself an aggressor and cannot claim he acted lawfully to defend himself.

On 24 April 2015, the jury returned a verdict finding defendant guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to a term of twenty-five to forty-two months imprisonment. However, the trial court suspended defendant's active sentence and placed him on supervised probation for a period of thirty-six months on the condition that he comply with the usual terms and conditions of probation, serve a term of ten months imprisonment in the custody of the Division of Adult Corrections, make restitution in the amount of $2,989.00, pay the costs, including the cost of his court-appointed attorney, and refrain from having any contact with Mr. Bobbitt or any member of his family. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the trial court's self-defense instruction misstated the applicable law and deprived him of the ability to fully present his defense.[2] More specifically, defendant asserted that, in light of the enactment of N.C.G.S. § 14-51.4(2)(a), the trial court erred by instructing the jury that "[j]ustification for lawful self-defense is not present if the person who uses defensive force voluntarily enter[ed] into a fight with the intent to use deadly force" and that, "if one initially displays a firearm to his opponent, intending to engage in a fight and intending to use

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2. In addition, defendant argued that the trial judge had unlawfully considered his personal feelings concerning firearm possession and other subjects in passing judgment upon defendant. However, we need not discuss this issue in any detail in this opinion given that the Court of Appeals declined to reach it given its decision to award defendant a new trial based upon the instructional error that it found the trial court to have committed.

deadly force in that fight and provokes the use of deadly force against himself by an alleged victim, he is himself an aggressor and cannot claim he acted lawfully to defend himself" and failing to instruct the jury that it could find that defendant regained the right to use defensive force pursuant to N.C.G.S. § 14-51.4(2)(a). In defendant's view, the enactment of N.C.G.S. § 14-51.4(2)(a), which allows a "person who initially provokes the use of force against himself or herself" to utilize defensive force in the event that "[t]he force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked [is] the only way to escape the danger," "arguably changes the common law as it relates [to] aggressors and the right to self-defense." According to defendant, his own "actions in possessing a gun and questioning [Mr.] Bobbitt over an incident that may have just occurred could have been seen by the jury as [defendant] initiating or seeking to provoke a fight with [Mr.] Bobbitt," causing Mr. Bobbitt to respond by "pulling a concealed gun from his pocket and firing at [defendant]." The amount of "force used by [Mr.] Bobbitt against [defendant] was so serious as to lead [defendant] to reasonably believe that he was in imminent danger of death or serious bodily harm, that he had no reasonable means to retreat, and that the use of force likely to cause death or serious bodily harm to [Mr.] Bobbitt was the only way to escape the danger." However, the self-defense instruction that the trial court actually delivered to the jury "failed to allow for the jury to consider whether [defendant] regained his right to self-defense under [N.C.G.S.] § 14-51.4 even if he had initiated or provoked the fight with [Mr.] Bobbitt," an error that prejudiced defendant and entitled him to a new trial given that "there is a reasonable probability that the jury would [have] acquitted [defendant] had they been properly instructed on the right to use self-defense even if [defendant] was the aggressor."

The State, on the other hand, argued that defendant had "requested an instruction substantially identical to the one" that the trial court had delivered, so that defendant had invited the commission of the error upon which his challenge to the trial court's judgment was predicated, citing *State v. Wilkinson*, 344 N.C. 198, 236, 474 S.E.2d 375, 396 (1996). In addition, the State argued that defendant had failed to demonstrate that the enactment of N.C.G.S. § 14-51.4 had "changed the law with regard to an aggressor *who had the intent to kill.*" On the contrary, the statutory reference to a person who " 'initially provokes the use of force' must mean an aggressor *without murderous intent*" in order to avoid

"allow[ing] a pretextual quarrel to countenance premeditated murder." In the State's view, the trial court's instructions "adequately informed the jury that a person may use defensive force when he reasonably believes [that] he is in imminent danger, he has no reasonable means to avoid the use of force, and his use of force is the only way to escape the danger."

The Court of Appeals awarded defendant a new trial on the grounds that "[t]he trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor cannot under any circumstances regain justification for using defensive force." *State v. Holloman*, ___ N.C. App. ___, ___, 786 S.E.2d 328, 334 (2016). According to the Court of Appeals, N.C.G.S. § 14-51.4(2)(a) allows "the person who initially provokes the use of force . . . to "us[e] defensive force" in the event that "[t]he force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger." *Id.* at ___, 786 S.E.2d at 332 (quoting N.C.G.S. § 14-51.4(2)(a) (2015)). The trial court erred, in the Court of Appeals' view, by "eliminat[ing] references to circumstances in which an aggressor can lawfully defend himself" and suggesting "that[,] if jurors determined [d]efendant had initiated the gun fight, they could not find that [he] acted in lawful self-defense, even if Mr. Bobbitt fired his gun first." *Id.* at ___, 786 S.E.2d at 334. As a result, after finding the trial court's error to be prejudicial, the Court of Appeals awarded defendant a new trial. This Court granted the State's request for discretionary review of the Court of Appeals' decision.

In seeking to persuade us to reverse the Court of Appeals' decision, the State notes that "[t]he 'law of self-defense in cases of homicide applies also in cases of assault,' " quoting *State v. Anderson*, 230 N.C. 54, 55, 51 S.E.2d 895, 897 (1949). As a result, "one who brings about an affray with the intent to take life or inflict serious bodily harm may not claim self-defense," citing *State v. Mize*, 316 N.C. 48, 52, 340 S.E.2d 439, 442 (1986). For that reason, the State argues that, "[i]f the defendant was the aggressor and killed with murderous intent, that is, the intent to kill or inflict serious bodily harm, then she is not entitled to an instruction on self-defense," quoting the dissenting opinion in *State v. Norman*, 324 N.C. 253, 274, 378 S.E.2d 8, 20 (1989). Although the State acknowledges that N.C.G.S. § 14-51.4(2)(a) appears to "abrogate[ ] the principle . . . that one who wrongfully commenced a fight may not regain the right of

self-defense upon being sorely pressed by his adversary," this apparent statutory expansion of the right of self-defense should not, as a matter of "common law, statutory context, and common sense," apply to "aggressors with murderous intent." According to the State, "[t]he legislature simply could not have intended for one who attacks with murderous intent to claim self-defense" given that "allow[ing] one to use defensive force when his intended victim lawfully responds with deadly force would legitimize both parties' conduct." For that reason, the challenged trial court instruction to the effect that an aggressor using deadly force could not regain the right to use defensive force did not misstate the applicable law and was not, for that reason, erroneous.

Defendant, on the other hand, asserts that the Court of Appeals correctly granted him a new trial based upon the trial court's failure to allow the jury to consider whether he had regained the right to use defensive force even if he was the aggressor. Assuming that "the statute only applies to aggressors without murderous intent," the challenged instruction "was still erroneous" because "[t]he intent to use deadly force is not the same as murderous intent" and "because the jury was not instructed to consider if [defendant] was an aggressor with murderous intent." According to defendant, the trial court's instructions allowed the jury to "conclude[ ] that [defendant] was an aggressor with intent to use 'deadly force' merely because he possessed a firearm and intended to use it to defend Ms. Mann and himself, if necessary." However, the jury failed to find that defendant intended to kill Mr. Bobbitt when it convicted him of assault with a deadly weapon inflicting serious injury rather than assault with a deadly weapon with the intent to kill and inflicting serious injury. In light of the conflicts in the evidence, "the jury had to determine if [Mr.] Bobbitt had the right to use lethal force against [defendant] and whether [defendant] had the right to use defensive force in response." Since the trial court's instructions "did not tell the jury that [defendant] could use defensive force even if the jury felt [that defendant] had provoked [Mr.] Bobbitt," those instructions "misstated the law, confused the jury, and deprived [defendant] of his constitutional right to fully present his defense." As a result, given that "[t]here is a reasonable possibility that the trial court's error impacted the jury's decision," the Court of Appeals correctly awarded defendant a new trial.

The ultimate issue before us in this case is the extent, if any, to which the trial court erred by instructing the jury that an individual having the status of an aggressor using deadly force could not regain the right to act in self-defense and by failing to instruct the jury that the aggressor may be entitled to utilize defensive force in the event that

the person provoked responded by using such significant force that the aggressor was placed in imminent danger of death or serious bodily harm, the aggressor did not have a reasonable opportunity to retreat, and the aggressor can only protect himself or herself from death or serious bodily harm by using defensive force. According to well-established North Carolina law, a trial judge's jury charge shall "give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (quoting *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971)). For that reason, "the judge has the duty to instruct the jury on the law arising from all the evidence presented." *Id.* at 346, 626 S.E.2d at 261 (quoting *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 862 (1985)). In instructing the jury with respect to a defense to a criminal charge, "the facts must be interpreted in the light most favorable to the defendant." *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979).

> A defendant may request a jury instruction in writing, and the trial court must so instruct provided the instruction is supported by the evidence. However, a trial court is not obligated to give a defendant's exact instruction so long as the instruction actually given delivers the substance of the request to the jury.

State v. Roache, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004) (citing *State v. McNeill*, 346 N.C. 233, 239, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 118 S. Ct. 704, 139 L. Ed. 2d 647 (1998); *State v. Atkins*, 349 N.C. 62, 90, 505 S.E.2d 97, 115 (1998), *cert. denied*, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999)). Although "[u]se of the pattern instructions is encouraged," *State v. Garcell*, 363 N.C. 10, 49, 678 S.E.2d 618, 642-43 (citation omitted), *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009), "[f]ailure to follow the pattern instructions does not automatically result in error," *State v. Bunch*, 363 N.C. 841, 846, 689 S.E.2d 866, 870 (2010); *see also State v. Mundy*, 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1967) (stating that, "[i]n giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon"). On the other hand, even though "no exact formula is required" when the trial court instructs the jury, "[o]nce it undertakes to do so, however, the [instructions] should be

given in substantial accord with those approved by this [C]ourt." *State v. Watson*, 294 N.C. 159, 167, 240 S.E.2d 440, 446 (1978) (citing *State v. Hammonds*, 241 N.C. 226, 85 S.E.2d 133 (1954)); *see also State v. Davis*, 238 N.C. 252, 253-54, 77 S.E.2d 630, 631 (1953) (stating that "[c]orrect instruction as to the law . . . limit[s] [the trial judge's] responsibilit[ies]"). Thus, we must determine whether the trial court's self-defense instructions accurately stated the applicable law arising upon the evidentiary record developed at trial.

The initial issue that must be addressed in order to determine whether the trial court correctly instructed the jury with respect to the self-defense issue is the extent, if any, to which North Carolina law allows an aggressor to regain the right to utilize defensive force based upon the nature and extent of the reaction that he or she provokes in the other party. Historically, as the State notes, North Carolina law did not allow an aggressor using deadly force to regain the right to exercise the right of self-defense in the event that the person to whom his or her aggression was directed responded by using deadly force to defend himself or herself. *State v. Wetmore*, 298 N.C. 743, 750, 259 S.E.2d 870, 875 (1979) (stating that, "[i]f one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder" (quoting *State v. Potter*, 295 N.C. 126, 144 n.2, 244 S.E.2d 397, 409 n.2 (1978))).[3] According to N.C.G.S. § 14-51.3, however:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:

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3. Although defendant appears to understand the references to "murderous intent" and "deadly force" as contained in certain of our prior decisions to refer to a specific intent to kill and argues that only such a specific intent to kill obviates an aggressor's right to use defensive force, that understanding is simply incorrect. Instead, "[m]urderous intent means the intent to kill or inflict serious bodily harm," *Mize*, 316 N.C. at 52, 340 S.E.2d at 442, and "[d]eadly force has been defined as 'force likely to cause death or great bodily harm,' " *State v. Hunter*, 315 N.C. 371, 373, 338 S.E.2d 99, 102 (1986) (quoting *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979), *overruled on other grounds*, *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982)).

> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to [N.C.] G.S. [§] 14-51.2.[4]

N.C.G.S. § 14-51.3 (2015). However, as has already been noted, N.C.G.S. § 14-51.4 provides, in pertinent part, that:

> The justification described in [N.C.]G.S. [§] 14-51.2 and [N.C.]G.S. [§] 14-51.3 is not available to a person who used defensive force and who:
>
> . . . .
>
> (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
>
> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.

Id. As this language reflects and as the State acknowledges, the General Assembly, by enacting this legislation, appears to have allowed an aggressor to regain the right to utilize defensive force under certain circumstances. Moreover, as the State also concedes, N.C.G.S. § 14-51.4(2)(a) does not, when read literally, appear to distinguish between situations in which the aggressor did or did not utilize deadly force. The absence of such a limitation does not, as defendant appears to suggest, necessarily resolve this issue. Instead, we can only determine whether the right to utilize defensive force can be regained by an aggressor using deadly force by properly construing the relevant statutory provision.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d

4. N.C.G.S. § 14-51.2 addresses a person's right to use defensive force for the purpose of protecting one's home, workplace, or motor vehicle.

513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 119 S. Ct. 1576, 143 L.Ed. 2d 671 (1991), *abrogated in part on other grounds by Lenox*, 353 N.C. at 663-64, 548 S.E.2d at 517). For that reason, "[l]egislative intent controls the meaning of a statute." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of the Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

> If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls. Conversely, "where 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." *State v. Barksdale*, 181 N.C. 621, [625,] 107 S.E. 505[, 507] (1921).

Mazda Motors of Am., Inc. v. Sw. Motors, Inc., 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (internal citations omitted).

The effect of adopting the construction of N.C.G.S. § 14-51.4(2)(a) espoused by defendant, which would allow an aggressor to utilize defensive force in the event that his conduct caused the person provoked to lawfully utilize deadly force in his own defense, cannot be squared with the likely legislative intent motivating the enactment of the relevant statutory provision. Simply put, the adoption of defendant's construction of N.C.G.S. § 14-51.4(2)(a) would create a situation in which the aggressor utilized deadly force in attacking the other party, the other party exercised his or her right to utilize deadly force in his or her own defense, and the initial aggressor then utilized deadly force in defense of himself or herself, thereby starting the self-defense merry-go-round all over again. We are unable to believe that the General Assembly intended to foster such a result, under which gun battles would effectively become legal, and hold that the provisions of N.C.G.S § 14-51.4(2)(a) allowing an aggressor to regain the right to use defensive force under certain circumstances do not apply in situations in which the aggressor initially uses deadly force against the person provoked. *See Mize*, 316 N.C. at 52, 340 S.E.2d at 442 (stating that, "[i]f . . . one brings about an affray

with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense" (quoting *Wetmore*, 298 N.C. at 750, 259 S.E.2d at 875)). As a result, the trial court's instruction to the effect that a defendant who was the aggressor using deadly force had forfeited the right to use deadly force in self-defense and that a person who displays a firearm to his opponent with the intent to use deadly force against him or her and provokes the use of deadly force in response is an aggressor for purposes of the law of self-defense does not constitute an inaccurate statement of the applicable North Carolina law.

Our determination that the instructions that the trial court actually gave with respect to the self-defense issue do not misstate the applicable law does not, however, end the inquiry that we must make in order to adequately address defendant's challenge to the trial court's instructions. Instead, we must also determine whether the trial court erred by failing to instruct the jury, in accordance with defendant's request, that he might have regained the right to use defensive force based upon Mr. Bobbitt's reaction to any provocative conduct in which defendant might have engaged. In light of the manner in which we have construed N.C.G.S. § 14-51.4(2)(a), defendant could have only been entitled to the delivery of such an instruction to the extent that his provocative conduct involved non-deadly, rather than deadly, force. A careful review of the record evidence demonstrates, however, the complete absence of any evidence tending to show that defendant was the aggressor using non-deadly, as compared to deadly, force.

The evidence developed at trial presented two contrasting accounts of the events that occurred at the time that defendant shot Mr. Bobbitt. On the one hand, Mr. Bobbitt and the other witnesses who testified on behalf of the State asserted that defendant approached Mr. Bobbitt with a gun in his hand and fired at Mr. Bobbitt before Mr. Bobbitt could retrieve his own firearm. In the event that the jury believed the testimony offered by the State, defendant was, under the authorities discussed above, an aggressor using deadly force. Defendant, on the other hand, asserted, that, as he stepped toward Mr. Bobbitt with his gun at his side for the purpose of ascertaining if Mr. Bobbitt had assaulted Ms. Mann, Mr. Bobbitt fired at him. In the event that the jury believed defendant's account, defendant was not an aggressor at all. *State v. Spaulding*, 298 N.C. 149, 155-56, 257 S.E.2d 391, 395 (1979) (stating that the fact that the "[d]efendant went out to the [prison] yard, a place where he had a right to be"; that the defendant "did not seek [the victim] out for the purpose of a violent encounter" and did not say "anything to provoke [the victim]"; and that the defendant "repeatedly told [the victim that] he

wanted no trouble" tend to show that the defendant "was free from fault in the difficulty"); *State v. Vaughn*, 227 N.C. App. 198, 203, 742 S.E.2d 276, 279-80 (stating that the "[d]efendant's decision to arm herself and leave the vehicle, while perhaps unwise, was not, in and of itself, evidence that she brought on the difficulty"), *disc. rev. denied*, 367 N.C. 221, 747 S.E.2d 526 (2013); *State v. Tann*, 57 N.C. App. 527, 531, 291 S.E.2d 824, 827 (1982) (stating that the fact that the "defendant, who anticipated the confrontation, armed himself with a .38 caliber pistol, and failed to avoid the fight" did "not in any way suggest that [he] was the provocator"). Although defendant asserts that the jury could have understood his conduct in approaching Mr. Bobbitt with his gun by his side while seeking an answer to his inquiry concerning whether Mr. Bobbitt had harmed Ms. Mann to make him an aggressor without the intent to use deadly force, any such decision on the part of the jury would have been in conflict with established North Carolina law. Thus, the trial court did not err by failing to allow the jury to consider whether defendant could have regained the right to use defensive force even though he had been the aggressor with the intent to use non-deadly force for the simple reason that such an instruction would not have constituted an accurate statement of the law arising upon the evidence. As a result, since the trial court's instructions concerning the law of self-defense were not, in light of the record evidence, erroneous, we reverse the Court of Appeals' decision to vacate defendant's conviction for assault with a deadly weapon inflicting serious injury and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA
v.
KEYSHAWN JONES

No. 27PA16

Filed 9 June 2017

Larceny—mistaken deposit—constructive possession

The State presented sufficient evidence to support defendant's larceny convictions where defendant, a truck driver and independent contractor, passively but knowingly received an overpayment by direct deposit and then proceeded to withdraw the excess funds against the wishes of the rightful possessor. The company for which defendant was driving (West) had the intent and capability to maintain control and dominion over the funds by effecting a reversal of the deposit; the fact that the reversal order was not successful did not indicate that West lacked constructive possession. Defendant had no possessory interest in the funds for the same reasons.

Justice NEWBY concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 781 S.E.2d 333 (2016), vacating defendant's convictions after appeal from a judgment entered on 29 October 2014 by Judge Kenneth F. Crow in Superior Court, Wayne County. Heard in the Supreme Court on 14 February 2017.

Joshua H. Stein, *Attorney General*, *by Robert C. Montgomery*, *Senior Deputy Attorney General*, *and Derrick C. Mertz*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by John F. Carella*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Chief Justice.

In this case, defendant was overpaid because a payroll processor accidentally typed "$120,000" instead of "$1,200" into a payment processing system, resulting in a total payment (after deductions) of $118,729.49. Although defendant was informed of the error and was asked not to remove the excess funds from his bank account, he made a series of withdrawals and transfers totaling $116,861.80. We must decide

whether the State produced sufficient evidence to support defendant's convictions for three counts of felonious larceny.

When the overpayment occurred, defendant Keyshawn Jones[1] was a truck driver who worked as an independent contractor. At that time, he was driving trucks for EF Corporation, which was doing business as WEST Motor Freight (West). West gave its drivers the option to have money withheld every payroll period and placed in a "maintenance account" for the driver. Defendant participated in the maintenance account program and, in July 2012, requested $1,200 from his maintenance account.

But Sherry Hojecki, West's payroll processor, made an error while trying to type in the $1,200 payment, accidentally typing in "$120,000" instead. The final statement indicated that, after payroll deductions, defendant was to be given $118,729.49. Hojecki sent a report to M&T Bank, the bank that held West's funds, directing that this $118,729.49 figure be paid by direct deposit to defendant's account.

The next morning, Hojecki realized her error and tried to stop the transaction. She also told defendant, through his agent, about the error and requested that defendant not withdraw or transfer the excess funds from his account. The stop transaction did not succeed, however, and the deposit went through. As a result, $118,729.49 was deposited in defendant's State Employees' Credit Union (SECU) account. West promptly tried to initiate a reversal of the deposit.

Despite West's instructions, defendant made several withdrawals and transfers that removed almost all of the excess funds from his account. Three days after being asked not to withdraw the funds, defendant made seven ATM cash withdrawals of $1,000 each, totaling $7,000. He also electronically transferred $20,000 from his checking account to his savings account. The next day, defendant went to one of SECU's branch locations to withdraw more of the money. The teller who assisted him noticed the deposit of $118,729.49 and asked defendant why such a large amount of money had been deposited into his account. Defendant replied that he was in business with someone else and had sold his part of the business. Defendant requested two cashier's checks in the amounts of $21,117.80 and $2,000. He also withdrew $66,744 from his checking account and used a portion of that amount to purchase a third

1. Defendant states in his brief that the correct spelling of his first name is "Keyshaun," not "Keyshawn." Because the trial court's judgment used the spelling "Keyshawn," however, that is what we use here.

cashier's check. These three withdrawals totaled $89,861.80. Because defendant had withdrawn or transferred virtually all of the money in question, the reversal that West had tried to initiate was not successful.

Defendant was later indicted for three counts of larceny and three counts of possession of stolen goods. The three larceny counts each charged defendant with "tak[ing] and carry[ing] away" a discrete amount of money from West—specifically, with taking and carrying away $7,000, $20,000, and $89,861.80, respectively. At the close of the State's evidence, the State made a motion to dismiss the three possession-of-stolen-goods counts, which the trial court granted. After the trial court ruled on the State's motion, defendant moved to dismiss the remaining charges based on insufficiency of the evidence. The trial court denied defendant's motion. Defendant renewed his motion at the close of all evidence, and the trial court again denied defendant's motion. The jury found defendant guilty of all three counts of larceny. Defendant appealed to the Court of Appeals, and the Court of Appeals vacated defendant's convictions, finding that he had not committed a trespassory taking. *State v. Jones*, ___ N.C. App. ___, ___, 781 S.E.2d 333, 339 (2016). The State petitioned this Court for discretionary review, and we allowed the State's petition.

The question before us is whether the State presented sufficient evidence of felonious larceny. A defendant is guilty of larceny if the State proves that he "(a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently." *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988) (citing *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010)). "To survive a motion to dismiss for insufficient evidence, the State must present 'substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense.' " *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (quoting *State v. Myrick*, 306 N.C. 110, 113-14, 291 S.E.2d 577, 579 (1982)). Whether the evidence that the State presented at trial was substantial "is a question of law for the court." *State v. Barnes*, 345 N.C. 146, 148, 478 S.E.2d 188, 189 (1996) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). A reviewing court must evaluate the evidence "in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom." *State v. Davis*, 340 N.C. 1, 12, 455 S.E.2d 627, 632, *cert. denied*, 516 U.S. 846 (1995).

Here, it is beyond dispute that defendant carried property away, and that—assuming the property did not belong to him—he did so with the intent to permanently deprive the owner of the property, and without the owner's consent. Thus, the only issue in this case is whether defendant "took" the property of another when he withdrew and transferred money from his bank account.

To constitute a larceny, a taking must be wrongful. *See State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968). In other words, the taking must be by an act of trespass. *See id.*; *State v. Webb*, 87 N.C. 558, 559 (1882). A larcenous trespass may be either actual or constructive. *Bowers*, 273 N.C. at 655, 161 S.E.2d at 14. A constructive trespass occurs "when possession of the property is fraudulently obtained by some trick or artifice." *Id.* (quoting *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 232-33 (1953)). An actual trespass, on the other hand, occurs when the taking is without the consent of the owner. *See* 50 Am. Jur. 2d *Larceny* § 22 (2017); 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.2(a), at 63 (2d ed. 2003) [hereinafter *Substantive Criminal Law*]; Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 303-04 (3d ed. 1982).

However the trespass occurs, it must be against the *possession* of another. *See Webb*, 87 N.C. at 559 (noting that a person with an interest in property may still be guilty of larceny if he "commit[s] a trespass upon the possession of" another); *Substantive Criminal Law* § 19.1(a), at 57 (noting that larceny is "a common law crime . . . committed when one person misappropriate[s] another's property by means of taking it *from his possession* without his consent" (emphasis added)). Possession of property can also be actual or constructive, though the meaning of these terms differs from their meaning in the trespass context.[2] *See, e.g.*, *State v. Weaver*, 359 N.C. 246, 259, 607 S.E.2d 599, 606-07 (2005). With respect to the crime of possession of a controlled substance, this Court has stated that "[a] person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). The Court of Appeals has adopted this test for constructive possession in the context of other offenses as well, including larceny. *See, e.g.*, *State v. McNair*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA16-707, 2017 WL 1381591, at *6 (Apr. 18, 2017) (possession of burglary tools); *State v. Bailey*, 233 N.C. App. 688, 691,

2. In other words, while we have just discussed actual and constructive *trespass*, this issue—whether a person or entity has actual or constructive *possession*—is a wholly separate one.

757 S.E.2d 491, 493, *disc. rev. denied*, 367 N.C. 789, 766 S.E.2d 678 (2014) (possession of a firearm by a felon); *State v. Phillips*, 172 N.C. App. 143, 146-47, 615 S.E.2d 880, 882-83 (2005) (possession of stolen property); *State v. Osborne*, 149 N.C. App. 235, 238-39, 562 S.E.2d 528, 531, *aff'd per curiam*, 356 N.C. 424, 571 S.E.2d 584 (2002) (larceny); *State v. Bonner*, 91 N.C. App. 424, 426, 371 S.E.2d 773, 775 (1988), *disc. rev. denied*, 323 N.C. 705, 377 S.E.2d 227 (1989) (embezzlement). We implicitly endorsed applying this test to the embezzlement context in *State v. Weaver*, *see* 359 N.C. at 259, 607 S.E.2d at 606-07, and we explicitly adopt it in the larceny context here.

To determine whether defendant took West's property by trespass, then, we must first determine whether West retained actual or constructive possession of the excess funds after they had been deposited in defendant's SECU account. Account holders generally do not have actual possession of funds in their bank accounts, and there is no indication in the record that West had actual possession of the funds here, even when they were still in its own account. *See Lipe v. Guilford Nat'l Bank*, 236 N.C. 328, 330-31, 72 S.E.2d 759, 761 (1952); Ann Graham, 1 Banking Law (Matthew Bender & Co., Inc.) § 9.05, at 9 14 (Feb. 2005) ("Absent some special arrangement between the parties, money deposited in a bank becomes the property of the bank and is available for use by the bank in its business."). Because there is no evidence that West had actual possession of the funds in its *own* bank account, West certainly did not retain actual possession of the funds that were transferred to *defendant's* bank account.

West did, however, retain constructive possession of the excess funds even after they had been transferred to defendant's account. From the time that defendant first knew about the excess funds transfer up until the time that defendant removed the funds from his account, West had the intent and capability to maintain control and dominion over the funds by effecting a reversal of the deposit. The fact that the reversal order was not successful—because defendant had removed the funds before the reversal could go through—does not indicate that West lacked constructive possession when the funds were in defendant's account. All it shows is that defendant's removal of the funds *deprived* West of constructive possession, which is consistent with *all* larcenies. After all, in every larceny, the possessor loses—for at least the briefest of moments, *see State v. Green*, 81 N.C. 560, 562 (1879)—the capability to control the property. As we have seen, that is what larceny is—a trespass against the rightful possessor's possession.

Having determined that the excess funds were in West's possession even after they were deposited into defendant's account, we must ascertain whether defendant simultaneously had possession of the funds once they were in his account. If he did, then he could not have committed larceny, because a defendant cannot commit larceny of goods that he already possesses. *See Substantive Criminal Law* § 19.2(a), at 62 ("If the wrongdoer fraudulently converts property already properly in his possession, he does not take it from anyone's possession and so cannot be guilty of larceny.").

We have not squarely addressed a situation like this one before, in which a defendant passively but knowingly received an overpayment by direct deposit and then proceeded to withdraw the excess funds against the wishes of the rightful possessor. But this case is akin to a case in which a person walks into a candy store and buys fifty cents' worth of candy. He hands the store owner a twenty dollar bill, only to be kicked out of the store, and the store owner pockets the bill. In that case, the store owner would be guilty of larceny because he did not have possession of the bill; the customer retained constructive possession of it, leaving the store owner with only custody of it. *See id.* §§ 19.1(a), at 59, 19.2(c), at 67. Similarly, here, because West retained constructive possession of the excess funds in defendant's account, and because defendant knew that West had the intent and capability to control the excess funds through a reversal of the deposit, defendant had no possessory interest in the funds. Like the store owner who accepts a bill that is worth more than he is owed without returning the change, defendant was simply the recipient of funds that he knew were supposed to be returned in large part. He therefore had mere custody of the funds, not possession of them.

When a person has mere custody of property, that person may be convicted of larceny when he appropriates the property to his own use with felonious intent. *See State v. Ruffin*, 164 N.C. 416, 417, 79 S.E. 417, 417 (1913). This is precisely because the property remains in the constructive possession of the rightful possessor, and the later appropriation interferes with that property right. *Id.*; *see also State v. Tilley*, 239 N.C. 245, 249, 79 S.E.2d 473, 476 (1954) (characterizing a warehouse custodian as having been "entrusted at most with the bare custody of the goods, whose possession in contemplation of law remained in the [owner] until [the defendant] feloniously took and carried them away"); *Substantive Criminal Law* § 19.1(a), at 58-59. The moment that the person in custody of the property wrongfully interferes with the rightful possessor's possessory interest is the moment that he takes that property.

So, because defendant lacked possession of the excess funds in his bank account, he "took" those funds when he removed them from his account through transfers and withdrawals. *Those* acts are what deprived West of constructive possession, by depriving West of its ability to effect a reversal of its excessive funds transfer. The State therefore presented sufficient evidence that defendant took West's property by an act of trespass when he removed the excess funds from his account.

Because we hold that the State presented sufficient evidence in support of defendant's larceny convictions, we reverse the decision of the Court of Appeals.

REVERSED.

Justice NEWBY concurring.

I concur fully with the majority opinion. I write separately to observe that this case presents an excellent example of the common law at work today, applying age-old tangible property principles to the modern, intangible electronic-banking context. As the Chief Justice well notes in his opinion, it is the knowing exercise of dominion and control over property to the exclusion of the true owner that "trespasses" on the owner's property rights and effectuates larceny. His candy store hypothetical is a good example. I write separately to amplify this point by taking this opportunity to answer the timeworn question arising from the iconic film *It's a Wonderful Life*: Was Old Man Potter simply morally corrupt or was he also guilty of a crime?

The role of the Court is not to devise the common law but to recognize and apply its lasting principles. *See Penny v. Little*, 4 Ill. (3 Scam.) 301, 304 (1841) (opinion of Stephen A. Douglas, father of Justice Robert M. Douglas of the North Carolina Supreme Court) ("The common law is a beautiful system; containing the wisdom and experience of ages . . . and a]dapting itself to the condition and circumstances of the people . . . ."); *see also Reg. v. Ramsey* [1883] 48 L.T. 733 at 735 (Eng.) (Lord Coleridge CJ) ("[L]aw grows; and . . . though the principles of the law remain unchanged, . . . their application is to be changed with the changing circumstances of the times."); 1 William Blackstone, *Commentaries* *73 (The "chief corner stone of the laws . . . is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice: which decisions are preserved among our public records, explained in our reports, and digested for general use.")

North Carolina law has long recognized that when an individual finds property, and is unaware of its true owner, that individual has no legal duty to locate and return the property to the true owner. *See State v. Roper*, 14 N.C. (3 Dev.) 473, 474-75 (1832) (opinion of Daniel, J.) (A bona fide finder of lost or abandoned property, who later "appropriate[s the property] to his own use," is not guilty of larceny.); *see also State v. West*, 293 N.C. 18, 30, 235 S.E.2d 150, 157 (1977) ("[T]he owner of articles of personal property may terminate his ownership by abandoning it and, in that event, title passes to the first person who thereafter takes possession." (citation omitted)). Nonetheless, we applaud the high morals of one who does.

On the other hand, when an individual possesses property with the knowledge of its true owner, and exercises dominion and control over the property for his or her own purposes, thus trespassing on the true owner's property rights, that individual has committed larceny. *See State v. Farrow*, 61 N.C. (Phil.) 161, 163 (1867). It is not the unintentional receipt of the property that makes the act larceny, but the knowing exercise of control over it. *See id.*; *Roper*, 14 N.C. (3 Dev.) at 474-75; *see also State v. Arkle*, 116 N.C. 1017, 1031, 21 S.E. 408, 408 (1895) ("[T]here must be an original, felonious intent . . . at the time of the taking or finding of lost property . . . to constitute larceny.").

Here defendant knowingly exercised dominion and control over the mistakenly deposited funds to the exclusion of West. Evidence showed that West immediately put defendant on notice of the company's error and that defendant knew the money was West's as early as 12 July 2012, well before his ATM withdrawals and electronic transfers on 15 July 2012. *See Roper*, 14 N.C. (3 Dev.) at 474-75. Logically, if West had lost or abandoned its ownership interest, West would not have immediately contacted defendant and his bank. Moreover, defendant could not have been mistaken about the money's ownership, given both West's notice to him and that his initial request was for only $1200. *See id.* at 475 ("If money, by mistake, is sent with a bureau to be repaired, and it is taken with felonious intent, it will be a larceny . . . ."); *see also* 50 Am. Jur. 2d *Larceny* § 32, at 42 (2006) ("Where money . . . is delivered by mistake, and the receiver takes it with knowledge of the mistake and with the intent to keep it, the offense is larceny, since there is no consent on the part of the owner to part with the excessive amount . . . ."). Thus, defendant committed larceny.

While the Chief Justice's opinion applies such long-standing common law principles to the modern banking context, the principles are

equally applicable to situations arising in the past. Thus are we able to use them to answer the question, lingering in the minds of many, as to the criminal culpability of Old Man Potter. *See It's a Wonderful Life* (Liberty Films 1946).

In this beloved film, on Christmas Eve morning in 1945, Uncle Billy goes to Old Man Potter's bank to deposit $8000 in cash[1] for his family's benevolent business, the Bailey Brothers Building & Loan Company. While Uncle Billy is preparing his deposit slip in the bank lobby, Potter arrives with newspaper in hand. Uncle Billy turns to greet him and cannot help but good-naturedly needle crotchety Potter, who had greedily sought to quash the struggling Building & Loan Company for some time. Uncle Billy grabs the newspaper from Potter and proudly points to the picture of his nephew Harry on the front page—the war hero returning home. Potter angrily snatches the newspaper back, in which Uncle Billy had mistakenly folded the $8000 cash. At this point no crime has occurred; Uncle Billy has misplaced his money and Potter is unaware of his possession of it. *See Roper*, 14 N.C. (3 Dev.) at 475 (Though the defendant had possession of a lost shawl, he lacked felonious intent and was not guilty of larceny while simply returning it to the true owner.).

Back in his bank office, Potter unfolds the newspaper and discovers the money. Meanwhile, Uncle Billy attempts to make the deposit and, in horror, finds that he has misplaced the funds. Potter begins to return with the money to the lobby, but upon opening his office door he observes Uncle Billy searching frantically. Potter "puts two and two together," realizing the loss of funds will ruin George Bailey and his Building & Loan Company. Potter closes the door, keeping the $8000 cash. Armed with the knowledge that the money belongs to the Building & Loan Company, Potter exercises dominion and control by keeping the funds, and has thus committed larceny. *See id.* at 474-75.

That same day, the state bank examiner began auditing the Building & Loan Company, which now faced unavoidable collapse given the $8000 shortage. At his wits' end, George pleads with Potter for a loan to save the business. In response, Potter not only does not confess that he has the Building & Loan Company's money, but instead brazenly inquires of George whether he had lost the money, possibly by "playing the markets" or through an extramarital affair. *See id.* at 474 (The finder's "subsequent appropriation in a secret manner, or *his denial*

1. $8000 adjusted for inflation would be approximately $107,483 today. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, [*Consumer Price Index*] *Inflation Calculator* (2017).

of any knowledge of the goods, or any other acts showing a felonious intent, would be evidence [supporting larceny]." (emphasis added) (citations omitted)). Ultimately, Potter phones the police to arrest George for "misappropriation" of company funds.

Facing certain tragedy, George attempts to take his own life. The attempt is cleverly thwarted by Clarence, an angel looking to earn his wings. Clarence helps George appreciate that, despite the current seemingly overwhelming challenges, life is worth living. George favors life over death. When he finally returns home to face whatever consequences may occur, George finds that the community has rallied around him, accumulating the necessary funds to save the Building & Loan Company and his reputation, just in time for Christmas.

So the story ends. George has a wonderful life. Clarence gets his wings. Old Man Potter is a morally bankrupt individual, but an unindicted felon. And we continue our quest to apply ageless common law principles to our ever-changing modern world.

STATE OF NORTH CAROLINA
v.
THOMAS DERUSSELL KNIGHT

No. 97A16

Filed 9 June 2017

Confessions and Incriminating Statements—Miranda rights—knowing and voluntary waiver—by course of conduct

Under the totality of the circumstances, the State established by a preponderance of the evidence that defendant understood his *Miranda* rights but knowingly and voluntarily waived them during a police interrogation. Through his course of conduct, defendant effected a knowing and voluntary waiver of his rights: He listened as the detective read his *Miranda* rights; he spoke coherently and was mature and experienced enough to understand his rights; he did not state that he wanted to remain silent or wanted an attorney; he emphatically denied any wrongdoing and tried to convince the police of his innocence; and he was not threatened or coerced in any way. An affirmative response acknowledging that defendant understood his rights was not required for his waiver to be valid. Further, even assuming defendant denied that he understood his rights, a

bare statement that he did not understand, without more, would not outweigh all of the evidence that he understood.

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. ___, 785 S.E.2d 324 (2016), finding no prejudicial error after appeal from a judgment entered on 7 February 2014 by Judge Kendra D. Hill in Superior Court, Wake County. On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review of an additional issue. The case was calendared for argument in the Supreme Court on 14 February 2017, but was determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(d).

Joshua H. Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General, for the State-appellee/appellant.

Craig M. Cooley for defendant-appellant/appellee.

MARTIN, Chief Justice.

Defendant Thomas Knight allegedly raped and assaulted T.H., the victim, at her home in October 2012. Wearing only a shirt, T.H. eventually escaped and ran to a neighbor's house to get help. Her neighbor gave her a pair of pants to wear and called the police. Evidence that the police recovered from T.H.'s home was consistent with her account of the events. The police soon apprehended defendant at a nearby gas station. When the police found defendant, he was carrying two cell phones, one of which belonged to T.H.

The police took defendant to a police station for questioning. Detective Jeff Wenhart began questioning defendant at around 10:30 or 10:45 p.m. that evening. In the video-recorded interrogation, which lasted under forty minutes, defendant acknowledged spending time with T.H. at her home earlier in the evening but vehemently denied having sexual relations with her and denied any wrongdoing.

I

Defendant was charged with common law robbery, assault on a female, interfering with emergency communication, second-degree rape, second-degree sexual offense, and first-degree kidnapping. He was tried before a jury, with the Honorable Reuben F. Young presiding. Defendant moved to suppress the custodial statements that he made to Detective Wenhart at the police station, claiming that the State had

not proved that he had understood his *Miranda* rights or that he had explicitly waived them. Judge Young granted defendant's motion and suppressed the statements. At the close of evidence, the trial court dismissed the common law robbery charge and the interfering-with-emergency-communication charge. The jury found defendant guilty of assault on a female but could not reach a unanimous verdict on the other three charges that remained. As a result, the trial court sentenced defendant for his assault-on-a-female conviction and declared a mistrial on the other three charges.

About six months later, defendant was retried before a new jury, with the Honorable Kendra D. Hill presiding, on those three charges—namely, second-degree rape, second-degree sexual offense, and first-degree kidnapping. At defendant's second trial, defendant again moved to suppress the custodial statements that he made to Detective Wenhart. Judge Hill held a voir dire hearing, heard the arguments of the parties, viewed the video recording of defendant's custodial interrogation, and ruled that defendant's custodial statements were admissible.

In the findings of fact that supported her ruling, Judge Hill noted that, when Detective Wenhart began to read defendant his *Miranda* rights and told defendant that he had a right to remain silent, "[d]efendant immediately said[,] are you arresting me?" Judge Hill also explained that, at the time, defendant "was clearly detained, and yet the reading of the rights triggered in the defendant's mind that this was an arrest, which to the [trial] [c]ourt provides some indication of knowledge" and "understanding about *Miranda* to some extent." Plus, "[c]lear language was used [by Detective Wenhart] here." "The defendant," moreover, was "an adult . . . in his 30s at the time of this" interrogation and gave "no indication to the [trial] [c]ourt" that he had "any cognitive problems." In addition, Judge Hill observed that "[d]efendant ha[d] a prior criminal history" and thus had "some knowledge and familiarity with the criminal justice system." Finally, "the discussion prior to the full reading of the rights made it clear that the defendant was seeking information . . . and wanted to provide information with regard to his indication of what had been done here." Judge Hill concluded that the discussion "indicat[ed] a willingness for the defendant to speak to" Detective Wenhart and noted that defendant "actually sa[id] to the officer[,] I want to be frank with you, I want to explain this to you."

Based on these findings of fact, Judge Hill found, under the totality of the circumstances, that there was "enough to determine that the defendant understood his *Miranda* rights" and that, "through his continued discussion[,] . . . he voluntarily waived those rights in providing

a statement to Detective Wenhart." At the close of defendant's second trial, the jury found him guilty of second degree rape and first-degree kidnapping and not guilty of second-degree sexual offense. Defendant gave oral notice of appeal.

Before the Court of Appeals, defendant argued, among other things, that Judge Hill erred when she denied defendant's motion to suppress his custodial statements. The Court of Appeals unanimously agreed that Judge Hill had erred because the State had not shown that defendant actually understood his *Miranda* rights. *State v. Knight*, ___ N.C. App. ___, ___, ___, 785 S.E.2d 324, 333-36, 338-40 (2016); *id.* at ___, 785 S.E.2d at 340 (Stroud, J., concurring in part and dissenting in part). The Court of Appeals therefore concluded that defendant had not knowingly and intelligently waived his rights. *Id.* at ___, 785 S.E.2d at 336 (majority opinion); *id.* at ___, 785 S.E.2d at 340 (Stroud, J., concurring in part and dissenting in part). A majority of the panel nevertheless held that Judge Hill's purported error was harmless beyond a reasonable doubt and thus found no prejudicial error in defendant's second trial. *Id.* at ___, ___, 785 S.E.2d at 336-38, 340 (majority opinion). A dissenting judge disagreed and would have granted defendant a new trial. *Id.* at ___, 785 S.E.2d at 340-41 (Stroud, J., concurring in part and dissenting in part).

Defendant appealed to this Court based on the dissenting opinion. The State filed a petition for discretionary review of an additional issue, namely, whether the Court of Appeals' ruling that defendant did not understand his *Miranda* rights and therefore did not knowingly and intelligently waive them was correct. We allowed the petition. By consent of the parties, the case was submitted for decision on the briefs under Rule 30(d) of the North Carolina Rules of Appellate Procedure.

II

The Fifth Amendment, which applies to the states through the Fourteenth Amendment, *see Griffin v. California*, 380 U.S. 609, 611, 615 (1965), provides that no person "shall be compelled in any criminal case to be a witness against himself," U.S. Const. amend. V. To protect this right, the Supreme Court of the United States has formulated a set of prophylactic warnings that criminal suspects must receive for any custodial statements that they make to be admissible in court. *See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). The substance of those warnings has not changed over the last fifty years. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010).

A defendant may, however, waive his *Miranda* rights as long as he waives them voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S.

at 444; *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985). A court's waiver inquiry has two distinct dimensions. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). First, a court must determine whether the waiver was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* Second, a court must determine that the waiver was knowing and intelligent—that is, that it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

A waiver can be either express or implied. *See State v. Connley*, 297 N.C. 584, 586, 256 S.E.2d 234, 235-36 (order on remand) (citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)), *cert. denied*, 444 U.S. 954 (1979). "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." *Id.* at 586, 256 S.E.2d at 235 (quoting *Butler*, 441 U.S. at 373). A court may properly conclude that a defendant has waived his *Miranda* rights only if the totality of the circumstances surrounding the defendant's interrogation show both that he adequately understands them and that he was not coerced into waiving them. *Moran*, 475 U.S. at 421; *see also State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983). Whether a defendant has knowingly and intelligently waived his *Miranda* rights therefore "depends on the specific facts and circumstances of each case, including the [defendant's] background, experience, and conduct." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (citing, inter alia, *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). And although the Supreme Court has stated that the State bears a "heavy burden" in proving waiver, *Miranda*, 384 U.S. at 475, the Court later clarified that "the State need prove waiver only by a preponderance of the evidence," *Colorado v. Connelly*, 479 U.S. 157, 168 (1986), *cited in Berghuis*, 560 U.S. at 384.

More recently, in *Berghuis v. Thompkins*, the Supreme Court addressed whether a defendant who was "[l]argely silent" during a nearly three hour custodial interrogation had invoked his *Miranda* rights, and also addressed whether he had waived them. *See* 560 U.S. at 375 (brackets in original; internal quotation marks omitted); *id.* at 380-87. After receiving his *Miranda* warnings, Van Chester Thompkins, the defendant in *Berghuis*, gave only "a few limited verbal responses" to the police officers' questions, "such as 'yeah,' 'no,' or 'I don't know.' " *Id.* at 375. "About 2 hours and 45 minutes into the interrogation," one of the interrogating police officers asked Thompkins if he believed in

God. *Id.* at 376. He replied, "Yes," and "his eyes welled up with tears." *Id.* (internal quotation marks and brackets omitted). The officer asked Thompkins if he prayed to God, and he replied, "Yes." *Id.* The officer then asked him if he prayed to God "to forgive [him] for shooting that boy down," and he "answered 'Yes' and looked away." *Id.*

The Court held that Thompkins had not invoked his right to remain silent under *Miranda*. *Id.* at 382. It ruled that a suspect must invoke his right to remain silent unambiguously, and that Thompkins had not done so. *See id.* at 381-82 (citing, inter alia, *Davis v. United States*, 512 U.S. 452, 458-62 (1994)). The Court also held that Thompkins waived his right to remain silent. *Id.* at 385, 387. It found that he had understood his *Miranda* rights, that he had engaged in a course of conduct to waive those rights, and that he had waived those rights voluntarily. *See id.* at 385-87.

With respect to the waiver issue, the Court first stated that "[t]here was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights." *Id.* at 385. It noted that "Thompkins received a written copy of the *Miranda* warnings"; that one of the officers who interrogated Thompkins "determined that Thompkins could read and understand English"; and that "Thompkins was given time to read the warnings." *Id.* at 385-86. The Court further noted that Thompkins read one of the *Miranda* warnings aloud and that one of the officers read all of the warnings aloud. *See id.* at 386. Based on these facts, the Court said that "[t]here is no basis in this case to conclude that [Thompkins] did not understand his rights; and . . . it follows that he chose not to invoke or rely on those rights when he did speak." *Id.* at 385.

Next, the Court ruled that, by responding to the officer's questions about praying to God for forgiveness for shooting the victim, Thompkins engaged in a " 'course of conduct indicating waiver' of the right to remain silent." *Id.* at 386 (quoting *Butler*, 441 U.S. at 373). "If Thompkins wanted to remain silent," the Court explained, "he could have said nothing in response to [the officer's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." *Id.*

Finally, the Court stated that there was "no evidence that Thompkins' statement was coerced." *Id.* It noted that "Thompkins d[id] not claim that police threatened or injured him during the interrogation or that he was in any way fearful." *Id.* It also observed that, although Thompkins seemed to have been "in a straight-backed chair for three hours, . . . there is no authority for the proposition that an interrogation of this

length is inherently coercive," and that even when longer interrogations had been held to be improper, the interrogations were accompanied by other coercive factors. *Id.* at 386-87. The Court held that, in these circumstances, Thompkins had "knowingly and voluntarily made a statement to police, so he waived his right to remain silent." *Id.* at 387.

III

When a trial court makes findings of fact after a voir dire hearing concerning the admissibility of a custodial statement, those findings are conclusive and binding on the appellate courts if they are supported by competent evidence. *See Simpson*, 314 N.C. at 368, 334 S.E.2d at 59. The trial court's conclusions of law, however, are reviewed de novo. *See id.*

The case at hand gives us our first opportunity to apply *Berghuis*, and the analysis in *Berghuis* is particularly instructive here. Defendant does not allege that he invoked his right to remain silent during the custodial interrogation with Detective Wenhart. He instead argues that the State did not show, by a preponderance of the evidence, that he understood his rights. He also argues that the trial court's purported error in admitting his custodial statements was prejudicial. We do not need to reach the prejudice issue, though, because we hold that, as in *Berghuis*, defendant understood his *Miranda* rights and that, through a "course of conduct indicating waiver," *Berghuis*, 560 U.S. at 386 (quoting *Butler*, 441 U.S. at 373), he effected a knowing and voluntary waiver of them.

Here, as in *Berghuis*, defendant never said "during the interrogation . . . that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." *Id.* at 375. Quite the contrary. As Judge Hill noted in her ruling on the admissibility of defendant's custodial statements, the video of defendant's interrogation—which, again, lasted under forty minutes—shows that defendant was willing to speak with Detective Wenhart. After being read his rights, defendant indicated that he wanted to tell his side of the story when he said "I'm not gonna lie to you, man" and "I'm gonna be frank with you." The video also shows that defendant talked at length during the interrogation, often interrupting Detective Wenhart, and that defendant responded without hesitation to Detective Wenhart's questions about where he had been and what he had been doing that evening. What's more, the video shows that defendant emphatically denied any wrongdoing; provided his account of the evening's events in detail, including the fact that he had spent some time at the victim's home; and seemed to be trying to talk his way out of custody. This last point is worth emphasizing because it appears that, when

faced with a choice between invoking his rights or trying to convince the police that he was innocent, defendant chose to do the latter.

Thus, defendant's course of conduct indicating waiver was much more pronounced than that of the defendant in *Berghuis*, who remained largely silent over the course of an almost three hour interrogation and who gave very limited responses when he did speak. *See id.* at 375. And yet, in *Berghuis*, the Supreme Court found that the defendant had implicitly waived his rights through his course of conduct when he answered the officer's question about whether he prayed to God for forgiveness for shooting the victim. *See id.* at 386-87. It follows that defendant in this case also made an implied waiver of his *Miranda* rights through a course of conduct that indicated waiver when he spoke, at great length, with Detective Wenhart.

In addition, as in *Berghuis*, there is no evidence here that defendant's statements were involuntary. The video of the interrogation shows that defendant was not threatened in any way and that Detective Wenhart did not make any promises, false or otherwise, to get defendant to talk. Before reading defendant his rights, Detective Wenhart simply told him that "[t]his is your opportunity, should you so desire, . . . to tell your side of the story so that we can get to the bottom of what happened." The interrogation was conducted in what appears to be a standard interview room, and Detective Wenhart's tone throughout the interrogation was calm and conversational. And the length of defendant's interrogation—which, as we have already noted, was less than forty minutes—was much shorter than the interrogation in *Berghuis*, which lasted almost three hours. As we have already seen, the Supreme Court noted in *Berghuis* that even interrogations *longer* than three hours have been held to be improper only when they were accompanied by other coercive factors. *Id.* at 387. Here, the only factor that one could even arguably claim was coercive was the fact that defendant's arm was handcuffed to a bar on the wall in the interrogation room. But his chair had an armrest; his arm still had an ample range of motion; and he did not appear to be in any discomfort during the interrogation. Thus, defendant voluntarily waived his *Miranda* rights.

Although he waived his *Miranda* rights through a course of conduct that indicated waiver, and although he did so voluntarily, defendant argues that the police still violated his *Miranda* rights because, he says, he did not *understand* his rights when he waived them. But under the totality of the circumstances, defendant here, like the defendant in *Berghuis*, did understand his rights.

In discussing why the defendant in *Berghuis* understood his rights, the Supreme Court noted that the defendant read and spoke English, was given a written copy of his *Miranda* rights, was informed that these rights would not dissipate after a certain amount of time, and was told that the police would have to honor his rights, which could be asserted at any time. *Id.* at 385-86. One of the officers in *Berghuis* also read the defendant's *Miranda* rights aloud to him. *Id.* at 386.

Similarly, in this case, Detective Wenhart read all of defendant's *Miranda* rights aloud, including his right to stop answering questions at any time during the interrogation. The video of the interrogation shows that Detective Wenhart spoke clearly when he read defendant his rights, and that defendant appeared to be listening and paying attention. It is clear from the video as a whole, moreover, that defendant speaks English fluently. And defendant was certainly mature and experienced enough to understand his rights. He repeatedly told Detective Wenhart that he was "38 years old," and, as the trial court found, he had prior experience with the criminal justice system and recognized that his rights were being read to him, as evidenced by his statement that, "[i]f you're reading me my rights, I'm under arrest." In addition, as the trial court also found, defendant gave no indication that he had any cognitive problems. Nor was there anything else that would have impaired his understanding of his rights. Although defendant admitted during the interrogation that he had "been drinking" and "smoking a little pot," and claimed at one point that he was intoxicated, the video of his interrogation shows that his answers to Detective Wenhart's questions were coherent and responsive throughout.

Defendant asserts, nevertheless, that he did not understand his rights because he did not say that he understood them. But it is clear from *Berghuis* that the State does not need to prove that a defendant explicitly *said* that he understood his rights; it must simply prove under the totality of the circumstances that he *in fact* understood them. In *Berghuis*, the Supreme Court stated that there was conflicting evidence as to whether Thompkins affirmatively said that he understood his *Miranda* rights, and he refused to sign an acknowledgement that he understood them. *Id.* at 375; *id.* at 399 (Sotomayor, J., dissenting). But, even though it was not clear whether Thompkins had said that he understood his rights, the Supreme Court still found that he had in fact understood them. *See id.* at 385-86 (majority opinion). In this case, then, as in *Berghuis*, "[t]here is no basis . . . to conclude that [defendant] did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak." *Id.* at 385.

Of course, defendant arguably indicated that he did *not* understand his rights. When asked if he understood them, he said, "I -- not really." Here is the exchange in context:

> MR. KNIGHT: See, that's the thing right there I just don't understand. What the hell am I doing in these damn cuffs, man?
>
> DETECTIVE: Well, if you want me to explain that, you got to allow me to get through here. Okay?
>
> MR. KNIGHT: I -- I'm -- listening --
>
> DETECTIVE: Before I ask you any questions --
>
> MR. KNIGHT: I'm listening (Inaudible) --
>
> DETECTIVE: -- You must understand your rights.
>
> MR. KNIGHT: You're not talking (Inaudible) --
>
> DETECTIVE: You have the right to remain silent and not make any statement.
>
> MR. KNIGHT: Like I said, I'm going to jail for no
>
> f---ing reason.
>
> DETECTIVE: Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice and before I ask you any questions, and to have him or anyone else with you during questioning. If you cannot afford a lawyer, one will be appointed for you by the court before questioning, if you wish.
>
> If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.
>
> Do you understand each of the rights I've explained to you, Mr. Knight?
>
> MR. KNIGHT: I -- not really. I'm --
>
> DETECTIVE: Well --
>
> MR. KNIGHT: I'm -- I'm not gonna lie to you, man. I'm -- I'm -- I'm -- I'm serious. See, this is where I'm at now.
>
> DETECTIVE: Uh-huh?

MR. KNIGHT: (Inaudible) I'm gonna be frank with you. This is exactly where I'm at. I haven't did anything wrong, man.

DETECTIVE: Uh-huh.

MR. KNIGHT: Not a damn thing. You see what you see. I don't care. But I haven't did any damn thing wrong. I haven't harmed anybody, I haven't did anything to anybody. All I'm trying to do is go home and lay in my damn bed so I can go to my boy's football game tomorrow morning at 9:30. That's all I'm trying to do, man.

DETECTIVE: Okay.

MR. KNIGHT: Other than that right there, I don't know what the hell you talking about.

DETECTIVE: So why would this young lady say that -- that you attacked her --

MR. KNIGHT: She's f---ing drunk. That's why.

DETECTIVE: Were you drinking with her?

MR. KNIGHT: Yeah, of -- yeah, we -- yeah, of course.

When viewed in its proper context, therefore, defendant's response to Detective Wenhart's question about understanding—"I -- not really. I'm--"—was a continuation of defendant's statement that he did not understand why he was in handcuffs and, more generally, why he was being held in custody, because—in his words—he had not done "anything wrong." So the argument that defendant denied understanding his rights is not persuasive.

Even if defendant *had* been denying that he understood his rights, this bare statement, without more, would not be enough to outweigh all of the evidence of understanding that we have already discussed. The totality of the circumstances analysis might have produced a different result had defendant also asked clarifying questions or sought additional details about his right to remain silent or his right to counsel. But he did not.

In other words, the fact that a defendant affirmatively denies that he understands his rights cannot, on its own, lead to suppression. Again, while an express written or oral statement of waiver of *Miranda* rights is usually strong proof of the validity of that waiver, it is neither necessary

nor sufficient to establish waiver. *Butler*, 441 U.S. at 373. Likewise, a defendant's affirmative acknowledgement that he *understands* his *Miranda* rights is neither necessary nor sufficient to establish that a defendant in fact understood them, because the test for a defendant's understanding looks to the totality of the circumstances. Just because a defendant *says* that he understands his rights, after all, does not mean that he actually understands them. By the same token, just because a defendant claims *not* to understand his rights does not necessarily mean that he does not actually understand them. In either situation, merely stating something cannot, in and of itself, establish that the thing stated is true. That is exactly why a trial court must analyze the totality of the circumstances to determine whether a defendant in fact understood his rights. As a result, even if defendant here had denied that he understood his rights—and again, in context it appears that he did not—that would not change our conclusion in this case.

Thus, under the totality of the circumstances, the State established by a preponderance of the evidence that defendant understood his rights but knowingly and voluntarily waived them, and Judge Hill's determination was correct.

The Court of Appeals' opinion could be read to suggest that a defendant must make some sort of affirmative verbal response or affirmative gesture to acknowledge that he has understood his *Miranda* rights for his waiver to be valid. *See Knight*, ___ N.C. App. at ___, 785 S.E.2d at 335-36. That suggestion, to the extent that it exists, is explicitly disavowed. As we have shown, requiring that a defendant affirmatively acknowledge that he understands his rights in order to validly waive them conflicts with the holding in *Berghuis*.

In sum, defendant waived his *Miranda* rights during his custodial interrogation, so the statements that he made during that interrogation are admissible. Because we find no error in the trial court's decision to admit those statements, we do not need to consider whether erroneously admitting them would have been prejudicial. The remaining issues addressed by the Court of Appeals are not before us, and we do not disturb its decision on those issues.

Although the Court of Appeals erred in finding that the admission of defendant's video-recorded interrogation violated his *Miranda* rights, it correctly upheld defendant's convictions and the judgment entered on those convictions. We therefore modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ALLEN McKIVER

No. 213PA16

Filed 9 June 2017

Constitutional Law—Confrontation Clause—911 calls

The Confrontation Clause did not prohibit the use of information received from an anonymous 911 caller and a reverse call by the 911 operator where the circumstances objectively indicated that the primary purpose for the calls was to enable law enforcement to meet an ongoing emergency and the statements were nontestimonial in nature.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 85 (2016), finding prejudicial error in a judgment entered on 29 April 2015 by Judge Benjamin G. Alford in Superior Court, New Hanover County, and awarding defendant a new trial. Heard in the Supreme Court on 11 April 2017.

Joshua H. Stein, Attorney General, by Daniel P. O'Brien, Special Deputy Attorney General, for the State-appellant.

Kimberly P. Hoppin for defendant-appellee.

NEWBY, Justice.

This case is about whether the Confrontation Clause prohibits the use at trial of information received from an anonymous 911 caller who informed law enforcement of a possible incident involving a firearm and described the suspect. Because the circumstances surrounding the 911 caller's statements objectively indicate that their primary purpose was to enable law enforcement to meet an ongoing emergency, the statements were nontestimonial in nature, thus not implicating the Confrontation Clause. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's evidentiary ruling and the resulting judgment upon defendant's conviction.

At 9:37 p.m. on 12 April 2014, an anonymous 911 caller reported a possible dispute involving a black man with a gun in his hand who was

standing outside on Penn Street in the Long Leaf Park subdivision of Wilmington, North Carolina. In response to the dispatch, Officer Scott Bramley of the Wilmington Police Department activated his patrol car's blue lights and siren on the way to the scene. Officer Bramley characterized the dispatch as "a pretty serious call" that is "always dispatched with backup." After stopping a few blocks away to retrieve his patrol rifle from his vehicle's trunk, he proceeded to Penn Street, where he parked on the side of the roadway. Penn Street was "very dark" with "very sporadic" street lighting, and Officer Bramley turned on his high-beam headlights "to try and light-up the area."

Upon exiting his vehicle, Officer Bramley noticed two people standing near a black, unoccupied Mercedes, which was still running and parked beside a vacant lot. Officer Bramley heard music "blaring" from the car radio. Lacking a detailed description of the suspect, Officer Bramley approached the two individuals. One of the individuals, a black male wearing a red and white plaid shirt and jeans, walked towards Officer Bramley. Officer Bramley "confronted him about possibly having [a firearm], at which point he lifted his shirt to show [Officer Bramley] he did not have a gun." Officer Bramley conducted a pat-down to confirm the man was unarmed and then, having no description or location for the suspect, continued to investigate down the block.

By this time other officers had arrived on the scene, and Officer Bramley observed a number of onlookers watching from nearby residences and the vacant lot. Officer Bramley asked for a more detailed description of the suspect, but the dispatcher informed him that the anonymous 911 caller had already disconnected. Officer Bramley requested that the dispatcher initiate a reverse call. After reconnecting with the caller, the dispatcher informed Officer Bramley that the caller "said it was in the field in a black car and someone said he might have thrown the gun."

In response to Officer Bramley's request for a more detailed description from the caller, the dispatcher replied: "Black Male light plaid shirt. He was last seen by the car with a gun in his hand and then they all went in the house because they were afraid." Officer Bramley testified that, upon receiving this information, he "immediately knew [the suspect] was the first gentleman that [he] had come into contact with because no one else in that area was wearing anything remotely similar to that clothing description." Officer Bramley relayed the suspect's description "to other officers still en route to help search the area in an attempt to locate him." Officers searched the nearby vacant lot and discovered a Sig Sauer P320 .45 caliber handgun located about ten feet away from the

Mercedes. The officers identified defendant as the suspect based on the caller's description, and defendant was arrested.

Defendant was indicted, *inter alia*, on one count of possession of a firearm by a felon. Before trial defendant moved to exclude evidence of the initial 911 call and the dispatcher's reverse call, contending that admitting statements made during either call without requiring the anonymous caller to testify would allow the jury to hear inadmissible testimonial statements in violation of his Sixth Amendment right to confront the witnesses against him. The State successfully argued, however, that the statements primarily served to enable law enforcement to meet an ongoing emergency and were therefore nontestimonial in nature. *See Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Along with the calls, the State introduced other evidence from the scene, including the firearm, and documentation verifying defendant's prior felony conviction. The jury convicted defendant of possessing a firearm as a convicted felon, and the trial court sentenced defendant to fourteen to twenty-six months of imprisonment, suspended for thirty-six months of supervised probation after completion of a six-month term. Defendant appealed.

On appeal the Court of Appeals concluded, *inter alia*, that the anonymous 911 call and the dispatcher's reverse call were inadmissible testimonial statements. *State v. McKiver*, ___ N.C. App. ___, ___, 786 S.E.2d 85, 94 (2016). According to the Court of Appeals, the 911 call was not placed in response to an "ongoing emergency" and admitting the statements without requiring the anonymous caller to testify violated defendant's constitutional right to confront the witnesses against him.[1] *Id.* at ___, 786 S.E.2d at 93-94 (citing *Davis*, 547 U.S. at 828, 126 S. Ct. at 2277, 165 L. Ed. 2d at 240-41). Noting the anonymous 911 caller's "position of relative safety" in her home and away from her window, the Court of Appeals determined that the record did not objectively indicate that an ongoing emergency existed. *Id.* at ___, 786 S.E.2d at 93. Even though "the identity and location of the man with the gun were not yet known to the officers," according to the Court of Appeals, " 'this fact [alone] does not in and of itself create an ongoing emergency.' " *Id.* at ___, 786 S.E.2d at 93 (quoting *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 829 (2007)). Moreover, the court concluded that receiving evidence of the calls could not be harmless because defendant's identification as the suspect rested almost entirely on these statements. *Id.* at ___, 786

1. The Court of Appeals first held that the incriminating circumstantial evidence sufficiently supported a jury verdict that defendant constructively possessed the firearm. *McKiver*, ___ N.C. App. at ___, 786 S.E.2d at 88-90. This issue is not before the Court.

S.E.2d at 94. While it emphasized that its conclusion should not be read to condemn the officers "who reacted professionally and selflessly to a potentially dangerous situation," the Court of Appeals ultimately held that the trial court erred by failing to exclude evidence concerning both the initial 911 call and the dispatcher's reverse call from evidence, and awarded defendant a new trial. *Id.* at ___, 786 S.E.2d at 94. This Court allowed discretionary review.

We review a trial court's decisions regarding a defendant's allegations of constitutional violations de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). The Confrontation Clause of the Sixth Amendment to the Federal Constitution declares: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend VI. The Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177, 194 (2004). The Confrontation Clause does not, however, apply to nontestimonial statements. *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S. Ct. 1173, 1183, 167 L. Ed. 2d 1, 13 (2007).

In *Davis v. Washington* the United States Supreme Court defined "nontestimonial statements" and compared them to "testimonial statements":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237. The Court described an ongoing emergency as "a call for help against a bona fide physical threat" or "speaking about events *as they were actually happening*, rather than 'describ[ing] past events.' " *Id.* at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240 (brackets in original) (quoting *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 1900, 144 L. Ed. 2d 117, 135 (1999) (plurality opinion)). Statements made during a 911 call often describe "current circumstances requiring police assistance" rather than

provide a narrative of past events. *Id.* at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240.

Moreover, the existence of an ongoing emergency and its duration "depend on the type and scope of danger posed to the victim, the police, and the public." *Michigan v. Bryant*, 562 U.S. 344, 371, 131 S. Ct. 1143, 1162, 179 L. Ed. 2d 93, 115 (2011). For example, assessing whether an emergency is ongoing, and is therefore a continuing threat to the public and law enforcement, "may depend in part on the type of weapon employed." *Id.* at 364, 131 S. Ct. at 1158, 179 L. Ed. 2d at 111 (reviewing statements made by a victim, mortally wounded during a nondomestic dispute in an exposed public location, that described and identified the fleeing gunman who posed a prospective threat to the general public).

"In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation," taking into account that law enforcement officers serve as both first responders and interrogators. *Id.* at 367, 131 S. Ct. at 1160, 179 L. Ed. 2d at 112. Formal statements made in the course of police interrogation suggest the lack of such an emergency. *Id.* at 366, 131 S. Ct. at 1160, 179 L. Ed. 2d at 112; *accord Lewis*, 361 N.C. at 548, 648 S.E.2d at 829 (concluding that a victim's formal statements to police in her home after the commission of a crime and her photo identification of the defendant while she was at the hospital were testimonial). "[C]ourts should look to all of the relevant circumstances" and objectively evaluate "the statements and actions of all participants," including "the parties' perception that an emergency is ongoing." *Bryant*, 562 U.S. at 369-70, 131 S. Ct. at 1162, 179 L. Ed. 2d at 114-15.

Here the trial court properly determined that, based on the objective circumstances surrounding the 911 calls, an ongoing emergency existed. The primary purpose of the initial 911 call was to inform law enforcement of current circumstances: a possible dispute involving an unidentified man brandishing a firearm outside the caller's home on a public street in a residential subdivision. *See Davis*, 547 U.S. at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240 (A "call for help" is nontestimonial.). The caller reacted by going into her home and staying away from the window. Likewise, the officer retrieved his patrol rifle before entering the scene. As is evident from the precautions taken by both the 911 caller and the officers on the scene, they believed the unidentified suspect was still roving the subdivision with a firearm, posing a continuing threat to the public and law enforcement. *See Bryant*, 562 U.S. at 370-71, 131 S. Ct. at 1162, 179 L. Ed. 2d at 115 ("[T]he existence and duration of an

emergency depend on the type and scope of danger posed to the victim, the police, and the public.").

To properly address the continuing threat, Officer Bramley requested that the dispatcher place a reverse call to ask for a more complete description of the individual and, once received, he quickly relayed that information to the other officers in an effort to locate and apprehend the suspect. Only after receiving this additional information from the reverse call were the officers able to find the weapon and identify the suspect. The 911 caller's description of the suspect's clothing and approximate location gave law enforcement the information that they needed to address an ongoing emergency. *See State v. Hewson*, 182 N.C. App. 196, 206-07, 642 S.E.2d 459, 466-67 (concluding that the victim's 911 call was nontestimonial because it "was not designed to establish a past fact, but 'to describe current circumstances requiring police assistance' " (quoting *Davis*, 547 U.S. at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240)), *disc. rev. denied*, 361 N.C. 572, 651 S.E.2d 229 (2007); *see also United States v. Johnson*, 509 F. App'x 487, 488-89, 494 (6th Cir. 2012) (concluding that an anonymous 911 caller's statement that "a black male wearing a blue t-shirt and dark-colored shorts" was carrying a gun and walking southbound down the street described "an ongoing situation requiring police assistance" and was therefore nontestimonial), *cert. denied*, ___ U.S. ___, 133 S. Ct. 2361, 185 L. Ed. 2d 1083 (2013). As a result, the anonymous 911 caller's statements here fit squarely within the definition of nontestimonial statements as defined in *Davis v. Washington*. Therefore, the statements are admissible without implicating the Confrontation Clause.

In sum, the circumstances surrounding the initial 911 call and the dispatcher's reverse call objectively indicate that the primary purpose of the dispatcher's questions and the caller's responses was to enable law enforcement to meet an ongoing emergency. As such, the statements were nontestimonial and did not trigger Sixth Amendment Confrontation Clause protection. Accordingly, we reverse the decision of the Court of Appeals on this issue and reinstate the trial court's evidentiary ruling and resulting judgment.

REVERSED.

STATE OF NORTH CAROLINA
v.
AUSTIN LYNN MILLER

No. 113PA16

Filed 9 June 2017

Drugs—newly enacted statute—unlawful to possess pseudoephedrine if prior conviction for methamphetamine possession or manufacture—as-applied challenge—active conduct

Where defendant was convicted of violating a newly enacted statute, N.C.G.S. § 90-95(d1)(1)(c), which made it unlawful for any person with a prior conviction for the possession or manufacture of methamphetamine to possess a pseudoephedrine product, based on his purchase of "Allergy Congestion Relief D-ER tabs," the Supreme Court held that his conviction did not violate his federal constitutional right to due process of law. His as-applied challenge failed because his conviction rested upon his own active conduct rather than a "wholly passive" failure to act.

Justice MORGAN 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. ___, 783 S.E.2d 512 (2016), vacating a judgment entered on 5 February 2015 by Judge Eric C. Morgan in Superior Court, Watauga County. Heard in the Supreme Court on 14 February 2017.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Jeffrey William Gillette for defendant-appellee.

ERVIN, Justice.

On 12 June 2013, the General Assembly enacted legislation that, effective 1 December 2013, made it "unlawful for any person" to "[p]ossess a pseudoephedrine product if the person has a prior conviction for the possession or manufacture of methamphetamine," with any person convicted of this offense to "be punished as a Class H felon." Act

of June 12, 2013, ch. 124, secs. 1, 3, 2013 N.C. Sess. Laws 291, 291-93 (codified at N.C.G.S. § 90-95(d1)(1)(c)).[1] Prior to the enactment of N.C.G.S. § 90-95(d1)(1)(c), any person aged eighteen or older was entitled to purchase "at retail" up to "3.6 grams of any pseudoephedrine products[2] per calendar day" and up to "9 grams of pseudoephedrine products within any 30-day period," N.C.G.S. § 90-113.53 (2015),[3] as long as the purchaser furnished appropriate photo identification and a current valid residential address and signed a form attesting to the validity of his or her personal information and other information that could be accessed by law enforcement officers, *see id.* §§ 90 113.52 (2015), 113.53. The ultimate issue presented for our consideration in this case is whether N.C.G.S. § 90-95(d1)(1)(c), as applied to defendant, worked a deprivation of defendant's right to due process of law under the federal constitution. After careful consideration of the record evidence in light of the applicable legal principles, we conclude that defendant's as-applied challenge to the constitutionality of N.C.G.S. § 90-95(d1)(1)(c) lacks merit and reverse the decision of the Court of Appeals, *State v. Miller*, ___ N.C. App. ___, ___, 783 S.E.2d 512, 523-24 (2016), to the contrary.

On 3 October 2012, Judge R. Stuart Albright entered a judgment in Ashe County File Nos. 12 CrS 248, 11 CrS 50918, 11 CrS 50919, and 11 CrS 50920 sentencing defendant to a term of sixteen to twenty months of imprisonment, with this sentence being suspended and with defendant being placed on supervised probation for a period of thirty-six months, based upon defendant's convictions for possession of a methamphetamine precursor with the intent to distribute (File No. 12 CrS 248), maintaining a vehicle or dwelling for the purpose of selling or delivering a controlled substance (File No. 11 CrS 50918), possession of methamphetamine (File No. 11 CrS 50919), and possession of drug paraphernalia (File No. 11 CrS 50920). On 5 January 2014, defendant purchased "Allergy Congestion Relief D–ER tabs," which contained 3.6 grams of pseudoephedrine, from a Walmart pharmacy in Boone. On 7 January 2014, Detective John Hollar of the Watauga County Sheriff's Office examined the National Precursor Log Exchange, which is an electronic database administered by the National Association of Drug

1. The Governor approved the new statutory provision on 19 June 2013.

2. A "pseudoephedrine product" is "a product containing any detectable quantity of pseudoephedrine or ephedrine base, their salts or isomers, or salts of their isomers." N.C.G.S. § 90-113.51(a) (2015).

3. The statutory purchase limits do not apply "if the product is dispensed under a valid prescription." *Id.* § 90-113.53(a), (b).

Diversion Investigators that tracks pseudoephedrine purchases, N.C.G.S. § 90-113.52A (2015), and determined that defendant had made this pseudoephedrine purchase. In view of the fact that Detective Hollar knew that defendant had previously been convicted of possessing methamphetamine, he obtained the issuance of a warrant for defendant's arrest. On 4 August 2014, the Watauga County grand jury returned a bill of indictment charging defendant with "possess[ing] an immediate precursor chemical, pseudoephedrine, having a prior conviction for the possession of methamphetamine, to wit: The defendant was convicted of Possession of Methamphetamine in Ashe County, File Number 11 CRS 50919, on 1 October 2012."[4]

On 4 February 2015, defendant filed a motion in which he requested the trial court to declare N.C.G.S. § 90-95(d1)(1)(c) unconstitutional on the grounds that punishing him for violating this newly enacted statutory provision contravened his federal due process rights as enunciated in *Lambert v. California*, 355 U.S. 225, 2 L. Ed. 2d 228 (1957). In support of this contention, defendant argued that N.C.G.S. § 90-95(d1)(1)(c) had criminalized the otherwise innocent act of possessing a pseudoephedrine product for a subset of felons to which defendant belonged despite the fact that the purchase of such substances by individuals like defendant had been entirely lawful little more than a month earlier and that the State's failure to provide adequate notice of this change in law constituted a federal due process violation like that identified in *Lambert*. In addition, defendant asserted that federal due process principles required that a mens rea or scienter element be imported into N.C.G.S. § 90-95(d1)(1)(c) in light of *Lambert*; *Morissette v. United States*, 342 U.S. 246, 96 L. Ed. 288 (1952); and *Liparota v. United States*, 471 U.S. 419, 85 L. Ed. 2d 434 (1985). For that reason, in the event that this case proceeded to trial, defendant argued that the trial court would be required to instruct the jury that, in order to return a verdict of guilty, the jury would have to find beyond a reasonable doubt that defendant had the specific intent to violate the law consisting of proof that defendant "had knowledge that it was illegal to purchase [a pseudoephedrine product] because he had a meth[amphetamine] conviction."

In response, the State argued that N.C.G.S. § 90-95(d1)(1)(c) resembles N.C.G.S. § 14-415.1, which provides, in pertinent part, that "[i]t

4. Although the dates associated with defendant's conviction for methamphetamine possession set out in the indictment and delineated in the evidence differ, defendant did not argue in the Court of Appeals that this divergence between allegation and proof constituted a fatal variance entitling him to dismissal of the charge that had been lodged against him.

shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction" and which has repeatedly been upheld by North Carolina courts. N.C.G.S. § 14-415.1(a) (2015). More specifically, the State asserted that N.C.G.S. § 90-95(d1)(1)(c), like N.C.G.S. § 14-415.1, merely requires an "intent to act"; that the dangers posed by methamphetamine are similar to those posed by firearms in the possession of felons; and that the similarities between these two statutes demonstrate the constitutionality of N.C.G.S. § 90-95(d1)(1)(c). Additionally, the State asserted that defendant's specific intent argument amounted to a claim that "ignorance of the law should be an excuse." At the conclusion of the pretrial hearing, the trial court denied defendant's motion to declare N.C.G.S. § 90-95(d1)(1)(c) unconstitutional "without prejudice to later arguments at the charging conference as to jury instructions."

At the jury instruction conference held near the conclusion of defendant's trial, defendant reiterated his request that the trial court instruct the jury concerning the necessity for a showing that he had acted with specific intent to violate the law using the "instruction from the *Liparota* case which tracked an earlier federal pattern jury instruction." Ultimately, the State and defendant agreed that the trial court would instruct the jury utilizing N.C.P.I. Crim. 120.10, which defines intent, 1 N.C.P.I.–Crim. 120.10 (June 2012), and N.C.P.I. Crim. 261.55, which defines the showing that the State was required to make in order to convict defendant of the substantive offense with which he had been charged, 3 N.C.P.I.–Crim. 261.55 (June 2014). In light of that agreement, the trial court instructed the jury that:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.
>
> The defendant has been charged with the possession of a pseudoephedrine product with a prior conviction of the possession of methamphetamine. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that the defendant possessed a pseudoephedrine product. And, second, that the defendant has a prior conviction for the possession of methamphetamine.

> If you find from the evidence beyond a reasonable doubt that the defendant possessed a pseudoephedrine product and has a prior conviction for the possession of methamphetamine, then 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, then it would be your duty to return a verdict of not guilty.

At the conclusion of its deliberations, the jury returned a verdict convicting defendant as charged. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to a term of six to seventeen months of imprisonment, with this sentence having been suspended and with defendant having been placed on supervised probation for a period of twenty-four months. Defendant successfully sought review of the trial court's judgment by filing a petition seeking the issuance of a writ of certiorari with the Court of Appeals. *Miller*, ___ N.C. App. at ___, 783 S.E.2d at 516.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that N.C.G.S. § 90-95(d1)(1)(c), as applied to him, violated his due process rights. In support of this contention, defendant argued that, in instances, like this one, in which a state has rendered otherwise innocent and lawful behavior subject to significant criminal penalties, due process considerations require either that scienter or mens rea be shown in order to prove guilt or, in the alternative, that the State establish that defendant had fair warning that a previously lawful act was now subject to the criminal sanction. Defendant claimed that he reasonably believed that he had the right to lawfully purchase pseudoephedrine products on 5 January 2014, that he reasonably lacked any knowledge that the law had changed effective 1 December 2013, that he did not intend to violate the law by purchasing an allergy medication, and that punishing him as a felon for purchasing a product containing pseudoephedrine under such circumstances was fundamentally unfair. For that reason, defendant asserted that guilt of the offense made punishable by N.C.G.S. § 90-95(d1)(1)(c) should require proof that defendant knew that his actions were unlawful or, in the absence of such a scienter or mens rea requirement, that the State's failure to notify him and other similarly situated individuals that they were prohibited from purchasing products containing pseudoephedrine as a precondition for subjecting them to the criminal sanction for acting in that manner rendered the relevant statutory provision unconstitutional.

In response, the State argued that, since N.C.G.S. § 90-95(d1)(1)(c) does not fall within the narrow category of crimes for which knowledge

that the prohibited conduct is unlawful is required, defendant's ignorance of the prohibited nature of his conduct does not preclude a finding of criminal liability. In the State's view, N.C.G.S. § 90-95(d1)(1)(c) is a straightforward and easily understood statutory provision rather than a "highly technical" tax or currency statute of the sort that requires proof that the defendant knew that his or her conduct was unlawful, citing *Bryan v. United States*, 524 U.S. 184, 194-95, 141 L. Ed. 2d 197, 207 (1998). Moreover, the State argued that the exception to the general rule that proof that the defendant knew of the unlawfulness of his or her conduct is not required in order to establish the defendant's guilt set out in *Lambert* only applies in the event that the challenged statutory provision criminalizes "wholly passive" conduct and that defendant's decision to purchase pseudoephedrine cannot be characterized in that manner. Although proof of defendant's guilt in this case does require a showing that defendant knew that he had a prior methamphetamine possession conviction and that the substance that he possessed contained pseudoephedrine, the relevant statutory provision cannot be reasonably construed to require proof that defendant knew that it was unlawful for him to possess pseudoephedrine as a precondition for a finding of guilt.

The Court of Appeals began its discussion of defendant's challenges to the trial court's judgment by noting that the extent, if any, to which the General Assembly intended to include a specific intent or scienter element in N.C.G.S. § 90-95(d1)(1)(c) depends upon the manner in which the relevant statutory language should be construed.[5] *Miller*, ___ N.C. App. at ___, 783 S.E.2d at 516. Given that N.C.G.S. § 90-95(d1)(1)(c) fails to explicitly provide for a specific intent or mens rea element and that the General Assembly has included such language in defining the other offenses listed under N.C.G.S. § 90-95(d1), *id.* at ___, 783 S.E.2d at 516-17 (discussing N.C.G.S. §§ 90-95(d1)(1)(a)-(b) and 90-95(d1)(2)(a)-(b)), the Court of Appeals concluded that the General Assembly had " 'intentionally and purposely' " excluded "an intent element" from N.C.G.S. § 90-95(d1)(1)(c), *id.* at ___, 783 S.E.2d at 517 (quoting *State v. Watterson*, 198 N.C. App. 500, 506, 679 S.E.2d 897, 900 (2009) (quoting *N.C. Dep't of*

5. The exact nature of defendant's statutory construction challenge to the trial court's judgment is not entirely clear. Although defendant could have advanced this contention in support of an argument that the trial court had erred by failing to dismiss the charge that had been lodged against him for insufficiency of the evidence, an argument that the trial court had erroneously instructed the jury concerning the applicable law, or an argument that N.C.G.S. § 90-95(d1)(1)(c) could only be upheld against a constitutional challenge in the event that the relevant statutory provision was construed so as to include such a scienter or mens rea requirement, defendant did not clearly make any one of these three arguments.

Revenue v. Hudson, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009))). Although "any possession of a controlled substance offense contains an implied *knowledge* element, to wit, that the defendant must know he possesses the controlled substance and must also know the identity of the substance," *id.* at ___ n.3, 783 S.E.2d at 517 n.3 (citing *State v. Galaviz–Torres*, 368 N.C. 44, 52, 772 S.E.2d 434, 439 (2015) (discussing *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346, *disc. rev. denied*, 367 N.C. 271, 752 S.E.2d 466 (2013))), the Court of Appeals concluded that the General Assembly intended for N.C.G.S. § 90-95(d1)(1)(c) "to be exactly what its plain language indicates: a strict liability offense without any element of intent," *id.* at ___, 783 S.E.2d at 517.

After rejecting defendant's contention that N.C.G.S. § 90-95(d1)(1)(c) should be construed to require proof that defendant knew that he was not entitled to purchase products containing pseudoephedrine, the Court of Appeals addressed defendant's as-applied challenge to the constitutionality of that statutory provision. *Id.* at ___, 783 S.E.2d at 517-23. Despite its recognition "that methamphetamine manufacture and use is a significant law enforcement and public health problem which demands serious criminal penalties," *id.* at ___, 783 S.E.2d at 519-20, the Court of Appeals concluded that, "in light of . . . *Lambert* and *Liparota*," N.C.G.S. § 90-95(d1)(1)(c) "is unconstitutional as applied to [defendant]," *id.* at ___, 783 S.E.2d at 520, given that "[p]ossession of pseudoephedrine products is an innocuous and entirely legal act for the majority of people in our State, including most convicted felons," *id.* at ___, 783 S.E.2d at 520, and that "possessing allergy medications containing pseudoephedrine," unlike the possession of "illegal drugs," "hand grenades," or "dangerous acids," "is an act that citizens, including convicted felons, would reasonably assume to be legal," *id.* at ___, 783 S.E.2d at 520 (citing *Liparota*, 471 U.S. at 426, 85 L. Ed. 2d at 440). Prior to the enactment of N.C.G.S. § 90-95(d1)(1)(c), the statutory provisions regulating the purchase of products containing pseudoephedrine required the provision of notice of the lawfulness of particular purchases at the point of sale, *id.* at ___, 783 S.E.2d at 520; however, violations of N.C.G.S. § 90-95(d1)(1)(c) can occur without the provision of any such point of sale notice even though such purchases would be lawful "for most people, *including the vast majority of convicted felons*," *id.* at ___, 783 S.E.2d at 520. "Simply put," the Court of Appeals reasoned, "there were no 'circumstances which might move one to inquire as to' a significant change in the [Controlled Substances Act's] requirements nor any notice to [defendant] that the new [provision] had transformed an innocent act previously legal for him into a felony." *Id.* at ___, 783 S.E.2d at 520 (quoting *Lambert*, 355 U.S. at 229, 2 L. Ed. 2d at 232). In reaching this conclusion, the Court of

Appeals found the decision in *Wolf v. State of Oklahoma*, 2012 OK CR 16, 292 P.3d 512 (Okla. Crim. App. 2012), *cert. denied*, ___ U.S. ___, 186 L. Ed. 2d 877 (2013), to be highly persuasive, *Miller*, ___ N.C. App. at ___, 783 S.E.2d at 520-21, concluding, in reliance upon *Wolf*, that

> [t]aken together, *Lambert* and *Liparota* suggest that, while a legislature may criminalize conduct in itself, with no intent requirement, the legislature must make some provision to inform a person that the conduct, as applied to her, is criminal. This is particularly important where the conduct in question is otherwise legal. This is precisely the circumstance here: some convicted felons are prohibited from purchasing pseudoephedrine, while others, along with the general population, are not.

Id. at ___, 783 S.E.2d at 521 (alteration in original) (quoting *Wolf*, 2012 OK CR at ¶ 10, 292 P.3d at 516). As a result, the Court of Appeals held that N.C.G.S. § 90-95(d1)(1)(c) is unconstitutional "as applied to a defendant in the absence of notice to the subset of convicted felons whose otherwise lawful conduct is criminalized thereby or proof beyond a reasonable doubt by the State that a particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law," *id.* at ___, 783 S.E.2d at 521, and that defendant's conviction for violating N.C.G.S. § 95-90(d1)(1)(c) should, for that reason, be vacated, *id.* at ___, 783 S.E.2d at 523-24. On 9 June 2016, we allowed the State's petition for discretionary review of the Court of Appeals' decision that N.C.G.S. § 90-95(d1)(1)(c) is unconstitutional as applied to defendant on notice-related grounds.

In seeking relief from the decision of the court below before this Court, the State argues that the Court of Appeals disregarded the well-established legal principle that ignorance of the law is no excuse by misapplying the *Lambert* exception and misconstruing decisions such as *Liparota* in order to limit the otherwise applicable maxim that members of the public have notice of the applicable law to situations in which a reasonable person would know the content of the law. In the State's view, this case is controlled by *Lambert* and this Court's decision in *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2005), in which we described *Lambert* as creating "a narrow exception to the general rule" to the effect that citizens are presumed to know the law applicable in situations when the allegedly unlawful conduct is " 'wholly passive.' " *Id.* at 566, 614 S.E.2d at 487 (quoting *Lambert*, 355 U.S. at 228, 2 L. Ed. 2d at 231). In order to take advantage of this exception, the defendant must establish that the statutory provision in question criminalizes a

failure to act, such as the failure to register as a felon at issue in *Lambert* and the failure to register as a sex offender at issue in *Bryant*. In the State's view, defendant was not prosecuted for a failure to act. On the contrary, N.C.G.S. § 90-95(d1)(1)(c) proscribes an affirmative act, which is the intentional possession of a prohibited substance. As defendant conceded before the trial court, his conduct was "not an absence to act like there is in *Lambert*." In the event that a defendant fails to establish that his behavior is "wholly passive," whether because the relevant conduct does not involve a failure to act, as is the situation in this case, or because the defendant's failure to act occurred under circumstances that would lead a reasonable person to inquire as to his or her legal duties, as was the case with the defendant's duty to register as a sex offender in North Carolina at issue in *Bryant*, the maxim that ignorance of the law provides no excuse and that all citizens are presumed to know the law remains applicable. Instead of correctly applying the narrow *Lambert* exception in accordance with this Court's decision in *Bryant*, the Court of Appeals created an inappropriate notice requirement resting upon a failure to distinguish between an affirmative action and purely passive conduct and conflating the analysis set out in *Lambert* with the analysis utilized in statutory construction cases such as *Liparota*.

In response, defendant contends that the proper resolution of the critical question concerning whether an act is "wholly passive" for purposes of *Lambert* and *Bryant* hinges upon whether the surrounding circumstances would put a reasonable person on notice that he or she should have inquired as to whether there had been a change in law rather than upon whether the underlying conduct should be deemed active or passive. Defendant argues that *Lambert* and *Bryant* rest upon a distinction between "active and passive *notice*, that is, the presence or absence of 'circumstances that should alert the doer to the consequences of his deed,' " rather than upon a distinction between acts of commission and acts of omission. According to defendant, his conduct should be deemed "wholly passive" given the absence of "circumstances that would [have] move[d] him to inquire if the General Assembly had recently criminalized his otherwise innocuous conduct." Moreover, even if a defendant's underlying conduct is a component of the relevant constitutional analysis, possession, as compared to the purchase, of a substance is a passive act.

In the alternative, defendant contends that, even if we "decline[ ] to adopt the analysis of the Court of Appeals," we should still affirm the result that it reached on the grounds "that an element of scienter must be read into [N.C.G.S.] § 90-95(d1)(1)(c) to comport with traditional notions of fair play and substantial justice, and the State failed

to present evidence from which a jury could infer such an element." According to defendant, the Court of Appeals should have held that proof of defendant's "awareness that a reasonable person in his shoes would have[known] that the purchase of pseudoephedrine was an illegal act" constituted an essential element of the offense created by N.C.G.S. § 90-95(d1)(1)(c). In reaching a contrary conclusion, the Court of Appeals overlooked the fact that the United States Supreme Court has read a similar requirement into various criminal statutes for the purpose of ensuring the constitutionality of the challenged statute regardless of any evidence concerning actual Congressional intent.

As this Court indicated in *Bryant*, the *Lambert* exception to the general rule that ignorance of the law is no excuse is "decidedly narrow." 359 N.C. at 568, 614 S.E.2d at 488.[6] After carefully reviewing the record, we conclude that the *Lambert* exception does not operate to protect defendant from criminal liability given the facts contained in the present record. Moreover, defendant's alternative argument to the effect that guilt of the offense defined in N.C.G.S. § 90-95(d1)(1)(c) requires proof that the defendant knew of the illegality of his conduct is not properly before us. Thus, we reverse the decision of the Court of Appeals.

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes.

Bryant, 359 N.C. at 566, 614 S.E.2d at 487 (citations omitted) (quoting *Cheek v. United States*, 498 U.S. 192, 199, 112 L. Ed. 2d 617, 628 (1991)). In *Lambert*, the United States Supreme Court sustained an as-applied challenge to a municipal ordinance making it unlawful for any individual who had been convicted of an offense that was a California felony or would have been a felony if committed in California to remain in Los Angeles for more than five days without registering with the Chief of Police. *Lambert*, 355 U.S. at 226-27, 2 L. Ed. 2d at 230-31. After noting

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6. Moreover, as the United States Supreme Court has stated, "application [of *Lambert*] has been limited, lending some credence to Justice Frankfurter's colorful prediction in dissent that the case would stand as 'an isolated deviation from the strong current of precedents—a derelict on the waters of the law.' " *Texaco, Inc. v. Short*, 454 U.S. 516, 537 n.33, 70 L. Ed. 2d 738, 756 n.33 (1982) (quoting *Lambert*, 355 U.S. at 232, 2 L. Ed. 2d at 233 (Frankfurter, J., dissenting)).

that the defendant, unlike defendant in this case, had presented proof that she "had no actual knowledge of the [registration] requirement" and that the relevant ordinance did not require proof of "willfulness," *id.* at 227, 2 L. Ed. 2d at 231, the United States Supreme Court stated that the relevant issue before it was "whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge," *id.* at 227, 2 L. Ed. 2d at 231. Recognizing that, as a general proposition, lawmakers have wide latitude in defining the scope and extent of prohibited conduct, the Court pointed out that the defendant's "conduct [was] wholly passive—mere failure to register" and did not constitute "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Id.* at 228, 2 L. Ed. 2d at 231 (citations omitted). Although the Court acknowledged the rule that "ignorance of the law will not excuse," *id.* at 228, 2 L. Ed. 2d at 231 (quoting *Shevlin–Carpenter Co. v. Minnesota*, 218 U.S. 57, 68, 54 L. Ed. 930, 935 (1910)), and that the police power is "one of the least limitable" powers of government, *id.* at 228, 2 L. Ed. 2d at 231 (quoting *District of Columbia v. Brooke*, 214 U.S. 138, 149, 53 L. Ed. 941, 945 (1909)), the Court pointed out that due process conditions the exercise of governmental authority upon the existence of proper notice "where a person, wholly passive and unaware of any criminal wrongdoing, is brought to the bar of justice for condemnation in a criminal case," *id.* at 228, 2 L. Ed. 2d at 231. In view of the fact that the ordinance at issue in *Lambert* did not condition a finding of guilt upon "any activity" whatsoever, *id.* at 229, 2 L. Ed. 2d at 232, and the fact that there were no surrounding "circumstances which might move one to inquire as to the necessity of registration," *id.* at 229, 2 L. Ed. 2d at 232, "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply [were] necessary before a conviction under the ordinance [could] stand" consistently with due process guarantees, *id.* at 229, 2 L. Ed. 2d at 232.

The statutory provision at issue in Bryant required individuals convicted of certain sexual offenses in other states to register as a sex offender with the relevant North Carolina sheriff's office within ten days after establishing residence in North Carolina or within fifteen days after the individual in question had entered North Carolina, whichever came first, with any person failing to comply with these requirements to be subject to criminal penalties. 359 N.C. at 561-63, 614 S.E.2d at 483-85. In that case, a person who had been convicted of committing an offense requiring registration in South Carolina and had been charged with violating the statutory provision in question challenged the provision's

constitutionality as applied to him given the absence of any requirement that the State "prove actual or probable notice of his duty to register to satisfy the due process notice requirement of *Lambert*." *Id.* at 565, 614 S.E.2d at 486. In rejecting the defendant's argument, this Court stated that

> to be entitled to relief under the decidedly narrow *Lambert* exception, a defendant must establish that his conduct was "wholly passive" such that "*circumstances which might move one to inquire as to the necessity of registration are completely lacking*" and that [the] defendant was ignorant of his duty to register and there was no reasonable probability that [the] defendant knew his conduct was illegal.

Id. at 568, 614 S.E.2d at 488 (quoting *Lambert*, 355 U.S. at 228-29, 2 L. Ed. 2d at 231-32 (emphasis added)). Defendant's assertion to the contrary notwithstanding, this Court never indicated in *Bryant* that the distinction between active and passive conduct set out in *Lambert* revolves around the nature and extent of the notice with which the defendant had been provided rather than upon the nature and extent of the underlying conduct that led to the imposition of the criminal sanction. Instead, this Court simply assumed that the defendant's conduct amounted to a failure to act and proceeded to examine the extent to which his failure to comply with North Carolina's sex offender registration requirements had occurred under circumstances suggesting that he should have registered upon moving from South Carolina to North Carolina. *Id.* at 566-68, 614 S.E.2d at 486-88. After making no suggestion that the defendant had actual notice of the necessity that he register as a sex offender in North Carolina after moving to this state and after concluding that the defendant's case was "rich with circumstances that would move the reasonable individual to inquire of his duty to register in North Carolina such that [the] defendant's conduct was not wholly passive and *Lambert* [was] not controlling," *id.* at 568, 614 S.E.2d at 488, this Court held that the defendant's case did "not fall within the narrow *Lambert* exception to the general rule that ignorance of the law is no excuse," *id.* at 569, 614 S.E.2d at 488.

> Thus, because "[g]enerally[,] a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply," *Texaco*, [*Inc. v. Short*,] 454 U.S. [516,] 532, 70 L. Ed. 2d [738,] 752[(1982), this Court

> remained] bound by the rule that "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130, 86 L. Ed. 2d 81, 93 (1985); *see also N. Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 69 L. Ed. 953, 957 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them.").

Id. at 569, 614 S.E.2d at 488-89 (first and seventh alterations in original). As a result, *Bryant* establishes that, in the event that a defendant's conduct is not "wholly passive," because it arises from either the commission of an act or a failure to act under circumstances that reasonably should alert the defendant to the likelihood that inaction would subject him or her to criminal liability, *Lambert* simply does not apply.

A defendant commits the offense delineated in N.C.G.S. § 90-95(d1)(1)(c) in the event that he or she has "the power and intent to control [the] disposition or use" of the substance that the defendant is charged with possessing, *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972), with knowledge of the identity of the substance that the defendant is alleged to have possessed, *Galaviz–Torres*, 368 N.C. at 49, 772 S.E.2d at 437 (citation omitted). The undisputed evidence contained in the present record tends to show that defendant actively procured the pseudoephedrine product that he was convicted of possessing over a month after it had become unlawful for him to do so and almost six months after the enactment of N.C.G.S. § 90-95(d1)(1)(c). Moreover, defendant has not argued in either this Court or the lower courts that he was ignorant of the fact that he possessed a pseudoephedrine product or that he had previously been convicted of methamphetamine possession. As defendant himself acknowledged, his conduct differs from the failure to register at issue in *Lambert* and *Bryant*. Since defendant's conviction rests upon his own active conduct rather than a "wholly passive" failure to act, there is no need for us to determine whether the surrounding circumstances should have put defendant on notice that he needed to make inquiry into his ability to lawfully purchase products containing pseudoephedrine. As a result, defendant's as-applied challenge to the constitutionality of N.C.G.S. § 90-95(d1)(1)(c) necessarily fails.

Liparota and other similar decisions, whether considered in conjunction with or in addition to *Lambert*, do not call for a different result. In *Liparota*, the United States Supreme Court considered what "mental state, if any, that the Government" needed to show, 471 U.S. at 423, 85 L. Ed. 2d at 438, in order to establish that the defendant had violated a federal statute making it a crime to "knowingly" use, transfer, acquire,

alter, or possess food stamps " 'in any manner not authorized by [the statute] or the regulations,' " *id.* at 423, 85 L. Ed. 2d at 438 (alteration in original) (quoting 7 U.S.C. § 2024(b)(1) (1977)), with the specific issue before the Court in that case being whether the term "knowingly" should be construed so as to require the Government to prove that the defendant was aware that he was acting in a manner not authorized by the applicable law, *id.* at 420-21, 85 L. Ed. 2d at 437. As a result, *Liparota*, like a number of the other decisions upon which defendant relies,[7] is a statutory construction case rather than one, like *Lambert*, in which the constitutionality of a statute was at issue. While these cases are arguably pertinent to defendant's statutory construction argument, they have no bearing on the constitutionality of N.C.G.S. § 90-95(d1)(1)(c) in the face of defendant's *Lambert*-based challenge. However, since neither defendant nor the State sought review of the Court of Appeals' determination that the offense defined in N.C.G.S. § 90-95(d1)(1)(c) does not include any sort of scienter or specific intent requirement over and above the knowledge requirement necessary for guilt of any possession-based offense by either noting an appeal or filing a discretionary review petition, defendant's statutory construction argument is not properly before us. *See* N.C. R. App. P. 16(a) (stating that "[r]eview by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals" and that, "[e]xcept when the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the issues stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed

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7. For example, *see Elonis v. United States*, ___ U.S. ___, ___, ___, 192 L. Ed. 2d 1, 8, 17 (2015) (interpreting a federal statute making "it a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another' " as requiring proof that the defendant intended to issue threats or knew that his communications would be viewed as threats (ellipsis in original) (quoting 18 U.S.C. § 875(c) 1994))); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68, 78, 130 L. Ed. 2d 372, 378, 385 (1994) (interpreting a federal statute prohibiting persons from "knowingly" transporting, shipping, receiving, distributing, or reproducing a visual depiction, if such depiction " 'involves the use of a minor engaging in sexually explicit conduct,' " to require proof that the defendant knew of the sexually explicit nature of the material and the age of the individuals depicted in the video (quoting 18 U.S.C. § 2252(a)(1)(A), -(a)(2)(A) (1988 ed. and Supp. V))); *Morissette*, 342 U.S. at 248, 271, 96 L. Ed. at 292, 304 (interpreting a federal statute providing that " 'whoever embezzles, steals, purloins, or knowingly converts' " property of the federal government shall be fined and imprisoned to require that the defendant have "knowledge of the facts, though not necessarily the law, that made the taking a conversion" (quoting 18 U.S.C. § 641 (1948))).

pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court"); *see also Estate of Fennell v. Stephenson*, 354 N.C. 327, 331-32, 554 S.E.2d 629, 632 (2001) (stating that "this Court's review of the Court of Appeals decision is limited to the issues raised by [the] defendants' petition for discretionary review" because the plaintiffs had failed to file their own discretionary review petition or a conditional discretionary review petition). As a result, given that defendant has failed to establish that his conduct in possessing pseudoephedrine was "wholly passive," *Bryant*, 359 N.C. at 568, 614 S.E.2d at 488, we hold that defendant's conviction for violating N.C.G.S. § 95-90(d1)(1)(c) did not result in a violation of his federal constitutional right to due process of law and, accordingly, reverse the decision of the Court of Appeals.

REVERSED.

Justice MORGAN dissenting.

While I agree with my learned colleagues in the majority that the Court of Appeals' interpretation of the applicability of *Liparota v. United States*, 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985) is misplaced, nonetheless I embrace the lower court's view that the narrow exception to the time-honored adage "ignorance of the law will not excuse" as articulated in *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) is applicable in the instant case regarding the properness of notice and due process. In addition, I consider the majority's interpretation of the phrase "wholly passive" as originally coined in *Lambert* and applied by this Court in *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2004), *superseded by statute*, 2006 N.C. Sess. Laws, Ch. 247, *on other grounds as recognized in State v. Moore*, 240 N.C. App. 465, 478, 770 S.E.2d 131, 141, *disc. review denied*, 368 N.C. 353, 776 S.E.2d 854 (2015) to be rigidly restrictive, particularly in light of this Court's own construction of this phrase in *Bryant*, and therefore I dissent.

In *Lambert*, a criminal defendant was found guilty of violating a registration provision of Los Angeles, California's Municipal Code because, as a person who had been "convicted of an offense punishable as a felony in the State of California," she "remain[ed] in Los Angeles for a period of more than five days without registering" with the city's Chief of Police. *Lambert*, 355 U.S. at 226, 78 S. Ct. at 241-42, 2 L. Ed. 2d at 230. As a resident of Los Angeles for over seven years at the time of her arrest on suspicion of another offense, the defendant argued that

her due process rights under the United States Constitution were violated with regard to the application of the city's registration law to her, because she had no actual knowledge of the requirement to register pursuant to the Los Angeles Municipal Code. *Id.* at 226, 78 S. Ct. at 241-42, 2 L. Ed. 2d at 230-31. In framing the legal issue in this case as a question of "whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge," the nation's highest court held that the Code's registration provision as applied to the defendant violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 227, 229-30, 78 S. Ct. at 242-44, 2 L. Ed. 2d at 231-32.

Defendant in the case *sub judice* cited the *Lambert* case as persuasive authority to support his position addressed by this dissent that his federal due process rights were violated by the application of the statute at issue to him because of his lack of proper notice of then newly-enacted N.C.G.S. § 90-95(d1)(1)(c), which had taken effect barely a month before defendant's proscribed pseudoephedrine purchase. Pursuant to the statute, his possession of such a substance was illegal in light of his prior methamphetamine convictions. Regarding the application of constitutional due process principles to the operation of statutes that create an imposition upon individuals convicted of a certain class of offenses that does not exist for the general population, I find the defendant in *Lambert* and the current defendant to be similarly situated. In *Lambert*, the defendant was required by law to register as a convicted felon if her stay in the city exceeded five days, which was not a registration requirement imposed on others; here, defendant was required by law to refrain from possessing pseudoephedrine as a person convicted of methamphetamine offenses, which was not a possession restriction imposed on others.

I also find that the defendant in the case at bar is similarly situated to the *Lambert* defendant in the resolution of the legal issue in *Lambert* which was ideally identified by the United States Supreme Court. The high court found, in applying its due process analysis to the dual components of the framed issue in *Lambert*, that the Los Angeles Municipal Code registration provision violated that defendant's due process rights because she had no knowledge of the duty to register and there was no showing made by the prosecution as to the probability of such knowledge by the defendant. *Id.* at 227-28, 78 S. Ct. at 242-43, 2 L. Ed. 2d at 231. While citing the phrase "ignorance of the law will not excuse," the United States Supreme Court conversely recognized that the exercise of

this legal axiom is limited by due process considerations. *Id.* at 228, 78 S. Ct. at 243, 2 L. Ed. 2d at 231. The Court went on to explain:

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a forfeiture might be suffered for mere failure to act. Recent cases illustrat[e] th[is] point . . . . These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

Id. (citations omitted).

I find these observations to be pertinent and applicable to the present case, just as the United States Supreme Court articulated them as insightful direction in *Lambert*. While ignorance of the law typically will not excuse one from criminal culpability, the operation of this routine legal paradigm must take a proverbial backseat when one's constitutional due process rights, undergirded by the concept of notice, are otherwise sacrificed. In the instant case, as in *Lambert*, the defendant has claimed that he had no knowledge of the law at issue when he purchased pseudoephedrine on 5 January 2014 and was therefore in *unlawful* possession of the medication which otherwise would have been in his *lawful* possession if the purchase had been made prior to the 1 December 2013 change in the law which did not apply to the general population, nor even all convicted felons, but rather only to a particular subset of convicted felons. Also in the present case, like *Lambert*, there has been no showing made of the probability that defendant knew of this change in the law which rendered *illegal* for him such activity that was *legal* for him a mere 36 days prior to his arrest. The majority's fervent embrace of the maxim that ignorance of the law provides no excuse supplies an untenable compromise of defendant's due process rights. Indeed, the well-established existence of a law and one's ignorance of it is markedly different from the newly-created existence of a law and one's unawareness of it, especially when it is a change in the law to make what was recently lawful suddenly unlawful *and* when it does not apply to everyone.

In my opinion, just as the majority fails to employ an appropriate application of the *Lambert* principle regarding due process wherein ignorance of the law by a criminal defendant is indisputable, the majority's unfortunate position is exacerbated by its strained literal interpretation of the phrase "wholly passive" in *Lambert*. The United States Supreme Court christened the term in *Lambert* to describe the lack of affirmative conduct by the defendant in that case—the failure to register one's presence—and to fit it into the framework of an individual's right to due process through the requirement of notice. The majority has focused so intently upon the "wholly passive" description of the *Lambert* defendant's proscribed conduct of failure to register that it is unable to clearly view the fullness of the relationship between due process and the required notice concerning the violation of criminal law.

The majority's position is faulty regarding its literal application of the phrase "wholly passive" on two fronts. Firstly, the United States Supreme Court in *Lambert* used the defendant's "wholly passive" failure to register as an example of the broad need to correctly balance constitutional due process with the "ignorance of the law will not excuse" axiom. The Court, in its discussion of the concept of due process through the requirement of notice in *Lambert*, spoke in sweeping terms about the importance of these legal tenets, without mentioning whether or not the illegal conduct involved was an offense of commission of an act or an offense of an omission to act. The high court thereupon applied its global look at these principles to the defendant's circumstances in *Lambert*, described her Municipal Code violation of failure to register as behavior which was "wholly passive," continued its analysis that this failure to register abrogated the breadth and depth of the integration of due process and notice, and ultimately determined that the application of the challenged registration law to the defendant's "wholly passive" failure to register was unconstitutional. In the case *sub judice*, the majority's occupation by the "wholly passive" categorization of the *Lambert* defendant's criminal act of omission has prevented it from fully grasping the wider requirement to apply constitutional due process and notice requirements so as to protect defendant's identical rights in the current case.

Secondly, this Court utilized the "wholly passive" language in *Lambert* to both discuss and decide our decision in *Bryant*. The majority in the instant case heavily relies upon *Bryant*, a criminal action in which a defendant, who was a convicted sex offender in the state of South Carolina, was notified by the South Carolina Department of Corrections prison officials of his lifelong requirement to register with

that state due to his sex offender status. *Id.* at 556, 614 S.E.2d at 480. Although the defendant was notified of this duty in verbal and written form, he failed to "provide written notice to the county sheriff where s/he was last registered in South Carolina within 10 days of the change of address to a new state," when the defendant moved out of the state of South Carolina and relocated in North Carolina. *Id.* at 556-57, 614 S.E.2d at 481 (emphasis omitted). The defendant likewise was deficient in his compliance with his South Carolina sex offender requirement that he "must send written notice of change of address to the county Sheriff's Office in the new county and the county where s/he previously resided within 10 days of moving to a new residence." *Id.* (emphasis omitted). Although the defendant moved to Winston-Salem, North Carolina and thereby established a residence in Forsyth County, nonetheless he failed to register upon establishing residency in North Carolina and did not notify the appropriate authorities in South Carolina of his out-of-state move. *Id.* at 557-58, 614 S.E.2d at 481-82. The defendant was convicted in this state of failing to register as a sex offender and attaining the status of habitual felon. *Id.* at 558, 614 S.E.2d at 482. On appeal, the defendant argued that North Carolina's sex offender registration statute was unconstitutional as applied to an out-of-state offender who lacked notice of his duty to register upon moving to North Carolina. *Id.* at 558, 614 S.E.2d at 482. The defendant relied almost exclusively upon *Lambert* in arguing his position on appeal to this Court. *Id.* at 564, 614 S.E.2d at 485. We found in *Bryant* that the defendant was not entitled to the application of *Lambert*. *Id.* at 568-69, 614 S.E.2d at 487-88. In this Court's decision, we explained:

> We find this case rich with circumstances that would move the reasonable individual to inquire of his duty to register in North Carolina such that defendant's conduct was not wholly passive and *Lambert* is not controlling. First, defendant had actual notice of his *lifelong duty* to register with the State of South Carolina as a convicted sex offender. Second, defendant had actual notice that he must register as a convicted sex offender in South Carolina for "similar offenses from other jurisdictions" and had a duty to inform South Carolina officials of a move out of state "within 10 days of the change of address to a new state," which defendant failed to do. Third, defendant himself informed law enforcement authorities that he had been convicted of a sex offense in Florida. These circumstances coupled with the pervasiveness of sex offender registration programs certainly constitute circumstances

> which would lead the reasonable individual to inquire of a duty to register in any state upon relocation.

Id. at 568, 614 S.E.2d at 488 (citations omitted) (emphasis in original). This explanation extracts pivotal terminology from the instructional language employed by the nation's Supreme Court in *Lambert* when it established the mandatory standard, which we expressly cited in *Bryant*, which I find to be the guiding rationale for adaptation in the present case and which I determine that the defendant has satisfied:

> Therefore, to be entitled to relief under the decidedly narrow *Lambert* exception, a defendant must establish that his conduct was "wholly passive" such that "*circumstances which might move one to inquire as to the necessity of registration are completely lacking*" and that defendant was ignorant of his duty to register and there was no reasonable probability that defendant knew his conduct was illegal. *Lambert*, 355 U.S. at 228-29, 78 S. Ct. 243-44, 2 L. Ed. 2d at 231-32) (emphasis added).

Id. at 568, 614 S.E.2d at 488. This Court's additional emphasis indicates that it defined the crucial phrase "wholly passive" as turning on whether the attendant circumstances could reasonably be seen as providing notice.

With the majority's determination that *Bryant* is controlling authority in the case at bar, it compounds the problematic analysis that it originally employs in the majority's erroneous premise that the requirement of a "wholly passive" act automatically disqualifies the current defendant from constitutional due process and intrinsic notice requirements where ignorance of the law is an existing circumstance. This compounded misdirection is further accentuated by the recitation of the aspects that are present in *Bryant* which clearly distinguish it from the case *sub judice*. While there are a litany of facts and circumstances occurring in *Bryant* that render the narrow *Lambert* exception as inapposite to the *Bryant* defendant, as this Court correctly decided, no such characteristics arise here. Indeed, the defendant in the instant case is deemed not to have had actual notice about the change in the law or the change in his status under the new law governing his ability to legally possess pseudoephedrine. Nor did the defendant here inform law enforcement authorities about any matters that would demonstrate his awareness about the change in the law or the change in his status under the new law. In summarizing the above delineation of factors quoted in *Bryant* and applying them to the present case, there are no circumstances here which would lead the reasonable individual to know, or even inquire

about, a duty to refrain from the possession of pseudoephedrine due to a recent change in the law which turned defendant's heretofore legal possession of the substance into a criminal offense.

Since I would find N.C.G.S. § 90-95(d1)(1)(c) unconstitutional as applied to defendant under these facts and circumstances, consistent with my interpretation of *Lambert*, and the critical distinguishing features of *Bryant*, I respectfully dissent.

Justice BEASLEY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JOSEPH MARIO ROMANO

No. 199PA16

Filed 9 June 2017

1. Search and Seizure—driving while impaired—blood draw—unconscious

In a prosecution for impaired driving, the trial court correctly suppressed blood test results taken from a highly inebriated defendant at a hospital without a warrant. The officer did not attempt to obtain a warrant for defendant's blood, did not believe any exigency existed, and instead expressly relied upon the statutory authorization set forth in N.C.G.S. § 20-16.2(b), allowing the taking and testing of blood from a person who has committed a driving while impaired offense if the person is unconscious or otherwise incapable of refusal. However, unlike breath tests, blood tests require an intrusive piercing of the skin and give law enforcement a sample that can be preserved and from which more than a blood alcohol reading can be determined. The United States Supreme Court has concluded that the Fourth Amendment does not permit warrantless blood tests incident to arrest for drunk driving. The analysis here is limited to N.C.G.S. § 20-16.2(b) and does not address any other provision of the implied-consent statute.

2. Motor Vehicles—driving while impaired—reasonable grounds

There was sufficient evidence in the record to show that a police sergeant had reasonable grounds to believe defendant had

committed a driving while impaired offense. The record showed that defendant stopped his vehicle at a congested intersection in the middle of the day, left the vehicle while wearing his sweater backwards, stumbled across four lanes of traffic, had a bottle of rum in his possession, and had vomited on himself and in his vehicle before exiting the vehicle. When police arrived, defendant was incoherent with slurred speech; his eyes were bloodshot; he smelled strongly of alcohol; and he could not stand or sit without assistance. Reasonable grounds in this context is equivalent to probable cause.

3. Appeal and Error—impaired driving—blood draw from unconscious defendant—per se exception—other issues not considered

In an impaired driving prosecution involving a blood draw at a hospital from an unconscious defendant, whether a third party was acting as an agent of the State or whether the independent source exception to the exclusionary rule applied were separate determinations from the statutory per se exception.

Chief Justice MARTIN dissenting.

Justices NEWBY and JACKSON join in this dissenting opinion.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 168 (2016), affirming an order entered on 23 March 2015 by Judge R. Gregory Horne in Superior Court, Buncombe County. On 18 August 2016, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 20 March 2017.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant/appellee.

Glenn Gerding, Appellate Defender, by Constance E. Widenhouse and Andrew DeSimone, Assistant Appellate Defenders, for defendant-appellant/appellee.

BEASLEY, Justice.

The issue before us in this case is whether N.C.G.S. § 20-16.2(b), which authorizes law enforcement to obtain a blood sample from an unconscious defendant who is suspected of driving while impaired without first obtaining a search warrant, was unconstitutionally applied to defendant. The trial court suppressed the results of defendant's blood test on Fourth Amendment grounds, and the Court of Appeals affirmed that decision. We now affirm the opinion of the Court of Appeals as modified herein.

On 6 October 2014, defendant was indicted for felony habitual driving while impaired and driving while his license was revoked. These charges were based on events that occurred on 17 February 2014. On 26 January 2015, defendant filed a pretrial motion to suppress all evidence gathered after his arrest. The motion was heard on 2 and 3 February 2015.

Based on the evidence presented at the suppression hearing, the trial court found the following facts. On 17 February 2014, Officer Tammy Bryson responded to a dispatch indicating that a white male wearing his sweater backwards and carrying a liquor bottle had stopped his SUV in the travel portion of a public road, gotten out of the vehicle, and stumbled across the multilane highway. Officer Bryson found Joseph Romano (defendant), who matched the description of the driver, sitting behind a restaurant "approximately 400 feet from the abandoned SUV." Officer Bryson observed that defendant was making incoherent statements, that his speech was slurred, that he was unable to stand due to his obvious intoxication, and that he smelled strongly of alcohol and vomit. Officer Bryson determined that defendant's faculties were appreciably impaired. Defendant was arrested for driving while impaired (DWI), and, due to his extreme level of intoxication, defendant was transported to a hospital for medical treatment. Officer Bryson requested the assistance of Sergeant Ann Fowler, a Drug Recognition Expert.

Defendant was belligerent and combative throughout his encounters with law enforcement and medical personnel. At the hospital, medical staff and law enforcement attempted to restrain defendant. Medical personnel determined it was necessary to medicate defendant to calm him down. Sergeant Fowler told the treating nurse "that she would likely need a blood draw for law enforcement purposes." Before defendant was medicated, Sergeant Fowler did not "advise[ ] [him] of his chemical analysis rights," "request[ ] that he submit[ ] to a blood draw," or obtain a warrant for a blood search. After defendant was medically subdued, the treating nurse drew blood for medical treatment purposes; however, the nurse drew more blood than was needed for treatment

purposes and offered the additional blood for law enforcement use. Before accepting the blood sample, Sergeant Fowler attempted to get defendant's consent to the blood draw or receipt of the evidence, but she was unable to wake him. The trial court found as fact that "[d]ue to his medically induced state, the Defendant was rendered unable to meaningfully receive and consider his blood test rights, unable to give or withhold his informed consent, and/or unable to exercise his right to refuse the warrantless test."

During this entire series of events, multiple officers were present to assist with the investigation, "such that an officer could have left to drive the relatively short distance (only a few miles) to the Buncombe County Magistrate's Office to obtain a search warrant." Sergeant Fowler was familiar with the blood search warrant procedure, and search warrants for a blood draw are fill-in-the-blank forms that are not time-consuming; moreover, magistrates were on duty and available during the relevant time period. Sergeant Fowler did not attempt to obtain a warrant for defendant's blood nor did she believe any exigency existed. Instead, she "expressly relied upon the statutory authorization set forth in [subsection] 20-16.2(b)," which allows the taking and testing of blood from a person who has committed a DWI if the person is "unconscious or otherwise in a condition that makes the person incapable of refusal." After taking possession of defendant's blood, Sergeant Fowler "drove to the Buncombe County Magistrate's Office and swore out warrants for the present charges," and then returned to the hospital and served the warrants on defendant. The trial court found that "nothing prevent[ed] her from obtaining a search warrant [for defendant's blood] at the same time she [obtained the other warrants] and then subsequently seizing the blood."

The trial court quoted *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013), which states that "a warrantless search of the person is reasonable only if it falls within a recognized exception," such as "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at ___, 133 S. Ct. at 1558 (citations omitted). A court "looks to the totality of circumstances" to determine whether exigent circumstances justified law enforcement in acting without a warrant. *Id.* at ___, 133 S. Ct. at 1559 (citations omitted).

The trial court concluded as a matter of law that the seizure of defendant's blood "was a search subject to Fourth Amendment protection," and, under "a totality of the circumstances test, no exigency existed justifying a warrantless search." The court concluded that N.C.G.S.

§ 20-16.2(b) "creates a per se exigency exception to the warrant requirement," and as applied here violates the holding in *McNeely*. Therefore, "any subsequent testing performed by law enforcement on the seized blood must be suppressed."

At the conclusion of the hearing on 3 February 2015, the court ruled orally on defendant's motions to suppress. The court then filed written orders on 23 March 2015.[1] The State timely appealed the trial court's order suppressing the blood test results.

The Court of Appeals affirmed the trial court's order suppressing the test results of the blood that Sergeant Fowler obtained from defendant at the hospital. *State v. Romano*, ___ N.C. App. ___, ___, 785 S.E.2d 168, 175 (2016). The court quoted *McNeely*'s holding that " 'the natural metabolization of alcohol in the bloodstream' does not present a '*per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases.' " *Id.* at ___, 785 S.E.2d at 173 (quoting *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1556). The Court of Appeals determined that N.C.G.S. § 20-16.2(b) could not justify a warrantless blood draw from an unconscious DWI defendant because *McNeely* "sharply prohibits *per se* warrant exceptions for blood draw searches." *Id.* at ___, 785 S.E.2d at 174.

Applying N.C.G.S. § 20-16.2(b) to the instant case, the Court of Appeals opined that "the record suggests, but does not affirmatively show, that [Sergeant] Fowler had 'reasonable grounds' to believe Defendant . . . was intoxicated while he drove his SUV," as opposed to his becoming intoxicated while drinking rum after leaving his vehicle. *Id.* at ___, 785 S.E.2d at 174. The court added: "More importantly, Fowler testified that she did not attempt to obtain a search warrant at any time, even though the magistrate's office was 'a couple of miles' away from the hospital." *Id.* at ___, 785 S.E.2d at 174. The court concluded that

> [t]he State's *post hoc* actions do not overcome the presumption that the warrantless search is unreasonable, and it offends the Fourth Amendment, the State Constitution, and *McNeely*. As the party seeking the warrant exception, the State did not carry its burden in proving "the exigencies of the situation made that [warrantless] course

1. At the suppression hearing, defendant made an oral motion to suppress the car keys and identification that were retrieved from him before he was transported to the hospital. The trial court denied suppression of the keys and identification; that order is not at issue in this appeal.

> imperative." *Coolidge* [*v. New Hampshire*], 403 U.S. [443,] 455, 91 S.[ ]Ct. 2022[, 2032 (1971)]. Under the totality of the circumstances, considering the alleged exigencies of the situation, the warrantless blood draw was not objectively reasonable. *See McNeely*, ___ U.S. at ___, 133 S.[ ]Ct. at 1558.

Romano, ___ N.C. App at ___, 785 S.E.2d at 174 (second alteration in original).

The Court of Appeals also concluded that neither the independent source doctrine nor the good faith exception to the warrant requirement applied in this case. *Id.* at ___, 785 S.E.2d at 174-75. The court first recognized that the State raised these arguments for the first time on appeal. Then, the court noted that under a previous Court of Appeals decision, "[t]he independent source doctrine permits the introduction of evidence initially discovered [during], or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality." *Id.* at ___, 785 S.E.2d at 174 (quoting *State v. Robinson*, 148 N.C. App. 422, 429, 560 S.E.2d 154, 159 (2002)). The court determined that "[t]he sequence of events in this case does not follow this framework," in that the attending nurse knew that defendant was going to be arrested for DWI and that officers wanted his blood drawn. *Id.* at ___, 785 S.E.2d at 174. As such, the court concluded that "the nurse cannot be an independent lawful source." *Id.* at ___, 785 S.E.2d at 174. Additionally, the Court of Appeals concluded that "[t]he good faith exception," which "allows police officers to objectively and reasonably rely on a magistrate's warrant that is later found to be invalid," *id.* at ___, 785 S.E.2d at 174 (citation omitted), was not applicable in this situation because "the officers never attempted to obtain a search warrant prior to the blood draw," *id.* at ___, 785 S.E.2d at 175. Thus, the officers could not "objectively and reasonably rely on the good faith exception." *Id.* at ___, 785 S.E.2d at 175.

[1] Both parties sought review of the Court of Appeals' decision. This Court allowed both petitions for discretionary review on 18 August 2016.

After the parties filed their petitions for discretionary review but before they filed their briefs with this Court, the Supreme Court of the United States decided *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016). After we granted review, in their briefs and oral arguments to this Court, both parties acknowledged that the *Birchfield* decision challenges the constitutionality of N.C.G.S. § 20-16.2(b). Both in its brief and oral argument before this Court, the State recognized that

Birchfield suggests that N.C.G.S. § 20-16.2(b) is unconstitutional. The State noted the differences between *Birchfield* and this case, but during oral argument stated that it could not read *Birchfield* to suggest anything other than that subsection 20-16.2(b) was unconstitutional. Defendant argued that subsection 20-16.2(b) was unconstitutional as applied to him because it created a per se exception to the warrant requirement in violation of *McNeely* and now also *Birchfield*. Defendant asserted that under *McNeely* and *Birchfield* both exigency and valid consent must be determined by a totality of the circumstances. Defendant argued that N.C.G.S. § 20-16.2(b) could only be constitutional if it could be read as allowing a blood draw from unconscious persons so long as the officer also complied with the Fourth Amendment.

The State also argued that the Court of Appeals' analyses of probable cause, state action, the independent source doctrine, and the good faith exception were incorrect and asked this Court to reverse or modify the Court of Appeals' opinion on those issues. Defendant argued that the State was procedurally barred from raising a state action, good faith, or independent source claim because these claims were not presented to the trial court.

We now address the application of the Supreme Court's decisions in *Birchfield v. North Dakota* and *Missouri v. McNeely* to the situation at bar, specifically, the warrantless blood draw from defendant for purposes of determining blood alcohol content. We hold that, in light of *Birchfield* and *McNeely*, N.C.G.S. § 20-16.2(b) is unconstitutional as applied to defendant because it permitted a warrantless search that violates the Fourth Amendment.[2] We also hold that the State's state action, good faith, and independent source claims are not properly before us.

Appellate courts review a trial court's denial of a motion to suppress to determine whether the trial court's findings of fact are supported by competent evidence, in which event they are conclusively binding on

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2. We recognize that other courts have grappled with the application of *McNeely* and *Birchfield* to implied-consent statutes as applied to unconscious DWI suspects and have reached differing conclusions. *Compare People v. Hyde*, 2017 CO 24, ¶ 32, ___ P.3d ___, ___ (holding that blood draw from an unconscious suspect was constitutional because statutory implied consent satisfies the consent exception to the Fourth Amendment warrant requirement), *with State v. Havatone*, 241 Ariz. 506, ___, 389 P.3d 1251, 1253, 1255 (2017) (holding that the "unconscious clause" of the implied-consent statute was unconstitutional as applied to the defendant and further determining that the "unconscious clause" can be constitutionally applied only when exigent circumstances prevent law enforcement from obtaining a warrant). *See generally Bailey v. State*, 338 Ga. App. 428, 434 & n.42, 790 S.E.2d 98, 103 & n.42 (2016) ("[I]mplied consent of an unconscious suspect is insufficient to satisfy the Fourth Amendment.") (collecting cases).

appeal, and whether the findings of fact support the trial court's conclusions of law. *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994) (citations omitted). Conclusions of law "are fully reviewable on appeal." *Id.* at 141, 446 S.E.2d at 585 (quoting *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 115 S. Ct. 749 (1995)). Whether a statute is constitutional is a question of law that this Court reviews de novo. We review the decision of the Court of Appeals for any errors of law. *Id.* at 149, 446 S.E.2d at 590 (citations omitted).

The Fourth Amendment to the United States Constitution and Article I of the North Carolina Constitution protect the rights of people to be secure from unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Our courts have held that drawing blood from a person constitutes a search under both the Federal and North Carolina Constitutions. *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966); *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988). A warrantless search of a person is per se unreasonable unless it falls within a recognized exception to the warrant requirement. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971).

In this case Sergeant Fowler took possession of defendant's blood from the treating nurse while defendant was unconscious without first obtaining a warrant in reliance on N.C.G.S. § 20-16.2(b). Subsection 20-16.2(b) states:

> (b) **Unconscious Person May Be Tested.** – If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.

N.C.G.S. § 20-16.2(b) (2016). Thus, we must determine whether this warrantless search violated the Fourth Amendment. This Court has never before addressed the constitutionality of N.C.G.S. § 20-16.2(b). This issue was raised, but not thoroughly discussed, in the Court of Appeals opinion in *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985). In that case the Court of Appeals considered the application of

the warrantless search exception permitted by N.C.G.S. § 20-16.2(b) but ultimately relied on *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000 (1973), and *Schmerber*, 384 U.S. 757, 86 S. Ct. 1826, to affirm the constitutionality of the officer's search and seizure in that case.[3]

In *Hollingsworth* a blood sample was taken from the defendant while he was unconscious at the hospital. The State argued that the defendant "gave implied consent to the blood test by operation of the 'implied consent' statute," N.C.G.S. § 20-16.2. 77 N.C. App. at 40, 334 S.E.2d at 466 (internal citation omitted). The Court of Appeals observed that "[N.C.]G.S. § 20-16.2 operates to imply consent by an unconscious driver to a blood alcohol test." *Id.* at 41, 334 S.E.2d at 467. The Court of Appeals, however, did not analyze whether the blood draw from the unconscious defendant was constitutional based upon an implied-consent rationale. *Id.* at 41-42, 334 S.E.2d at 467. Instead, the court held that the officer's actions did not violate the Fourth Amendment because a blood draw is only slightly intrusive, and probable cause and exigent circumstances existed, which permitted the officers to draw the defendant's blood without a warrant.[4] *Id.* at 44-45, 334 S.E.2d at 468-69. As to the exigency of destructibility of the evidence, the Court of Appeals relied on *Schmerber* in determining that "the body's breakdown of alcohol in the blood creates the reasonable risk that the evidence of intoxication will quickly be destroyed." *Id.* at 44, 334 S.E.2d at 468 (citing *Schmerber*, 384 U.S. 757, 86 S. Ct. 1826).[5]

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3. In *State v. Garcia–Lorenzo* the Court of Appeals again mentioned N.C.G.S. § 20-16.2(b) without specifically addressing or discussing the constitutionality of the statute. 110 N.C. App. 319, 430 S.E.2d 290 (1993). In that case the court relied on *Schmerber*, 384 U.S. 757, 86 S. Ct. 1826, and *State v. Howren*, 312 N.C. 454, 456, 323 S.E.2d 335, 337 (1984), in determining that the defendant's constitutional rights to due process and to be free from illegal search and seizure were not violated. *Garcia–Lorenzo*, 110 N.C. App. at 330, 430 S.E.2d at 296. The court also concluded that the defendant's *statutory* rights under N.C.G.S. 20-16.2 were not violated. *Id.* at 330-32, 430 S.E.2d at 296-97.

4. Though *Hollingsworth* has been credited with upholding N.C.G.S. § 20-16.2(b) as constitutional, in *Hollingsworth* the court did not rely on section 20-16.2(b) for its rationale, and the constitutional analysis of the blood draw in *Hollingsworth* would have been the same with or without the statute. 77 N.C. App. at 41-42, 334 S.E.2d at 467.

5. The Court of Appeals in *Hollingsworth* premised its decision, as did many courts across the country, on *Schmerber's* holding that indicated that all DWI cases involve exigent circumstances based solely on the fact that alcohol begins to naturally dissipate in the blood stream after a person stops drinking. *See, e.g.*, *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008) (holding that the natural dissipation of blood alcohol evidence is per se exigency), *cert. denied*, 555 U.S. 1137, 129 S. Ct. 1001 (2009); *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (same), *cert. denied*, 510 U.S. 836, 114 S. Ct. 112 (1993); *see also State v. Woolery*, 116 Idaho 368, 775 P.2d 1210 (1989) (same), *overruled by State v. Wulff*,

In *Schmerber v. California* the Supreme Court of the United States upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' " 384 U.S. at 770, 86 S. Ct. at 1835 (quoting *Preston v. United States*, 376 U.S. 364, 367, 84 S. Ct. 881, 883 (1964)). After the *Schmerber* decision, courts split over "whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency" that justifies a warrantless, nonconsensual blood test in drunk-driving investigations. *See McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558 & n.2. The Supreme Court settled this issue in *Missouri v. McNeely*, holding that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant," *id.* at ___, 133 S. Ct. at 1568, and that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances," *id.* at ___, 133 S. Ct. at 1563.[6] Subsection 20-16.2(b), therefore, cannot be constitutionally upheld based on a per se exigency rationale. Here the trial court aptly noted that this case does not involve a situation of exigency.

Though exigency did not relieve Sergeant Fowler of the requirement to obtain a warrant for a blood draw, the State argued that N.C.G.S. § 20-16.2 authorized Sergeant Fowler's actions because a DWI is an implied-consent offense. "[A] search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973). Thus, the State argued that by driving on the road, defendant consented to having his blood drawn for a blood test and never withdrew this statutorily implied consent before the blood draw. We must therefore determine whether the warrantless seizure of defendant's blood pursuant to N.C.G.S. § 20-16.2(b) was constitutional as applied to defendant based on the rationale that the seizure satisfied the consent exception to the warrant requirement.

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157 Idaho 416, 337 P.3d 575 (2014). The Supreme Court of the United States corrected this interpretation of *Schmerber* in its analysis of *McNeely* as discussed below. *See McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558-63.

6. *McNeely* distinguishes blood-testing cases from other destruction-of-evidence cases in which a suspect "has control over easily disposable evidence," such as *Cupp v. Murphy*, 412 U.S. at 296, 93 S. Ct. at 2004, in which the defendant was trying to get rid of evidence under his fingernails. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1561. Blood alcohol concentration, on the other hand, "naturally dissipates over time in a gradual and relatively predictable manner." *Id.* at ___, 133 S. Ct. at 1561.

North Carolina's Uniform Driver's License Act states that "[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense."[7] N.C.G.S. § 20-16.2(a) (2016). Impaired driving is an implied-consent offense. *Id.* § 20-16.2(a1) (2016). When a law enforcement officer "has reasonable grounds to believe that the person charged has committed the implied-consent offense," the officer "may obtain a chemical analysis of the person." *Id.* § 20-16.2(a).

Before the administration of any chemical analysis, the person charged must be informed orally and in writing of the following:

> (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
>
> (2) [Repealed.]
>
> (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
>
> (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving

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7. In *Seders v. Powell*, 298 N.C. 453, 259 S.E.2d 544 (1979), this Court discussed the purpose and rationale for this implied-consent statute.

> By accepting his license and operating a motor vehicle on our highways, plaintiff consented to submitting to a [chemical analysis] if arrested for driving under the influence. . . . We think the legislature wisely enacted the statute in question. Its purpose is to provide scientific evidence of intoxication not only for the purpose of convicting the guilty and removing them from the public highways for the safety of others, but also to protect the innocent by eliminating mistakes from objective observation such as a driver who has the odor of alcohol on his breath when in fact his consumption is little or those who appear to be intoxicated but actually suffer from some unrelated cause. Public policy behind such a statute is a sound one. It ensures civil cooperation in providing scientific evidence and avoids incidents of violence in testing by force. It gives an arrested person a reasonable time to make up his mind about the test and yet does not tie up officers involved for an unreasonable amount of time which would interfere with their regular duties.

Id. at 464-65, 259 S.E.2d at 551-52.

a commercial vehicle, or 0.01 or more if you are under the age of 21.

(5) After you are released, you may seek your own test in addition to this test.

(6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Id. "If the person charged willfully refuses to submit to [the] chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures." N.C.G.S. § 20-16.2(c) (2016). Under N.C.G.S. § 20-16.2(b), a DWI suspect who is unconscious, however, does not have to be given notification of his right to refuse any test or given the opportunity to willfully refuse the test. *Id.* § 20-16.2(b).

In 2016, after this case proceeded through the trial court and the Court of Appeals, and the parties had submitted their petitions for discretionary review to this Court, the Supreme Court of the United States decided *Birchfield v. North Dakota*. In *Birchfield* the Supreme Court for the first time addressed the constitutionality of a blood draw under the rationale of statutory implied consent, as well as whether a blood draw can be justified as a search incident to arrest.

The specific issue in *Birchfield* was "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." 579 U.S. at ___, 136 S. Ct. at 2172. The Supreme Court concluded that "the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving" but does not permit warrantless blood tests incident to arrest for drunk driving. *Id.* at ___, 136 S. Ct. at 2184. Additionally, the Supreme Court concluded "that motorists cannot be deemed to have consented to submit to a blood test [by virtue of an implied-consent statute] on pain of committing a criminal offense." *Id.* at ___, 136 S. Ct. at 2186.

In *Birchfield* the Supreme Court first considered whether the warrantless "search-incident-to-arrest" doctrine applied to breath and blood

tests. Using the analysis in *Riley v. California*, 573 U.S. ___, ___, 134 S. Ct. 2473, 2484 (2014)—which assessed the degree to which the search intrudes on an individual's privacy versus the degree to which the search is needed to promote a legitimate governmental interest—the Court determined that a breath test is a permissible search incident to arrest but a blood test is not. *Birchfield*, 579 U.S. at ___, ___, 136 S. Ct. at 2176, 2184-85. The Court noted that, unlike breath tests, blood tests require an intrusive piercing of the skin and give law enforcement a sample that can be preserved and from which more than a blood alcohol reading can be determined. *Id.* at ___, 136 S. Ct. at 2178.

After determining that a warrantless blood test could not be justified as a search incident to arrest, the Court turned to whether a blood test is permissible based on a driver's statutory implied consent to submit to it. The Court noted that its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at ___, 136 S. Ct. at 2185. Nonetheless, "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads," *id.* at ___, 136 S. Ct. at 2185, and the Court determined that imposing a criminal penalty for refusing to submit to a blood test exceeds such a limit, *id.* at ___, 136 S. Ct. at 2186.

Here N.C.G.S. § 20-16.2(b) does not impose a criminal penalty for refusal to submit to a warrantless blood test; rather, the statute allows police to take blood from an unconscious person suspected of driving while intoxicated on the basis that the person has given implied consent by choosing to drive on public roads. Thus, *Birchfield* does not answer the specific question before us, namely, whether treating N.C.G.S. § 20-16.2(b) as a per se consent exception to the warrant requirement is constitutional under the Fourth Amendment.[8] Though we do not have definitive guidance from the Supreme Court, based on the Supreme Court's Fourth Amendment precedent regarding consent as well as the rationale and language the Court employed in *McNeely* and *Birchfield*, we conclude that the blood draw from defendant cannot be justified

8. As discussed above, there is no dispute that the constitutionality of N.C.G.S. § 20-16.2(b) cannot be upheld under a per se exigency rationale. In *McNeely* the Supreme Court concluded that the natural dissipation of alcohol in the blood stream does not always constitute an exigency justifying the warrantless taking of a blood sample. 569 U.S. at ___, 133 S. Ct. at 1556. Exigent circumstances must be determined by the totality of the circumstances on a case-by-case basis. *Id.* at ___, 133 S. Ct. at 1559.

under N.C.G.S. § 20-16.2(b) as a per se categorical exception to the warrant requirement.

Treating subsection 20-16.2(b) as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances. "[W]hether a consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2047-48. Further, the State has the burden to prove that "consent was, in fact, freely and voluntarily given." *Id.* at 222, 93 S. Ct. at 2045 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 1792 (1968)). Consent is not voluntary if it is "the product of duress or coercion, express or implied." *Id.* at 227, 93 S. Ct. at 2048. A court's decision regarding whether a suspect's consent was voluntary is based on "a careful scrutiny of all the surrounding circumstances" and does not "turn[ ] on the presence or absence of a single controlling criterion." *Id.* at 226, 93 S. Ct. at 2047. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness . . . ." *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-04 (1991); *State v. Stone*, 362 N.C. 50, 53, 653 S.E.2d 414, 417 (2007).

Additionally, in *McNeely*, though the Supreme Court only specifically addressed the exigency exception to the warrant requirement, *McNeely*, 569 U.S. at ___ n.3, 133 S. Ct. at 1559 n.3, the Court spoke disapprovingly of per se categorical exceptions to the warrant requirement, *id.* at ___, 133 S. Ct. at 1564 ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. . . . [A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence."). Moreover, language in *Birchfield*, though not specifically on point, indicates that taking blood without a warrant is an unreasonable search and seizure under the Fourth Amendment unless an exception to the warrant requirement applies, such as exigent circumstances or valid consent.

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication

> or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Id. at ___, 136 S. Ct. at 2184-85.[9]

Thus, while the specific issue analyzed in *Birchfield* does not directly address the constitutionality of N.C.G.S. § 20-16.2(b) as applied to defendant, the reasoning and analysis in *Birchfield* and *McNeely*, as well as other Fourth Amendment precedent, suggest that blood draws may only be performed after either obtaining a warrant, obtaining valid consent from the defendant, or under exigent circumstances with probable cause. Here, because Sergeant Fowler relied on N.C.G.S. § 20-16.2(b) to take a blood draw outside these circumstances, we conclude that N.C.G.S. § 20-16.2(b) was unconstitutionally applied to defendant.[10]

Here there is no dispute that the officer did not get a warrant and that there were no exigent circumstances. Regarding consent, the State's argument was based solely on N.C.G.S. § 20-16.2(b) as a per se exception to the warrant requirement. To be sure, the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw, but the statute alone does not create a per se exception to the warrant requirement. The State did not present any other evidence of consent or argue that under the totality of the circumstances defendant consented to a blood draw. Therefore, the State did not carry its burden of proving voluntary consent. As such, the trial court correctly suppressed the blood evidence and any subsequent testing of the blood that was obtained without a warrant.

[2] We now turn to the State's remaining concerns regarding the Court of Appeals' opinion below. To the extent that the Court of Appeals questioned whether Sergeant Fowler had "reasonable grounds" to believe that defendant had committed the implied-consent offense of DWI, we modify that portion of the opinion. The Court of Appeals stated that "[t]he record does not affirmatively show Defendant was intoxicated while he drove his SUV," *Romano*, ___ N.C. App. at ___, 785 S.E.2d at

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9. This statement was made during the Court's analysis of whether a warrantless blood draw could be justified as a search incident to arrest. We believe that that the sentiment is also applicable to our analysis of implied consent.

10. Our analysis here is limited to N.C.G.S. § 20-16.2(b) and does not address any other provision of the implied-consent statute.

174; however, a finding of "reasonable grounds" does not require "affirmative proof." "Reasonable grounds" in this context is equivalent to "probable cause." *See Moore v. Hodge*s, 116 N.C. App. 727, 729-30, 449 S.E.2d 218, 220 (1994) (citations omitted); *Rock v. Hiatt*, 103 N.C. App. 578, 584, 406 S.E.2d 638, 642 (1991) (citations omitted). Probable cause for an arrest requires "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty"; it does not require that "the evidence . . . amount to proof of guilt, or even to prima facie evidence of guilt." *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971).

The record shows that defendant stopped his vehicle at a congested intersection in the middle of the day, left the vehicle while wearing his sweater backwards, and proceeded to stumble across four lanes of traffic. Defendant had a bottle of rum in his possession, and had vomited on himself and in his vehicle before exiting the SUV. When police arrived, defendant was incoherent with slurred speech; his eyes were bloodshot; he smelled strongly of alcohol; and he could not stand or sit without assistance. Thus, there was sufficient evidence in the record to show that Sergeant Fowler had reasonable grounds to believe defendant had committed a DWI offense. Furthermore, defendant has never contested this issue on appeal and has conceded that there were reasonable grounds to believe he committed a DWI offense.

The State also argues that there was no state action and that the good faith exception and the inevitable discovery and independent source exceptions to the exclusionary rule are applicable in this case. A review of the record reveals that the State did not advance these arguments at the suppression hearing; accordingly, the issues are waived and are not properly before this Court. N.C. R. App. P. 10; *see State v. Cooke*, 306 N.C. 132, 136-38, 291 S.E.2d 618, 621-22 (1982) (stating that a party is limited to specific grounds argued to the trial court and concluding in particular that the State cannot assert new bases to justify admissibility of evidence obtained from a warrantless search for the first time on appeal).

Here defendant argued at the suppression hearing that the statute's per se exception to the warrant requirement was unconstitutional under *McNeely*, and the trial court specifically asked the parties for additional research regarding "the constitutionality of the statute . . . in regard to the unconscious defendant." The State was aware that the statute's constitutionality was questionable and that Sergeant Fowler's actions may have been illegal. The State had the opportunity at the suppression

hearing to argue that the good faith exception to the exclusionary rule should apply if the court determined that the officer's actions were unconstitutional, but the State failed to raise the argument. N.C. R. App. P. 10; *see, e.g.*, *State v. Rodrigues*, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (per curiam) (holding that the State, when seeking reversal of a trial court's grant of a motion to suppress, waived the argument that a good faith exception to the exclusionary rule applied because "the State had never presented the issue . . . to the trial court" and observing that "[i]t is a generally accepted rule that issues not raised at the trial level will not be considered on appeal" (citations omitted)).

Additionally, the trial court explicitly invited the parties to make an argument regarding whether the nurse was a third-party actor; the State made no argument that the nurse was not a state actor, or that the seizure of the blood was not an act of the State and thus, was not subject to the Fourth Amendment's search and seizure analysis. *See Cooke*, 306 N.C. 132, 136, 291 S.E.2d 618, 621 (1982) (concluding that the State could not advance the argument on appeal that "the Fourth Amendment does not apply" when it "failed to [present this argument] at the suppression hearing in the trial court"); *see also United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013) (noting that the government bears the burden to prove, as an initial matter, that a challenged search or seizure is not unlawful (citing, *inter alia*, *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 2097 (1984)), *cert denied*, ___ U.S. ___, 134 S. Ct. 1572 (2014).

[3] Though we do not address the merits of the State's arguments regarding these exceptions to the exclusionary rule, we will address the State's concerns regarding the Court of Appeals' statements of law pertaining to these issues. The Court of Appeals' opinion seems to limit the federal good faith exception's[11] applicability to situations in which law enforcement reasonably relies on a magistrate's warrant that is later found to be invalid; however, this is not the only situation in which the good faith exception to the exclusionary rule may apply. For example, the good faith exception also applies to searches conducted in reasonable reliance on subsequently invalidated statutes, as well as searches conforming to appellate precedent. *See Davis v. United States*, 564 U.S. 229, 237-41, 131 S. Ct. 2419, 2428-29 (2011); *Illinois v. Krull*, 480 U.S. 340, 349-60, 107 S. Ct. 1160, 1166-72 (1987). Additionally, to the extent that

11. We specify that this is the federal good faith exception to the exclusionary rule because in *State v. Carter* this Court declined to adopt a good faith exception to the state constitution's exclusionary rule. 332 N.C. 709, 724, 370 S.E.2d 553, 562 (1988).

the Court of Appeals conflated the state action analysis with the independent source and inevitable discovery analysis in concluding that "the nurse cannot be an independent lawful source," we clarify that whether a third party is acting as an agent of the State and whether the independent source exception to the exclusionary rule applies are separate determinations.

In sum, we hold that N.C.G.S. § 20-16.2(b) is unconstitutional under the Fourth Amendment as applied to defendant in this case. We also hold that the State's state action, good faith, and independent source claims are not properly before us.

For the foregoing reasons we affirm as modified herein the Court of Appeals' opinion affirming the trial court's order suppressing any testing of defendant's blood. We remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

Chief Justice MARTIN dissenting.

Subsection 20-16.2(b) of our General Statutes authorizes the police to direct the drawing of blood from an unconscious defendant who is suspected of impaired driving in order to determine the defendant's blood-alcohol content, based on the defendant's implied consent to a blood test. *See generally* N.C.G.S. § 20-16.2(a)-(b) (2015). In this case, Sergeant Ann Fowler, a supervising sergeant in the Asheville-Buncombe DWI task force, relied in good faith on this statutory provision when she accepted a portion of defendant's blood that the attending nurse drew on the day of defendant's arrest for impaired driving. At that time, the provision had never been held unconstitutional. It may now be unconstitutional, at least as applied to defendant, but only because of a decision that the Supreme Court of the United States issued after the State had filed a petition for review of this case in this Court. The search that was conducted in this case therefore falls into the good faith exception to the exclusionary rule under federal law. Because of that, and because—contrary to what the majority says—the State preserved its good faith exception argument for appeal, I respectfully dissent.

First, let me address the preservation issue. To understand why the majority is wrong to say that the State failed to preserve its good faith exception argument, it helps to look at what happened when.

In 1993, more than two decades before this case arose, our Court of Appeals upheld subsection 20-16.2(b) against a Fourth Amendment challenge. In *State v. Garcia–Lorenzo*, the Court of Appeals ruled that the defendant in that case, who—like defendant here—was sedated for medical reasons and then subjected to a blood draw while unconscious, "had no constitutional right to refuse to submit to chemical analysis." 110 N.C. App. 319, 327-30, 430 S.E.2d 290, 294-96 (1993). Citing an opinion of this Court, the Court of Appeals indicated that the General Assembly had simply "given the right to refuse to submit to chemical analysis as a matter of grace." *Id.* at 330, 430 S.E.2d at 296 (citing *State v. Howren*, 312 N.C. 454, 456, 323 S.E.2d 335, 337 (1984)). The Court of Appeals also analyzed whether the defendant's statutory rights had been violated and found that they had not been. *Id.* at 330-32, 430 S.E.2d at 296-97. It then held that the evidence derived from the blood draw was admissible. *See id.* at 327, 332, 430 S.E.2d at 294, 297.[1]

Twenty years later, in 2013, the Supreme Court of the United States decided *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013). *McNeely* held that, in drunk-driving investigations, the dissipation of alcohol in the bloodstream through natural metabolic processes does not create a per se exigency that would permit a warrantless blood draw in every case. *Id.* at ___, 133 S. Ct. at 1556. Instead, the government has to show, on a case-by-case basis, that exigent circumstances other than the mere dissipation of alcohol are present. *See id.* at ___, ___, 133 S. Ct. at 1556, 1568.

In 2014, the search and arrest pertinent to this case took place. Defendant was detained for impaired driving, taken to a hospital for medical treatment, and subjected to a warrantless blood draw while unconscious.

In January 2015, defendant filed his motion to suppress. At the suppression hearing, which took place the next month, Sergeant Fowler testified that she relied on subsection 20-16.2(b) when she took custody

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1. The majority downplays *Garcia–Lorenzo*'s significance by claiming that *Garcia–Lorenzo* did not "specifically address[ ] or discuss[ ] the constitutionality of" subsection 20-16.2(b). That is true in a strictly formal sense, but not in any practical sense. In *Garcia–Lorenzo*, the Court of Appeals discussed whether the admission of evidence obtained under the subsection was constitutional, but not whether the subsection *itself* was constitutional. *See id.* at 330, 430 S.E.2d at 296. As I have just noted, however, the Court of Appeals ruled that an unconscious defendant did not have a constitutional right to refuse a blood draw. *See id*. at 328-30, 430 S.E.2d at 295-96. It necessarily followed that, in the Court of Appeals' view, subsection 20-16.2(b) was constitutional.

of defendant's blood, and the State argued that subsection 20-16.2(b) was constitutional. Defendant responded that, under *McNeely*, subsection 20-16.2(b) was unconstitutional because it created a per se exigent circumstances exception to the warrant requirement. The trial court agreed with defendant, found that no other exigency to justify a warrantless search was present in this case, and excluded the blood test results.

The State appealed. In its brief to the Court of Appeals, the State again argued that subsection 20-16.2(b) was constitutional. It also argued in its brief to the Court of Appeals that, even if that subsection were unconstitutional, the good faith exception to the exclusionary rule would make the evidence in question admissible. In April 2016, the Court of Appeals affirmed the trial court's decision. *See State v. Romano*, ___ N.C. App. ___, ___, 785 S.E.2d 168, 175 (2016). The State filed a petition for discretionary review with this Court.

In June 2016, while the State's petition was pending in this Court, the Supreme Court of the United States decided *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016). *Birchfield* addressed whether implied-consent laws that make it a crime for a lawfully arrested drunk-driving suspect to refuse to take a breath test or a blood test comply with the Fourth Amendment. *Id.* at ___, ___, 136 S. Ct. at 2166-67, 2184. Early in the *Birchfield* opinion, the Court suggested that this analysis hinged on whether a warrantless search of breath or blood is constitutional and said that, if it is, then refusing to submit to the search can be criminalized. *See id.* at ___, 136 S. Ct. at 2172-73. Later on in the opinion, the Court found that warrantless breath tests can be criminalized because they are searches incident to arrest, but that warrantless blood tests cannot be criminalized under either a search-incident-to-arrest theory or an implied-consent theory. *Id.* at ___, 136 S. Ct. at 2184-86. Read together, these two parts of *Birchfield* may indicate that it is unconstitutional to conduct a warrantless blood draw of a suspected drunk driver based only on the driver's statutorily inferred consent. If so, then it would be unconstitutional to conduct a warrantless blood draw based only on implied consent even when the suspected drunk driver is unconscious.

After *Birchfield* was handed down, this Court allowed the State's petition for discretionary review. In its briefing before this Court, the State all but concedes that subsection 20-16.2(b) is unconstitutional under *Birchfield* but also argues that it preserved its good faith argument for appeal, and it continues to argue that the good faith exception applies here.

It is beyond dispute that the State briefed the exclusionary rule's good faith exception before the Court of Appeals and again before this Court. So the majority's ruling that the State's good faith argument has not been preserved rises or falls on whether the State adequately raised that argument before the trial court. The State's *only* justification for accepting the blood drawn by the nurse that Sergeant Fowler testified about at the suppression hearing, and that the State argued to the trial court at that hearing, was that Sergeant Fowler had relied on N.C.G.S. § 20-16.2(b). Because the State clearly argued that Sergeant Fowler relied on this statutory provision, the majority can maintain that the State failed to preserve its good faith argument only if, in the majority's view, the State had to couch its statutory-reliance argument in the language of the good faith exception. In other words, the majority must think that it was wrong for the State to do what the State in fact did: argue before the trial court that Sergeant Fowler reasonably relied on the statute and that the statute was constitutional.[2]

But why should the State have to do otherwise? As we have seen, when the State opposed defendant's motion to suppress before the trial court, binding precedent from our own Court of Appeals seemed to make it clear that subsection 20-16.2(b) withstood Fourth Amendment scrutiny. Did the State really have to make an alternative argument, in the face of then-binding caselaw that supported its main argument, that assumed the statute's invalidity and that used the magic words "good faith exception"?

Remember, it was not until *Birchfield* was decided—and thus not until this case had already been appealed to this Court—that the Supreme Court called subsection 20-16.2(b) into constitutional doubt. When this case was still before the trial court, therefore, the State had every reason to think that Sergeant Fowler had relied on a *constitutionally permitted* statute that justified the search of defendant.

The majority suggests that *McNeely* changed the equation. Granted, *McNeely* had already been handed down when the trial court held the suppression hearing here. *McNeely*'s holding, however, was about exigency—specifically, whether exigency always exists when the police

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2. The majority also cites *State v. Rodrigues*, a 1985 case from Hawaii, to support its argument. *See* 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (per curiam). But in *Rodrigues*, the State of Hawaii relied only on actual consent when arguing before the trial court that the evidence in question there was admissible. *See id.* at 497-98, 692 P.2d at 1157-58. Hawaii did not "even hint[ ]" at the trial court level "that [it] was also relying . . . on a 'good faith' exception theory." *Id.* at 498, 692 P.2d at 1158.

suspect a person of driving drunk because alcohol in the bloodstream naturally dissipates over time. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1556. Exigency, of course, is an exception to the warrant requirement, *see*, *e.g.*, *id.* at ___, 133 S. Ct. at 1558, meaning that an officer does not need a warrant to conduct a search when exigent circumstances exist, *see*, *e.g.*, *Kentucky v. King*, 563 U.S. 452, 460 (2011). But an officer who has *consent* to conduct a search does not need a warrant either. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). In other words, consent and exigency are two separate exceptions to the warrant requirement. It follows that an officer with consent to conduct a search does not need exigent circumstances to justify it.

This case has always been about consent. As the majority admits, "Sergeant Fowler did not . . . believe any exigency existed. Instead, she expressly relied upon the statutory authorization set forth in [subsection] 20-16.2(b) . . . ." (Brackets in original; internal quotation marks omitted.) And subsection 20-16.2(b) allows an officer to direct the drawing of blood from an unconscious suspect based on the suspect's implied consent. *See* N.C.G.S. § 20-16.2(a)-(b). *McNeely*'s holding thus has no bearing on this case, which hinges on defendant's consent or lack thereof, not on exigent circumstances.

So, given the state of the law as it existed at the time of the suppression hearing, the State had absolutely no reason to weaken its case by conceding that the statute on which Sergeant Fowler relied might be unconstitutional. Controlling caselaw from our Court of Appeals settled the issue—at least for the purposes of any proceedings before the trial court—and no higher court had done anything to undermine that caselaw. In that situation, the State should be allowed to oppose a suppression motion by depending exclusively on the argument that a statute relied on for a Fourth Amendment search is in fact constitutional. By refusing to give the State this tactical option—even when the State has based its whole argument on an officer's good faith reliance on a facially valid statute—the majority has effectively penalized the State for having a strong case.

To support its anti-preservation argument, the majority cites Rule 10 of the North Carolina Rules of Appellate Procedure. But, far from supporting the majority's argument, that rule only bolsters my point. It states that, "[i]n order to preserve an issue for appellate review, a party must . . . stat[e] 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) (emphasis added). This rule squarely applies here. When the State is exclusively arguing before the trial court

that an officer relied on a statute to conduct a search, how could the State *not* want the trial court to rule that the officer relied on the statute *in good faith*? As I will discuss below, as long as the statute in question is not clearly unconstitutional, that is all that is required for the good faith exception to apply. So Rule 10 shows that, in this particular context, the State does not even need to expressly make a good faith exception argument in order to preserve that argument. A trial court should recognize that if the State loses on the Fourth Amendment merits, the State will still want the trial court to rule in its favor based on the good faith exception.

For all of these reasons, I would hold that the State has preserved its good faith exception argument for appeal. I now turn to the substantive constitutional question, which is governed exclusively by federal law.[3]

In *United States v. Leon*, the Supreme Court of the United States held that evidence obtained through a Fourth Amendment violation should not be excluded if, when conducting the search that led to the evidence, the police rely in good faith on a search warrant issued by a neutral and detached magistrate, even if the warrant is later found to lack probable cause. *See* 468 U.S. 897, 900, 925-26 (1984). The Court explained that the good faith standard is one of objective, not subjective, reasonableness. *Id.* at 919 n.20. *Illinois v. Krull* then held, based on the principles announced in *Leon*, that the good faith exception to the exclusionary rule also applies when the police rely in good faith on a *statute* authorizing warrantless searches that is later found to be unconstitutional. *See* 480 U.S. 340, 342, 349-55 (1987).

Although *Krull* pertained specifically to an administrative search, *id.* at 342, the rationale for the good faith exception that both *Leon* and *Krull* provide plainly extends to other kinds of searches as well. The Court in *Leon* noted that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916. And in *Krull*, the Court said that "[t]he approach used in *Leon* is equally applicable to the present case" because "suppress[ing] evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect" as suppressing evidence obtained "in objectively reasonable reliance on a warrant." *Krull*, 480 U.S. at 349. Paraphrasing *Leon*, the Court in *Krull* commented that "[p]enalizing the officer for the [legislature's] error,

3. Defendant's written motion to suppress does not refer to the state constitution, and his arguments at the suppression hearing were based solely on the Fourth Amendment.

rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 350 (second brackets in original) (quoting *Leon*, 468 U.S. at 921).

Other cases that the Supreme Court has handed down since *Leon* reinforce the good faith exception's broad applicability. In *Arizona v. Evans*, for instance, the Court addressed whether the good faith exception applies when a police officer reasonably relies on a police record that indicates the existence of an outstanding arrest warrant but that is later shown to be erroneous. 514 U.S. 1, 3-4 (1995). Noting that an employee of a Clerk of Court's office was the source of the error in that case, the Court held that the good faith exception applied. *Id.* at 4, 14-16. More recently, the Court held that the good faith exception applies "when the police conduct a search in compliance with binding precedent that is later overruled." *Davis v. United States*, 564 U.S. 229, 232 (2011). The reason that all of these cases are decided as they are boils down to the same core principle: that the exclusionary rule is designed to deter *police* misconduct, not misconduct or mistakes by other government actors. *See id.*; *Evans*, 514 U.S. at 14; *Krull*, 480 U.S. at 349-50; *Leon*, 468 U.S. at 916.

In this case, although Sergeant Fowler did not exactly "direct the taking of a blood sample," as subsection 20-16.2(b) contemplates, she still relied on that subsection when she took custody of excess blood from a vial that the attending nurse had drawn for medical purposes. After all, if subsection 20-16.2(b) permits a blood draw from an unconscious defendant, it must also permit the lesser intrusion entailed by taking custody of blood that has already been drawn for other purposes, which is what Sergeant Fowler did here.

Sergeant Fowler's reliance on subsection 20-16.2(b) was objectively reasonable, too. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Krull*, 480 U.S. at 349-50. To reiterate, not only was subsection 20-16.2(b) not clearly *unconstitutional* when defendant's blood was drawn; it had already been held *constitutional* by our Court of Appeals.

The good faith exception to the exclusionary rule applies in instances where "suppression would do nothing to deter police misconduct . . . and . . . would come at a high cost to both the truth and the public safety." *Davis*, 564 U.S. at 232. Because Sergeant Fowler relied in good faith on N.C.G.S. § 20-16.2(b) when she took custody of blood drawn by the attending nurse, and because the State preserved its argument to this

effect, I would hold that the good faith exception applies here. I would therefore reverse the decision of the Court of Appeals and remand for a trial in which the blood test results that defendant seeks to suppress are deemed admissible under the Fourth Amendment. As a result, I respectfully dissent.

Justices NEWBY and JACKSON join in this dissenting opinion.

Justice NEWBY dissenting.

I fully agree with and join the dissenting opinion, which correctly applies our waiver precedent and thoughtfully discusses the good faith exception. I am also of the view, however, that, on the record before us, the medical staff who drew defendant's blood were not state actors. State action is a threshold consideration in any Fourth Amendment analysis. Because the constitutional protections against unreasonable searches and seizures apply only to actions by governmental officials and their agents, and defendant failed to establish that the medical personnel were such agents, the blood draw at issue was not a search contemplated by the Fourth Amendment.

Defendant received treatment for severe intoxication at a private hospital. Upon arrival there, defendant was belligerent and combative toward the medical staff and the officers present. Irrespective of any criminal investigation, "medical staff determined it was necessary to medicate" defendant and draw his blood, though they knew law enforcement might require a blood sample for their DWI investigation. Officers were not present when medical staff drew defendant's blood. Importantly, nothing in the record suggests the officers coerced, enticed, induced, or otherwise instructed medical staff to draw defendant's blood or to draw more than was medically necessary.

The Fourth Amendment declares, in relevant part, that "[t]he 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; *see also State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510-11 (1992) (adopting the inevitable discovery exception to the exclusionary rule and noting that our state constitution's limitation against unreasonable searches and seizures does not confer protections beyond those afforded by the Fourth Amendment). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that

property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984) (footnotes omitted).

Though a blood draw can constitute a search under the Fourth Amendment, *e.g.*, *Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696, 704 (2013), the Fourth Amendment protects against unreasonable searches or seizures by state actors exclusively, *e.g.*, *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 576, 65 L. Ed. 1048, 1051 (1921) (concluding that the Fourth Amendment proscribes only unreasonable governmental action); *see also State Action*, *Black's Law Dictionary* (10th ed. 2014) ("Anything done by a government; . . . an intrusion on a person's rights . . . by a governmental entity . . . ."). The Fourth Amendment generally does not apply to a search or seizure, even an unreasonable one, by a private person. *See Burdeau*, 256 U.S. at 475, 41 S. Ct. at 576, 65 L. Ed. at 1051. Thus, evidence obtained from an unreasonable private search need not be excluded from a criminal trial. *See Walter v. United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 2401, 65 L. Ed. 2d 410, 417 (1980) (plurality opinion) ("[A] wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and . . . does not deprive the government of the right to use evidence that it has acquired lawfully." (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90, 91 S. Ct. 2022, 2048-50, 29 L. Ed. 2d 564, 595-96 (1971))).

In certain cases, however, the Fourth Amendment may limit private conduct when private persons become state actors, thereby acting as " 'instrument[s]' or agent[s] of the state." *Coolidge*, 403 U.S. at 487, 91 S. Ct. at 2048-49, 29 L. Ed. 2d at 595 (citations omitted). Whether a private party becomes a state actor "turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.' " *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614-15, 109 S. Ct. 1402, 1411-12, 103 L. Ed. 2d 639, 658 (1989) (internal citations omitted) (quoting *Coolidge*, 403 U.S. at 487, 91 S. Ct. at 2049, 29 L. Ed. 2d at 595). Relevant factors include "the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police." *State v. Sanders*, 327 N.C. 319, 334, 395 S.E.2d 412, 422 (1990), *cert. denied*, 498 U.S. 1051, 111 S. Ct. 763, 112 L. Ed. 2d 782 (1991). The defendant, not the State, bears the burden of establishing state action, thus triggering the protections of the Fourth Amendment. *See State v. Taylor*, 298 N.C. 405, 415, 259 S.E.2d 502, 508 (1979) ("[I]t is well settled that the burden is on defendant to establish [Fourth Amendment] standing." (citing, *inter alia*, *Jones v. United States*, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed. 2d 697,

702 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980))); *see, e.g.*, *Sanders*, 327 N.C. at 334, 395 S.E.2d at 422 (admitting the evidence because the defendant "failed to show that [a private citizen's] seizure specifically of the topaz ring and white gold watch was" "attributable to the State").

Though the State is on solid legal ground in making its statutory argument, our precedent "requires that we first determine whether, under the facts of this case, there has been a search." *State v. Reams*, 277 N.C. 391, 396, 178 S.E.2d 65, 68 (1970), *cert. denied*, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), *overruled on other grounds by State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994); *see State v. Raynor*, 27 N.C. App. 538, 540, 219 S.E.2d 657, 659 (1975) ("Before the legality of an alleged search may be questioned, it is necessary to first determine whether there has actually been a search."); *see also Reams*, 277 N.C. at 396, 178 S.E.2d at 68 ("[W]hen the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures."). Because the Fourth Amendment's prohibition on unreasonable searches operates only against the government and its agents, *Burdeau*, 256 U.S. at 475, 41 S. Ct. at 576, 65 L. Ed. at 1051, the nature of the actor remains a threshold question.

Here the record before us does not support the existence of an agency relationship between the medical staff of a private hospital and law enforcement. Nothing in the record suggests the government had anything to do with the blood draw, and defendant fails to persuasively argue that the blood draw was the result of state action. To the contrary, the record reflects that law enforcement never asked the medical staff to draw defendant's blood and were not in the room during the blood draw. Nothing suggests that law enforcement prompted, enticed, or induced the medical staff to draw more blood than medically necessary. Instead, medical staff drew defendant's blood for purposes of his medical treatment, irrespective of any criminal investigation. Whether medical staff knew that law enforcement would eventually need a sample of defendant's blood is irrelevant. *See State v. Kornegay*, 313 N.C. 1, 10-12, 326 S.E.2d 881, 890-91 (1985) (concluding that a private citizen who copied a defendant's records to turn over to the State Bureau of Investigation in exchange for prosecutorial immunity was not a state agent). When the nurse, "of her own accord," produced the blood sample, "it was not incumbent on the police to stop her or avert their eyes." *Coolidge*, 403 U.S. at 489, 91 S. Ct. at 2049, 29 L. Ed. 2d at 596. Accordingly, there was nothing wrongful about the State's "acquisition of the [vial of blood]

or its examination of [its] contents to the extent that [the blood] had already been examined by third parties." *Walter*, 447 U.S. at 656, 100 S. Ct. at 2401, 65 L. Ed. 2d. at 417.

The majority's puzzling attempt to avoid this issue concludes, in a few lines of dismissive prose, that the State waived any state action argument. The purpose of the waiver rule is to "prevent . . . errors . . . that [a] court could have corrected if brought to its attention at the proper time." *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984). Here it is beyond dispute that the State briefed the issue of state action before the Court of Appeals and again before this Court.[1] Moreover, the trial court recognized that "[t]he issue with regard to the blood . . . [being] drawn by a third party" was before the court and concluded that "the blood draw . . . [was] a part of the normal course of treatment and would have occurred without any subsequent police action." It is our duty as a jurisprudential court to address state action as the threshold legal question in any Fourth Amendment analysis.

Even assuming that a Fourth Amendment search occurred, defendant fails to persuasively argue that he retained any ongoing expectation of privacy in the vial of blood. *See State v. Barkley*, 144 N.C. App. 514, 518-19, 551 S.E.2d 131, 134-35, *appeal dismissed*, 354 N.C. 221, 554 S.E.2d 646 (2001). The sample here was lawfully removed from his body, and the State's analysis of the blood sample did not involve any further search and seizure of defendant's person. *See id.* at 518-20, 551 S.E.2d at 134-35; *see also Washington v. State*, 653 So. 2d 362, 364 (Fla. 1994) (per curiam) (concluding that once the samples were validly obtained in one case, the State was not prohibited from using them in another case), *cert. denied*, 516 U.S. 946, 116 S. Ct. 387, 133 L. Ed. 2d 309 (1995); *Bickley v. State*, 227 Ga. App. 413, 415, 489 S.E.2d 167, 170 (1997) (finding no constitutional violation when the defendant's blood was drawn pursuant to a warrant and used in an unrelated case, noting that, "[i]n this respect,

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1. Before the Court of Appeals, the State argued, *inter alia*, that the blood draw was for medical purposes and was not "government action." Before this Court, the State argued, *inter alia*, that the blood draw was conducted by a third party actor, not an agent of the police.

The State has also advanced an argument based upon the independent source exception to the exclusionary rule. This exception is distinct from the state action requirement and permits the introduction of evidence initially discovered from an unlawful search "but later obtained independently from activities untainted by the initial illegality." *Murray v. United States*, 487 U.S. 533, 537, 108 S. Ct. 2529, 2533, 101 L. Ed. 2d 472, 480 (1988). Regardless, the independent source doctrine presupposes that the invasion of privacy involved a state actor and that a search occurred.

DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations" (brackets in original)); *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001) (stating that once a DNA profile is obtained, the owner no longer has any possessory or ownership interest in it); *Wilson v. State*, 132 Md. App. 510, 550, 752 A.2d 1250, 1272 (2000) (concluding that the lawful use of the defendant's DNA in an unrelated case did not violate his Fourth Amendment rights because the defendant lost "[a]ny legitimate expectation of privacy that [he] had in his blood . . . when that blood was validly seized").

To be sure, "an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.' " *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1558, 185 L. Ed. 2d at 704 (quoting *Winston v. Lee*, 470 U.S. 753, 760, 105 S. Ct. 1611, 1616, 84 L. Ed. 2d 662, 668 (1985)). Such an expectation should be jealously guarded from unreasonable government intrusion. Nevertheless, the Fourth Amendment proscribes only unreasonable governmental action and does not apply to a search or seizure, even an unreasonable one, effectuated by a private party not acting as a governmental agent.

In sum, the threshold question in any Fourth Amendment analysis is whether a person's reasonable expectation of privacy was invaded by a governmental official or agent. The majority's analysis erroneously overlooks this foundational principle. Because the constitutional protections against unreasonable searches and seizures apply only to actions by governmental officials and their agents, and defendant failed to establish that the medical staff were such agents, the blood draw at issue was not a search contemplated by the Fourth Amendment.

STATE OF NORTH CAROLINA
v.
PARIS JUJUAN TODD

No. 18A14-2

Filed 9 June 2017

1. Appeal and Error—Court of Appeals dissent and motion for appropriate relief—Supreme Court supervisory authority

The Supreme Court exercised the supervisory authority granted by Article IV, Section 12 of the North Carolina Constitution where the case involved a dissent in the Court of Appeals and a motion for appropriate relief. Although the plain language of N.C.G.S. § 7A-28 precludes Supreme Court review when there is a dissent in the Court of Appeals and the case involves a motion for appropriate relief, a statute cannot restrict the Supreme Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise jurisdiction to review any decision of the courts below.

2. Constitutional Law—effective assistance of appellate counsel—failure to raise sufficiency of evidence

The record was insufficient to determine whether defendant received ineffective assistance of counsel in the Court of Appeals where there was no determination of whether defendant's appellate counsel had a strategic reason to refrain from addressing the sufficiency of the evidence supporting the conviction. The case was remanded to the Court of Appeals.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 790 S.E.2d 349 (2016), reversing an order denying defendant's motion for appropriate relief entered on 15 January 2015 by Judge Donald W. Stephens in Superior Court, Wake County, and remanding the case for entry of an order granting defendant's motion for appropriate relief and vacating his prior conviction. Heard in the Supreme Court on 12 April 2017.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

N.C. Prisoner Legal Services, Inc., by Reid Cater, for defendant-appellee.

BEASLEY, Justice.

In this appeal we consider whether this Court has jurisdiction to decide an appeal taken from a divided decision of the Court of Appeals pursuant to N.C.G.S. § 7A-30(2) arising from a trial court's ruling granting or denying a motion for appropriate relief (MAR) and whether the Court of Appeals erred by reversing the trial court's decision that defendant received effective assistance of appellate counsel. The Court of Appeals concluded that the State presented insufficient evidence to show that defendant committed the underlying offense and further concluded that, if defendant's appellate counsel had raised the sufficiency of the evidence issue in the previous appeal, defendant's conviction would have been reversed. We hold that this Court has jurisdiction to hear this matter and conclude that the record should be further developed before a reviewing court can adequately address the ineffective assistance of counsel claim. Accordingly, we reverse and remand the decision of the Court of Appeals.

On 2 April 2012, Paris Jujuan Todd (defendant) was indicted for robbery with a dangerous weapon and conspiracy to commit the same offense. After a trial beginning on 12 June 2012, defendant was convicted of robbery with a dangerous weapon. Defendant appealed that conviction to the Court of Appeals, arguing that the trial court erred by denying his motion to continue and that he received ineffective assistance of trial counsel. *See State v. Todd*, 229 N.C. App. 197, 749 S.E.2d 113 2013 WL 4460143 (2013) (unpublished) (*Todd I*). The Court of Appeals disagreed with defendant and held that the trial court did not err in denying defendant's motion to continue and that defendant did not receive ineffective assistance of trial counsel. *Todd*, 2013 WL 4460143, at *5.

On 21 October 2014, defendant filed a motion for appropriate relief (MAR) in the trial court, arguing that the evidence was insufficient to support his conviction and that his appellate counsel was ineffective for failing to raise this claim on appeal. On 15 January 2015, the trial court, without conducting an evidentiary hearing on defendant's ineffective assistance of counsel claim, entered an order denying defendant's MAR. The trial court found that "[a] review of all the matters of record, including the opinion of the North Carolina Court of Appeals . . . clearly demonstrates that the evidence was sufficient to support the jury verdict and appellate counsel rendered effective assistance to Defendant in his appeal." Defendant filed a petition for writ of certiorari to the Court of Appeals seeking review of the trial court's order denying his MAR, which the Court of Appeals allowed on 27 March 2015.

Defendant argued to the Court of Appeals that in the first appeal his appellate counsel performed below an objective standard of reasonableness by failing to argue that the evidence was insufficient to support defendant's conviction. A divided panel of the Court of Appeals held that defendant received ineffective assistance of appellate counsel in his first appeal and concluded that defendant likely would have been successful had his counsel raised the sufficiency of the evidence issue in his first appeal. *State v. Todd*, ___ N.C. App. ___, ___, 790 S.E.2d 349, 364 (2016) (*Todd II*). More specifically, after concluding that, "the State presented insufficient evidence that defendant committed the underlying offense," the majority held that the trial court erred in denying defendant's MAR. *Id.* at ___, 790 S.E.2d at 364. Accordingly, the Court of Appeals reversed the trial court's order and remanded the case to the trial court with instructions to grant defendant's MAR and vacate his conviction. *Id.* at ___, 790 S.E.2d at 364.

Nonetheless, according to the dissent, defendant failed to show that appellate counsel's performance was deficient. *Id.* at ___, 790 S.E.2d at 365 (Tyson, J., dissenting). The dissent noted that "[e]ffective appellate advocates winnow out weaker arguments and focus on those more likely to prevail on appeal." *Id.* at ___, 790 S.E.2d at 367 (citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983)). Because "[t]his accepted discretionary process lies within the professional judgment of appellate counsel," *id.* at ___, 790 S.E.2d at 367, the dissent concluded that defendant could not show that his appellate counsel was deficient in not raising a sufficiency of the evidence argument in the first appeal, *id.* at ___, 790 S.E.2d at 368. The State gave timely notice of appeal based upon the dissenting opinion.[1]

[1] As a threshold matter, we must consider whether this Court has jurisdiction to decide this appeal. Generally N.C.G.S § 7A-30(2) provides an automatic right of appeal to this Court based on a dissent at the Court of Appeals. N.C.G.S. § 7A-30(2) (2015). But, that automatic right of appeal is limited by N.C.G.S. § 7A-28, which states that "[d]ecisions of the Court of Appeals upon review of motions for appropriate relief listed in G.S. 15A-1415(b) are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise." *Id.*,

1. Additionally, on 9 December 2016, we ordered the parties to brief and argue (1) whether the Court of Appeals erred in reversing and remanding the trial court's judgment, and (2) whether this Court has jurisdiction to hear and decide an appeal taken from a decision of the Court of Appeals that arose from a trial court ruling granting or denying a motion for appropriate relief pursuant to N.C.G.S. § 7A-30(2), in light of the provisions of N.C.G.S. §§ 7A-28(a) and 15A-1422(f).

§ 7A-28(a) (2015). We acknowledge that the plain language of N.C.G.S. § 7A-28 precludes this Court's review of a case in which there is a dissent in the Court of Appeals when the case involves review of a motion for appropriate relief; however, we maintain the authority granted to us by the state constitution and recognize that "it is beyond question that a statute cannot restrict this Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise 'jurisdiction to review upon appeal any decision of the courts below.' " *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007) (quoting N.C. Const. art. IV, § 12). "This Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice." *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975) (citations omitted). Thus, we exercise the supervisory authority granted by Article IV, Section 12 of the North Carolina Constitution to decide this matter.

[2] Having determined that we have jurisdiction to hear this matter, we next consider whether defendant received ineffective assistance of appellate counsel. Before this Court, the State argues that defendant's appellate counsel apparently made a strategic decision not to challenge the sufficiency of the evidence. Because the lower courts did not determine whether there was a strategic reason for defendant's appellate counsel to refrain from addressing the sufficiency of the evidence supporting defendant's conviction, we reverse and remand the decision of the Court of Appeals.

A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771 & n.14, 90 S. Ct. 1441, 1449 & n. 14 (1970)). When challenging a conviction on the basis that counsel was ineffective, a defendant must show that counsel's conduct "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984); *see also Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248. In *Strickland* the United States Supreme Court set forth a two-pronged test for determining whether a defendant has received ineffective assistance of counsel. 466 U.S. at 687, 104 S. Ct. at 2064. *Strickland* requires that a defendant first establish that counsel's performance was deficient. *Id.* at 687, 104 S. Ct. at 2064. This first prong requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S. Ct. at 2064. Second, a defendant must demonstrate that the deficient

performance prejudiced the defense, which requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S. Ct. at 2064. Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim.

In this case defendant's claim stems from appellate counsel's decision not to argue in his first appeal that the evidence was insufficient to support defendant's conviction. Defendant contends that he would have won his appeal had this dispositive issue been raised. Conversely, the State argues that defendant's appellate counsel "apparently made a strategic decision not to challenge the sufficiency of the evidence."

Rather than articulating specific guidelines for appropriate attorney conduct, the Court in *Strickland* emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688, 104 S. Ct. at 2065. *Strickland* notes that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91, 104 S. Ct. at 2066. Simply put, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S. Ct. at 2066. In considering the merits of any claim for ineffective assistance of counsel, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691, 104 S. Ct. at 2066.

As to the first prong of the *Strickland* test, the Court of Appeals acknowledged the State's argument that defendant's prior appellate counsel "apparently made a strategic decision" not to challenge the sufficiency of the evidence. *Todd II*, ___ N.C. App. at ___, 790 S.E.2d at 364 (majority opinion). But the Court of Appeals majority opinion noted that the State failed to explain how the failure to challenge the sufficiency of the evidence in the first appeal could be a strategic decision. *Id.* at ___, 790 S.E.2d at 364. Neither of our lower courts, however, addressed whether there was an actual strategic reason for defendant's appellate counsel not to address the sufficiency of the evidence issue, and if so, whether the strategic decision was reasonable. Specifically, the trial court did not address whether this was a strategic decision because that court summarily denied defendant's MAR without

a hearing. Additionally, the Court of Appeals did not fully address this issue. While "winnowing out weaker arguments on appeal and focusing on one central issue" is an important aspect of appellate advocacy, *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3313 (1983), the determination of whether a defendant's appellate counsel made a particular strategic decision remains a question of fact, and is not something which can be hypothesized, *see Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir.), *reh'g en banc denied*, 162 F.3d 100 (11th Cir. 1998). Thus, the record before this Court is not thoroughly developed regarding defendant's appellate counsel's reasonableness, or lack thereof, in choosing not to argue sufficiency of the evidence.

We therefore hold that the record before us is insufficient to determine whether defendant received ineffective assistance of counsel. On remand the Court of Appeals should further remand this matter to the trial court with instructions to fully address whether appellate counsel made a strategic decision not to raise a sufficiency of the evidence argument, and, if such a decision was strategic, to determine whether that decision was a reasonable decision. Further, if the trial court finds that defendant's appellate counsel's performance was deficient, that court should then determine whether counsel's performance prejudiced defendant.

For the reasons stated herein, the decision of the Court of Appeals is reversed, and that court is instructed to remand this matter to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

STOKES v. CRUMPTON

[369 N.C. 713 (2017)]

THOMAS A. STOKES, III
v.
CATHERINE C. CRUMPTON (FORMERLY STOKES)

No. 168A16

Filed 9 June 2017

Divorce—equitable distribution—arbitration and settlement—allegations of fraud—interlocutory appeal—settlement

In an action involving equitable distribution and arbitration in which fraud in the valuation of a business was alleged after a settlement, plaintiff had a right to appeal the trial court's order denying discovery under the substantial rights analysis of N.C.G.S. § 7A-27(b)(3)(a), and a right to appeal may exist under section 7A-27 even if the order is not appealable under the arbitration statute itself. The trial court had discretion to award discovery because the action was pending pursuant to sections 50-53 and 50-54 of the Family Law Arbitration Act.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 784 S.E.2d 537 (2016), dismissing an appeal from an order entered on 7 August 2014 by Judge Anna E. Worley in District Court, Wake County. On 22 September 2016, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 20 March 2017.

Shanahan Law Group, PLLC, by Kieran J. Shanahan, Christopher S. Battles, and John E. Branch, III, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, K. Edward Greene, and Robert A. Ponton, Jr., for defendant-appellee.

BEASLEY, Justice.

This case is about whether a trial court has discretion to order post-confirmation discovery in an action under the Family Law Arbitration Act and a party's right to an interlocutory appeal of the trial court's denial of such a motion. We hold that plaintiff had a right to appeal the trial court's denial of his motion to engage in discovery and that the trial court has discretion to order post-confirmation discovery in this case. Accordingly, we reverse the decision of the Court of Appeals and remand this case with instructions for the Court of Appeals to vacate the

trial court's order and remand the matter for reconsideration of plaintiff's motion consistent with this opinion.

In April 2011, Thomas A. Stokes, III (plaintiff) and Catherine C. Stokes (now Crumpton) (defendant) separated. Plaintiff filed an action in July 2011 seeking equitable distribution of the parties' marital assets and child support. Shortly thereafter, the parties agreed to arbitrate the action under North Carolina's Family Law Arbitration Act (FLAA), N.C.G.S. §§ 50-41 to 50-62. On 13 August 2011, the trial court entered a Consent Order to Arbitrate Equitable Distribution and Child Support. One of the main issues to be settled during arbitration was the value of defendant's stake in Drug Safety Alliance, Inc. (DSA),[1] a company in which defendant was the President, CEO, and majority shareholder.

As part of the agreed-upon pre-arbitration discovery, plaintiff's counsel deposed defendant, seeking information, *inter alia*, on the value of DSA. During the deposition, defendant testified that she had "no intention of selling" DSA at that time, although she had been contacted by parties interested in purchasing the company. In response to questions regarding the possible sale, merger, or acquisition relating to DSA, defendant, for the most part, responded that she did not know or could not answer the question. During discovery, plaintiff's valuation expert also interviewed defendant and specifically inquired about "any written or oral offers to purchase DSA"; defendant said there were none. Plaintiff's expert also requested production of documents from DSA, including buy-sell agreements, written offers to purchase stock, and any major sale or purchase contracts. No such documents were ever produced.

On 18 May 2012, plaintiff and defendant entered into an Equitable Distribution Arbitration Award by Consent (the Award). That same day, the trial court entered an order and judgment in District Court, Wake County, confirming the award. The Award, *inter alia*, distributed to defendant all stock held by her in DSA and any other interest claimed by either party in the company. In return, defendant would pay plaintiff a lump sum of $1,000,000.00, plus an additional $650,000.00 over a six year period. The entire balance would become immediately due and payable, however, if defendant sold her ownership interest in DSA.

Less than two months later, on 5 July 2012, defendant signed a Letter of Intent to sell DSA to another company, United Drug, PLLC. In August

1. DSA managed adverse event reporting for pharmaceutical, biotech, animal health, and over-the-counter dietary supplement companies.

2012, United Drug purchased DSA for $28,000,000.00, of which defendant received approximately $14,000,000.00 for her shares. Plaintiff claims to have learned about the sale through the media, without any prior knowledge of it during arbitration.

On 26 November 2012, plaintiff filed a Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery.[2] Plaintiff's motion was predicated on an allegation of fraud, that defendant "intentionally induced [p]laintiff to settle through misrepresentation and/or concealment of material facts related to the sale, possible sale, discussions, negotiations and existence of documents related to the possible sale of DSA to a third party." Specifically, plaintiff alleged that defendant intended to sell DSA while arbitration was under way and that she fraudulently induced plaintiff to accept a distribution of only $1,650,000.00 for DSA based on her representations about the company during arbitration. According to plaintiff, during arbitration "the parties were arguing over a valuation of the marital interest in DSA as being between approximately two and five million dollars" and eventually stipulated to a value of $3,485,000.00 for DSA.[3] Plaintiff contends that he never would have agreed to DSA's value had defendant disclosed the sale opportunity.

As part of these motions, plaintiff requested leave "to conduct discovery regarding discussions, negotiations and activity by and involving [d]efendant and her company DSA, its agents and United Drug and its agents that led to the July 5, 2012 Letter of Intent and subsequent sale of DSA to United Drug." On 7 August 2014, the trial court entered an order denying plaintiff's motion for leave to engage in discovery. The trial court concluded:

> 1. There is no pending action between Plaintiff and Defendant in which discovery may be propounded.
>
> 2. Plaintiff's Verified Motion to Vacate Arbitration Award is not a claim within which discovery may be conducted. Plaintiff's [request for] written discovery is therefore inappropriate.

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2. Plaintiff amended his motion on 13 December 2013 to clarify that the motions were brought under the FLAA.

3. As pointed out by defendant, the parties never stipulated to a value for DSA. Plaintiff contends, however, that the parties reached a mutual understanding as to DSA's value prior to consenting to the Award.

> 3. All of Plaintiff's Motions to Compel [Discovery] . . . should be denied.

Plaintiff appealed to the Court of Appeals, which filed a divided opinion dismissing the appeal on 5 April 2016.

As a preliminary matter, the Court of Appeals addressed whether the trial court's order denying discovery was immediately appealable as an interlocutory order. *Stokes v. Crumpton*, ___ N.C. App. ___, ___, 784 S.E.2d 537, 539 (2016). Agreeing with defendant, the majority concluded that the order was not appealable under either the FLAA's appeal provision, N.C.G.S. § 50-60 (2015), or the substantial rights analysis of N.C.G.S. § 7A-27(b)(3)(a) (2015). *See id.* at ___, 784 S.E.2d at 540. In regards to the FLAA, the majority held that the discovery order did not fall under any of the types of orders enumerated in subsection 50-60(a) of the statute under which a right of appeal lies. *Id.* at ___, 784 S.E.2d at 540. Specifically, the majority also concluded that the order at issue here "is not a judgment" for purposes of subdivision 50-60(a)(6). *Id.* at ___, 784 S.E.2d at 541. The majority then rejected plaintiff's argument that he was separately entitled to appeal from the order under N.C.G.S. § 7A-27, which governs interlocutory appeals. *Id.* at ___, 784 S.E.2d at 541-42. The majority concluded that plaintiff "failed to demonstrate that he would be deprived of a substantial right without appellate review of the order before a final judgment has been entered," as required under section 7A-27. *Id.* at ___, 784 S.E.2d at 541-42.

The dissent disagreed with the majority's conclusion that the discovery order was not immediately appealable. *Id.* at ___, 784 S.E.2d at 543 (Calabria, J., dissenting). Specifically, the dissent concluded that the order denying discovery was appealable under subdivision 50-60(a)(6), which the dissent deemed to be a "catch-all" provision that permits appeal from "[a] judgment entered pursuant to provisions of this Article." *Id.* at ___, 784 S.E.2d at 543. According to the dissent, "judgment" as used in this provision is not limited to "final judgments," but includes judgments that are interlocutory as well. *Id.* at ___, 784 S.E.2d at 543-44. The dissent also concluded that plaintiff had a right to appeal under section 7A-27 because plaintiff demonstrated that, if the order was not immediately reviewed, he would be deprived of a substantial right, consisting of any ability to prove the alleged fraud at the hearing on his motion to vacate, without some limited discovery. *Id.* at ___, 784 S.E.2d at 544-47.

Next, the dissent disagreed with the trial court's conclusion that "[t]here is no pending action between Plaintiff and Defendant in which

discovery may be propounded." *Id.* at ___, 784 S.E.2d at 546. According to the dissent, "plaintiff's Motion to Vacate Arbitration Award and Set Aside Order based on allegations that the arbitration award was procured by fraud is pending." *Id.* at ___, 784 S.E.2d at 546. In response, the majority addressed the pending action issue in a footnote, disagreeing with the dissent's interpretation and stating that "[i]t is correct that Plaintiff's *motion* to vacate was pending, but the trial court concluded, and we agree, that the *action*—the arbitration of the parties' equitable distribution action—had concluded, and the pending motion was 'not a claim within which discovery may be conducted.' " *Id.* at ___ n.1, 784 S.E.2d at 539 n.1 (majority opinion).

Plaintiff filed an appeal of right based on the dissenting opinion, and on 22 September 2016, this Court allowed plaintiff's petition for discretionary review as to an additional issue. The issues before this Court are whether plaintiff has a right to appeal the trial court's order and whether the trial court had discretion to award discovery in this case.

As a threshold matter we consider whether plaintiff had a right to immediately appeal the trial court's order denying discovery. We hold that he did.

Plaintiff contends that the trial court's interlocutory order may be appealed if it affects a substantial right, pursuant to N.C.G.S. § 7A-27(b)(3)(a), even if plaintiff has no right to appeal under the FLAA.[4] We agree. This Court has never explicitly addressed the interplay between appeals under an arbitration statute and section 7A-27. The Court of Appeals case law on this issue is unclear and somewhat contradictory. We take this opportunity to clarify the relationship between N.C.G.S. §§ 50-60 and 7A-27.

In *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 314 S.E.2d 291 (1984), the threshold issue before the court was whether there is an immediate right to appeal an order compelling arbitration under the Uniform Arbitration Act (UAA), which the court held did not exist. 68 N.C. App. at 286, 314 S.E.2d at 293. The court began its analysis by reviewing the bases for appeal enumerated in N.C.G.S. § 1-567.18(a) and concluding

4. Plaintiff did not argue to this Court that he had a right to appeal under the FLAA itself. Assuming *arguendo* that the majority at the Court of Appeals correctly determined that plaintiff did not have a right to appeal under subdivision 50-60(a)(6) of the FLAA, we hold that plaintiff had a right to appeal the interlocutory order under N.C.G.S. § 7A-27 because the order affected a substantial right.

that an order compelling arbitration does not fall under the statute. *Id.* at 285, 314 S.E.2d at 292-93. After reaching this conclusion, the court then addressed whether the order affected a substantial right. *Id.* at 285-86, 314 S.E.2d at 293. Ultimately, the court held that an order compelling arbitration is not appealable under either the UAA[5] or section 7A-27. *Id.* at 285, 314 S.E.2d at 293.

Subsequent Court of Appeals cases relying on *Wysocki* have followed a similar analytical framework—conducting a substantial rights analysis under section 7A-27 *after* concluding that the order at issue did not fall under the enumerated bases for appeal set out in the relevant arbitration statute. *See*, *e.g.*, *Smith v. Shipman*, 153 N.C. App. 200, 569 S.E.2d 34, 2002 WL 31055991 (2002) (unpublished); *N.C. Elec. Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 381 S.E.2d 896, *disc. rev. denied*, 325 N.C. 709, 388 S.E.2d 461 (1989). *Wysocki* and its progeny do not explicitly address the relationship between appeals under an arbitration statute and interlocutory appeals under section 7A-27. Implicit in these cases, however, is support for the conclusion that a right to appeal can be based on section 7A-27 even if there is no right to appeal under the arbitration statute.

In the present case the Court of Appeals majority based its decision, in part, on the fact that the FLAA appeal provision does not include an order denying discovery as one of the enumerated bases for appeal. *Stokes*, ___ N.C. App. at ___, 784 S.E.2d at 540. The majority in *Stokes* relied on *Bullard v. Tall House Building, Co.*, 196 N.C. App. 627, 676 S.E.2d 96 (2009), quoting specifically the statement "that the list enumerated in [N.C.G.S.] § 1-569.28(a) includes the *only* possible routes for appeal under the [Revised UAA]." *Id.* at ___, 784 S.E.2d at 540-41 (quoting *Bullard*, 196 N.C. App. at 635, 676 S.E.2d at 102) (emphasis added)). The court in *Bullard* concluded that the order was not appealable under the Revised UAA and then conducted a substantial rights analysis under section 7A-27. 196 N.C. App. at 635-39, 676 S.E.2d at 102-04. The court held that an order compelling arbitration: (1) was not appealable under the Revised UAA; *and* (2) did not impair a substantial right justifying immediate appeal under section 7A-27. *Id.* at 635-39, 676 S.E.2d at 102-04.

Therefore, despite this quoted language, the court in *Bullard* followed the same analysis used in *Wysocki* and its progeny, further

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5. Although an order compelling arbitration is not appealable under the UAA, *Wysocki*, 68 N.C. App. at 285, 314 S.E.2d at 292-93, the Revised UAA does provide a basis for appeal from an order denying a motion to compel arbitration, N.C.G.S. § 1-569.28(a)(1) (2015) ("An appeal may be taken from . . . [a]n order denying a motion to compel arbitration . . . .").

supporting the inference that an appeal can lie from either statute. Additionally, the Court of Appeals majority in this case similarly analyzed whether a substantial right was affected by the trial court's order, despite quoting *Bullard* and despite previously concluding that plaintiff had no right to appeal under the FLAA itself. *Stokes*, ___ N.C. App. at ___, 784 S.E.2d at 541-42. We hold that an appeal can be justified under section 7A-27 even if there is no right to appeal under the relevant arbitration statute. To the extent *Bullard* suggests otherwise, it is abrogated.

Having determined that a substantial rights analysis under section 7A-27 may be conducted notwithstanding that no right to appeal lies under the arbitration statute itself, we turn now to whether the trial court's order denying discovery to plaintiff in this case affected a substantial right justifying immediate appeal. We hold that the trial court's order denying discovery affected a substantial right.

An interlocutory order is generally not immediately appealable unless the order "[a]ffects a substantial right," *id.* § 7A-27(b)(3)(a). *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 578-79 (1999) (discussing two avenues for immediate appeal of an interlocutory order, including N.C.G.S. § 7A-27). Discovery orders are "generally not immediately appealable because [they are] interlocutory and do[ ] not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Id.* at 163, 522 S.E.2d at 579 (citations omitted). Such orders, however, are immediately appealable when "the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is *highly material to a determination of the critical question* to be resolved in the case." *Dworsky v. Travelers Ins.*, 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980) (emphasis added) (citing *Tenn.-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977)). In these situations, "an order denying such discovery does affect a substantial right and is appealable." *Id.* at 448, 271 S.E.2d at 523 (citing *Tenn.-Carolina*, 291 N.C. 618, 231 S.E.2d 597).

Here there is no dispute that the trial court's order is interlocutory, as it was made while plaintiff's motion to vacate was still pending. *See Sharpe*, 351 N.C. at 161, 522 S.E.2d at 578. As such, the interlocutory order must be shown to affect a substantial right in order to justify immediate appeal.

Plaintiff's motion requested limited discovery in the form of information relating to the timeline, details, and discussions between DSA

and United Drug regarding the August 2012 sale. This information is "highly material" to a determination on plaintiff's motion to vacate based on allegations that defendant fraudulently concealed the true value of her shares in DSA. Generally, a motion to vacate an arbitration award based on fraud must be proved by clear and convincing evidence. *See MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 858 (4th Cir. 2010) (stating that vacatur under the Federal Arbitration Act based on an allegation of "undue means" requires that the fraud or corruption be established by clear and convincing evidence); *Trafalgar House Constr., Inc. v. MSL Enters.*, 128 N.C. App. 252, 257-59, 494 S.E.2d 613, 617 (1998) (holding that the plaintiff failed to meet its burden of proof that grounds existed to vacate an arbitration agreement under the FAA on the basis of fraud). Fraud is generally defined as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Fraud*, *Black's Law Dictionary* (10th ed. 2014). Due to the concealment and deception inherent in fraud, it is unlikely that plaintiff will be able to obtain information necessary to support his motion to vacate without conducting some limited discovery. Thus, because the limited discovery requested by plaintiff is "highly material to a determination of the critical issue" in his motion to vacate, the order denying discovery affects a substantial right justifying immediate appeal under N.C.G.S. § 7A-27(b)(3)(a). *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 523 (citing *Tenn.-Carolina*, 291 N.C. 618, 231 S.E.2d 597).

Having determined that plaintiff had a right to immediately appeal the trial court's order denying discovery, we reverse the Court of Appeals holding on this issue. We now consider whether the trial court had the discretion to order discovery in the case at hand. We hold that it did.

Plaintiff contends that his motion to vacate the arbitration award under the FLAA is a pending action under which discovery may be propounded. We agree. Under the FLAA, "upon a party's application, the court shall confirm an award, *except* when within time limits imposed under G.S. 50-54 . . . grounds are urged for vacating . . . the award, in which case the court *shall* proceed as provided in G.S. 50-54." N.C.G.S. § 50-53(a) (2015) (emphases added). Section 50-54 sets forth various reasons for which "the court *shall* vacate an award," including that "[t]he award was procured by corruption, fraud, or other undue means." *Id.* § 50-54(a)(1) (2015) (emphasis added). A timely motion to vacate under section 50-54 predicated on corruption, fraud, or other undue means "shall be made within 90 days after these grounds are known or should have been known." *Id.* § 50-54(b) (2015). Plaintiff's motion to vacate was timely filed, thus triggering the provisions of section 50-54.

Contrary to defendant's contention, there is no law prohibiting the trial court from utilizing its discretion to order discovery in this case. The plain language of the FLAA itself provides a mechanism for vacating an arbitration award upon proof of fraud. *See id.* §§ 50-53, -54. As stated above, clear and convincing evidence is needed to succeed on a motion to vacate based on allegations of fraud. Given this high standard, and the concealment and deception inherent in fraud, post-confirmation discovery naturally follows. Moreover, there is no provision of the FLAA that prohibits post-confirmation discovery, and nothing within the statute limits section 50-54 solely to claims of fraud made pre-confirmation.

Section 50-53 explicitly provides an alternative, mandatory path for courts to take if a timely motion to vacate is filed, in which event the court *shall* proceed according to section 50-54. Here there is no debate that plaintiff timely filed his motion to vacate based on an allegation of fraud. Defendant argues that this alternative path only applies in the pre-confirmation context; nothing, however, in the language of sections 50-53 or 50-54 supports this conclusion. Reading an exception into the statute for post-confirmation motions would appear to create a right without a remedy. We decline to limit the statute in such a manner without clear indication of the General Assembly's intent.

Under the terms of the FLAA, a motion to vacate based on allegations of fraud disrupts the general process for confirming arbitration awards and creates a vehicle by which confirmed awards can be vacated. Accordingly, a motion to vacate under section 50-54 is pending because it seeks a remedy made available by the FLAA related to the underlying arbitration, to which plaintiff has availed himself. Therefore, the motion to vacate was a pending action under which the trial court had the discretion to order discovery.

We hold, therefore, that plaintiff had a right to appeal the trial court's order denying discovery under the substantial rights analysis of N.C.G.S. § 7A-27(b)(3)(a), and that a right to appeal may exist under section 7A-27 even if the order is not appealable under the arbitration statute itself. Additionally, we hold that the trial court had discretion to award discovery in this case because the action was pending pursuant to sections 50-53 and 50-54 of the FLAA. For the reasons stated, we reverse the decision of the Court of Appeals and remand this matter with instructions to the Court of Appeals to vacate the trial court's order denying discovery and remand this case to the trial court for further consideration of plaintiff's motion consistent with this opinion.

REVERSED AND REMANDED.

TOWN OF BEECH MOUNTAIN
v.
GENESIS WILDLIFE SANCTUARY, INC.

No. 230A16

Filed 9 June 2017

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. ___, 786 S.E.2d 335 (2016), affirming an order granting summary judgment to defendant entered on 5 September 2014 by Judge Gary M. Gavenus; and finding no error in an order entered on 30 October 2013 by Judge Mark E. Powell, and in judgments entered on 29 September 2014 and 24 November 2014 and an order entered on 27 October 2014 by Judge J. Thomas Davis, all in Superior Court, Watauga County. On 7 July 2016, the Supreme Court allowed plaintiff's petition for writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an additional issue. Heard in the Supreme Court on 10 April 2017.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Patrick H. Flanagan; and Eggers, Eggers, Eggers, & Eggers, PLLC, by Stacy C. Eggers, IV, for plaintiff-appellant.

John J. Korzen, Wake Forest University School of Law; and Clement Law Office, by Charles E. Clement and Charles A. Brady, III, for defendant-appellee.

Morningstar Law Group, by William J. Brian, Jr., for Pacific Legal Foundation, amicus curiae.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for writ of certiorari as to the additional issue was improvidently allowed.

AFFIRMED; CERTIORARI IMPROVIDENTLY ALLOWED.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE C-BASS MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-RP2

v.

WILLIE LEE PINKNEY, CLARA PINKNEY, SIDDCO, INC., AND POORE SUBSTITUTE TRUSTEE, LTD

No. 229PA16

Filed 9 June 2017

Mortgages and Deeds of Trust—foreclosure—pleadings

The trial court erred by dismissing plaintiff's foreclosure claim under N.C.G.S. § 1A-1, Rule 12(b)(6) where it applied requirements applicable to non-judicial foreclosures by power of sale to a judicial foreclosure. Foreclosure by action or "judicial foreclosure," unlike non-judicial foreclosure by power of sale, is an ordinary civil action governed by the liberal standard of notice pleading. A missing indorsement at the initial notice-pleading stage did not preclude the bank from proceeding with its civil action.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 464 (2016), affirming an order entered on 5 March 2015 by Judge Patrice A. Hinnant in Superior Court, Forsyth County. Heard in the Supreme Court on 11 April 2017.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, for plaintiff-appellant.

Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for defendant-appellees Willie Lee Pinkney and Clara Pinkney.

NEWBY, Justice.

Foreclosure by action or "judicial foreclosure," unlike non-judicial foreclosure by power of sale, is an ordinary civil action governed by the liberal standard of notice pleading. As such, a complaint is sufficient if it alleges a debt secured by a deed of trust, a default, and the plaintiff's right to enforce the deed of trust. Here plaintiff's complaint adequately states a cause of action for judicial foreclosure. The Court of Appeals erred by applying the requirements applicable in non-judicial foreclosure by power of sale to the plaintiff's judicial foreclosure action and, accordingly, we reverse the decision of that court.

In December 1997, defendants Willie Lee Pinkney and Clara Pinkney (collectively borrower) executed a promissory note with Ford Consumer Finance Company, Inc. (the Note) in the principal amount of $257,256.89 to purchase real property situated in Forsyth County. The debt is repayable through monthly installments due on the seventeenth of the month and matures on 17 December 2027. The Note includes default and acceleration provisions. The debt is secured by a deed of trust on the underlying real property, identified "as Lot No. 2, . . . SHERWOOD FOREST, . . . recorded in Plat Book 29, Page 22, in the Office of the Register of Deeds of Forsyth County." U.S. Bank National Association (the Bank)[1] alleges that it "is the present holder of the Note and Subject Deed of Trust and is the party entitled to enforce the same."

In September 2014, the Bank filed its complaint against borrower and the substitute trustee under the deed of trust in Superior Court, Forsyth County, seeking judicial foreclosure and judgment on the Note.[2] The Bank alleges, *inter alia*, that "the Note evidences a valid debt owned [sic] by [borrower] to [the Bank]," that borrower "defaulted under the terms of the Note for failure to make payments," and that the Bank "has given [borrower] written notice of default," but that borrower has "refused . . . to make the payments required." The Bank claims that the outstanding balance on the Note is $268,171.13 plus "past due interest" of $118,055.05.

In regard to the Bank's authority to enforce the terms of the deed of trust, the complaint states that the Note was "transferred" several times, ultimately to the Bank. Ford Consumer Finance "endorsed" the Note to Credit Based Asset Servicing and Securitization, LLC (Credit Asset), which "assigned" the Note to the "Salomon Mortgage Loan Trust" Indenture, which "specifically endorsed" the Note to the Bank.[3]

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1. U.S. Bank National Association acts as Trustee for the C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-RP2.

2. The Bank alleges that defendant Poore Substitute Trustee, LTD is substitute trustee under the deed of trust and "is named in this action solely for notice purposes." The Bank successfully moved for default judgment against defendant Siddco, Inc. regarding its priority of interest claim on a previously recorded deed of trust, which is not a subject of this appeal.

3. Ford Consumer Finance Company, Inc. merged into Associates Home Equity Services, Inc., which executed the endorsement. Credit Asset assigned the Note to U.S. Bank "as Indenture Trustee under the Indenture, dated as December 14, 2001, Between Salomon Mortgage Loan Trust 2001-CB4, and U.S. Bank National Association, C-Bass Mortgage Loan Asset-Backed Notes," herein referred to as the "Salomon Mortgage Loan Trust Indenture."

The Bank also attached exhibits to its complaint, including Exhibit E (the Note), which includes allonges evidencing the two endorsements, and Exhibit G ("Assignment of Mortgage/Deed of Trust") evidencing the assignment, which states that Credit Asset "for value received, does by these presents grant, bargain, sell, assign, transfer and set over unto: [the Salomon Mortgage Loan Trust Indenture] . . . all of [its] right, title and beneficial interest in and to that certain Deed of Trust."

Borrower moved to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Because the Bank "is not the original payee" under the Note, borrower argued that the Exhibits reveal a "lack of indorsement from the predecessor in the chain of title[, which] is fatal to the Plaintiff's claim of being holder entitled to enforce the instrument."[4] The trial court dismissed the action with prejudice, and the Bank appealed.

The Court of Appeals affirmed the trial court's dismissal order. *U.S. Bank v. Pinkney*, ___ N.C. App. ___, 787 S.E.2d 464, 2016 WL 2647709 (2016) (unpublished). Applying the requirements of N.C.G.S. § 45-21.16(d) applicable to non-judicial foreclosures by power of sale, the Court of Appeals found that the Bank failed to establish its status as a holder of the Note and therefore did not have the right to foreclose. *Pinkney*, 2016 WL 2647709, at *3-5 (citing and quoting *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 490, 711 S.E.2d 165, 170 (2011) (requiring holdership status to foreclose under subsection 45-21.16(d))). Because the Bank "was not the original holder of the Note," *id.* at *4, the court reasoned that "each transfer required indorsement of the Note from one holder to the next," *id.* (quoting *In re Foreclosure of Bass*, 366 N.C. 464, 469, 738 S.E.2d 173, 176 (2013)). Though "plaintiff alleged . . . that it was the present holder of the Note and Subject Deed of Trust," *id.* at *6, the court nonetheless concluded that the Exhibits lacked an essential "indorsement from Credit Asset"—in other words, that the assignment was an inadequate indorsement, *id.* at *5. Therefore, the court found that "plaintiff cannot establish that it is the holder of the Note." *Id.*[5] We allowed the Bank's petition for discretionary review.

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4. Borrower also argued that Exhibit E (the Note) failed to establish a negotiable instrument or an instrument under seal, and that the statute of limitations therefore barred "any cause of action against the Defendants on the Note."

5. Having so held, the Court of Appeals did not reach borrower's statute-of-limitations argument. *Pinkney*, 2016 WL 2647709, at *6.

We review dismissals under Rule 12(b)(6) de novo, *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013), "view[ing] the allegations as true and . . . in the light most favorable to the non-moving party," *Kirby v. NCDOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016) (citing *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). The complaint is construed liberally, and dismissal is appropriate "if it appears certain that plaintiffs could prove no set of facts which would entitle them to relief under some legal theory," *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) (citations omitted), or "no law exists to support the claim made," *id.* at 225, 695 S.E.2d at 440 (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

The precise question presented is whether the complaint reveals sufficient allegations to survive borrower's motion to dismiss the Bank's judicial foreclosure claim. Here the complaint provides adequate notice of the claim. Because the Court of Appeals applied the requirements applicable to non-judicial foreclosure by power of sale, not judicial foreclosure, we conclude that the court erred and that dismissal on that basis was improper.

North Carolina law has long recognized a creditor's right to proceed with non-judicial foreclosure by power of sale or foreclosure by action (judicial foreclosure). *In re Foreclosure of Lucks*, ___ N.C. ___, ___, 794 S.E.2d 501, 504-05 (2016); *e.g.*, *Blackledge v. Nelson*, 16 N.C. (1 Dev. Eq.) 418, 419 (1830). "Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding." *In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 504 (citation omitted). Judicial foreclosure, on the other hand, is an ordinary civil action. *See Shaw v. Wolf*, 23 N.C. App. 73, 76, 208 S.E.2d 214, 216 (1974) ("A proceeding to foreclose a mortgage under an order of court is a civil action." (quoting 1 Thomas Johnston Wilson, II & Jane Myers Wilson, *McIntosh North Carolina Practice and Procedure* § 239(4), at 151 (2d ed. 1956))); *see also* N.C.G.S. § 1-339.1(a)(1) (2015) ("A judicial sale . . . is not . . . [a] sale made pursuant to a power of sale . . . [c]ontained in a mortgage, deed of trust . . . ."). [6] As such, the Rules of Civil Procedure apply, and the parties are entitled to all the benefits

6. Generally, judicial foreclosure is favored when non-judicial foreclosure by power of sale is impracticable, for example "where a poorly drafted mortgage or deed of trust omits the granting of an express power of sale to the [creditor]," James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13.30[1], at 13-56.4 n.213 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2016), or "when a lien priority is disputed," 1 Grant S. Nelson et al., *Real Estate Finance Law* § 7:12, at 904 (6th ed. 2014), which may obviate "title problems for the sale purchaser," *id.*

and procedures available in a civil action, including the opportunity for discovery, to present and defend evidence, and to make legal arguments. *See In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 503 (The Rules are "applicable to formal judicial actions [for foreclosure]."); *see also* N.C.G.S. § 1A-1, Rule 1 (2015) ("These rules shall govern . . . all actions and proceedings of a civil nature . . . .").

Procedurally, to pursue a claim for judicial foreclosure, the creditor files a complaint "in the county in which the subject [property] of the action, or some part thereof, is situated," N.C.G.S. § 1-76 (2015), "praying that the real property be sold under judicial process and that the proceeds be applied to the mortgage debt," James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13.30[1], at 13-56.4 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2016) [hereinafter *Webster's*]; *see In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 505 (Unlike judicial foreclosure, "non-judicial foreclosure does not require the filing of an action."); *see also* N.C.G.S. § 1A-1, Rule 3(a) (2015) ("Commencement of action."). The complaint must allege, at minimum, a debt, default on the debt, a deed of trust securing the debt, and the plaintiff's right to enforce the deed of trust. *See Webster's* § 13.30[4], at 13-57 ("The complaint . . . must set forth the mortgage contract, alleging facts entitling the plaintiff to a money judgment by reason of a breach or default, identifying the mortgaged property, and asking for a foreclosure of the mortgage security.").

If successful, the creditor obtains a judgment on the debt and a foreclosure decree, culminating in judicial sale of the mortgaged property. *See* N.C.G.S. § 1-243 (2015) ("The Supreme and other courts [may] order[ ] a judicial sale . . . ."); *id.* § 1-339.3A (2015) (allowing the court to order public or private sale); *id.* § 1-339.4 (2015) (allowing the court to appoint various persons, including the trustee under the deed of trust, to hold the sale); *see also Webster's* § 13.30[4], at 13-57 ("The decree contains not only an order for a sale of real property to satisfy the debt, but . . . the court's directions for conduct of the sale."). Article 29A of Chapter 1 of our General Statutes governs judicial sale and foreclosure of the mortgaged property. *See* N.C.G.S. § 1-339.1(a) ("A judicial sale is a sale of property made pursuant to an order of [the court] . . . , including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust . . . ."); *see also A Survey of Statutory Changes in North Carolina in 1949*, 27 N.C. L. Rev. 405, 479-81 (1949) (discussing the purpose of Article 29A, judicial sales, and sales under a power of sale).

As with any other civil action, a creditor seeking judicial foreclosure is not required to prove its entire case at the initial pleading stage. *See In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 505 (Non-judicial foreclosure by

power of sale, on the other hand, requires that the "creditor must show the existence of" all the subsection 45-21.16(d) elements to proceed.). The complaint need only contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series [thereof], intended to be proved showing that the [creditor] is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a) (2015). Thus, the complaint "is adequate if it gives sufficient notice of the claim asserted 'to enable the [borrower] to answer and prepare for trial . . . and to show the type of case brought.' " *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (quoting 2A James Wm. Moore et al., *Moore's Federal Practice* § 8.13 (2d ed. 1968)). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules . . . ." *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988) (citing *Sutton*, 277 N.C. at 102, 176 S.E.2d at 165).

Here the Bank pled the facts and circumstances necessary to give borrower adequate notice of the judicial foreclosure claim. The complaint states that borrower "executed a Note in the principal amount of $257,256.89," which "evidences a valid debt owned [sic] by [borrower] to [the Bank]," "secured by a Deed of Trust" on the underlying real property. The Bank further alleged that it "is the holder of the Note" and listed a series of Note transfers that ultimately ended with the Bank. The Bank expressly requested "to foreclose its lien by way of judicial foreclosure pursuant to the Subject Deed of Trust . . . as provided by N.C.G.S. § 1-339 et seq.," and prayed "that the Subject Property be sold under and [through] judicial process." These allegations are plainly sufficient to satisfy the substantive elements for a judicial foreclosure claim. *Cf. Embree Constr. Grp. v. Rafcor, Inc.*, 330 N.C. 487, 501, 411 S.E.2d 916, 926 (1992) (finding "under the liberal concept of notice pleading" that the allegations gave "sufficient notice of the events" and substantive elements of the plaintiff's tort claim).

Though the Bank elected to attach additional Exhibits in support of its claim, the Exhibits do not deprive borrower of adequate notice of foreclosure by judicial action. *See Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979) ("[W]hen the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal."). The Bank is entitled to submit and prove by evidence at trial its right to foreclose in a number

of ways.[7] Borrower is free to defend the action, such as by raising evidentiary objections and testing the legal sufficiency of the Bank's case. *See Thompson v. Osborne*, 152 N.C. 408, 410, 67 S.E. 1029, 1029 (1910) (noting that the defendant was entitled to assert legal and equitable defenses in response to an action on the note at trial). A missing indorsement at this initial notice-pleading stage does not preclude the Bank from proceeding with its civil action. *See In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 506. The Court of Appeals therefore erred by applying the statutory requirements of N.C.G.S. § 45-21.16(d) applicable to nonjudicial foreclosure by power of sale to the Bank's judicial foreclosure action *sub judice*.

In sum, the Bank adequately pled its claim for judicial foreclosure. Because the Court of Appeals failed to analyze the complaint under the notice-pleading standard applicable to judicial foreclosures, we reverse the decision of that court and remand this case to the Court of Appeals for consideration of borrower's remaining issue on appeal.

REVERSED AND REMANDED.

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7. *See*, *e.g.*, N.C.G.S. § 25-3-301 (2015) (" 'Person entitled to enforce' an instrument" includes holder and nonholder in possession); *id.* § 25-3-309 (2015) (allowing "[a] person not in possession" to enforce an instrument when it is lost, destroyed, or stolen); *see also*, *e.g.*, 25-3-203(b) (2015) (vesting transferee with transferor's rights to enforce the instrument); *id.* § 25-3-203(c) (2015) (providing transferee for value the "enforceable right to the unqualified indorsement of the transferor"); *see also Norfolk Shipbuilding & Drydock Corp. v. Carlyle*, 242 B.R. 881, 887 (Bankr. E.D. Va. 1999) ("[T]he absence of an endorsement does not . . . deprive a transferee of the right to enforce the instrument."); *Pierce v. DeZeeuw*, 824 P.2d 97, 100 (Colo. App. 1991) (applying the indorsement exception under the predecessor of U.C.C. § 3-203(c) to an assignment), *cert. denied*, Colo. Sup. Ct., (Feb. 18, 1992) (unpublished); *Fleming v. Caras*, 170 Ga. App. 579, 580, 317 S.E.2d 600, 602 (1984) (reversing dismissal because the plaintiff was "entitled to an indorsement" under the predecessor of U.C.C. § 3-203(c)).

JOHNNIE WILKES, EMPLOYEE
v.
CITY OF GREENVILLE, EMPLOYER, SELF-INSURED
(PMA MANAGEMENT GROUP, THIRD-PARTY ADMINISTRATOR)

No. 368PA15

Filed 9 June 2017

1. Workers' Compensation—Form 60 compensable injuries—additional medical treatment sought—presumption in favor of plaintiff

Where plaintiff-employee sustained significant physical injuries as a result of an automobile accident that occurred during the course and scope of his employment, and defendant-employer filed a Form 60 accepting that plaintiff had suffered compensable injuries by accident and began paying temporary total compensation and medical compensation for his injuries, the Industrial Commission erred by failing to give plaintiff the benefit of a presumption that the additional medical treatment he sought was for conditions related to his compensable injuries. Plaintiff was entitled to a presumption that additional medical treatment for tinnitus, anxiety, and depression was related to his compensable conditions.

2. Workers' Compensation—compensable condition—effect on wage-earning capacity

In a Workers' Compensation case, the Industrial Commission erred by failing to address the effects of plaintiff-employee's tinnitus in determining whether he lost wage-earning capacity. The case was remanded to the Commission for findings addressing plaintiff's wage-earning capacity, considering plaintiff's compensable tinnitus in the context of all the preexisting and coexisting conditions bearing upon his wage-earning capacity.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 282 (2015), reversing in part and vacating and remanding in part an opinion and award filed on 9 April 2014 by the North Carolina Industrial Commission. Heard in the Supreme Court on 15 February 2017.

Hunt Law Firm, PLLC, by Anita B. Hunt; and Patterson Harkavy LLP, by Narendra K. Ghosh, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Matthew P. Blake, for defendant-appellant.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson; and Sumwalt Law Firm, by Vernon Sumwalt, for North Carolina Advocates for Justice, amicus curiae.

Young Moore and Henderson, P.A., by Angela Farag Craddock; and Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for North Carolina Association of Defense Attorneys, North Carolina Chamber, North Carolina Retail Merchants Association, North Carolina Home Builders Association, Employers Coalition of North Carolina, Property Casualty Insurers of America, and American Insurance Association, amici curiae.

Lewis & Roberts, PLLC, by J. William Crone and J. Timothy Wilson, for all amici; Teague, Campbell, Dennis & Gorham, LLP, by Bruce Hamilton, for North Carolina Association of Self-Insurers, and by Tracey Jones, for North Carolina Association of County Commissioners; Allison B. Schafer, Legal Counsel, and Christine T. Scheef, Staff Attorney, for N.C. School Boards Association; and Kimberly S. Hibbard, General Counsel, for N.C. League of Municipalities, amici curiae.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner; and Law Office of David P. Stewart, by David P. Stewart, for Workers' Injury Law & Advocacy Group, amicus curiae.

HUDSON, Justice.

Plaintiff Johnnie Wilkes appealed the opinion and award of the North Carolina Industrial Commission concluding that: (1) plaintiff failed to meet his burden of establishing that his anxiety and depression were a result of his work-related accident; and (2) plaintiff was not entitled to disability payments made after 18 January 2011. *Wilkes v. City of Greenville*, ___ N.C. App. ___, ___, ___, 777 S.E.2d 282, 284-85, 289 (2015). On appeal, the Court of Appeals unanimously vacated and remanded in part, holding that on remand in reviewing plaintiff's entitlement to medical treatment, the Commission should give plaintiff the benefit of a presumption that his anxiety and depression were related to his injuries, and reversed in part, holding that plaintiff had met his burden of establishing disability. *Id.* at ___, ___, 777 S.E.2d at 285-91.

Because we agree that plaintiff was entitled to a presumption of compensability in regards to his continued medical treatment, we affirm that portion of the decision of the Court of Appeals. Because we conclude further that the Commission failed to address the effects of plaintiff's tinnitus in determining whether he lost wage-earning capacity, we modify and affirm that portion of the Court of Appeals' decision, and remand for further proceedings not inconsistent with this opinion.

Background

Plaintiff was employed by defendant as a landscaper for approximately nine years before 21 April 2010, when he was involved in a motor vehicle wreck while on the job. Plaintiff was driving a truck owned by defendant when a third party ran a red light and struck plaintiff's vehicle. The truck then collided with a tree, causing the windshield to break and the airbags to deploy. Plaintiff was taken to the emergency room at Pitt County Memorial Hospital and treated for his injuries, which included an abrasion on his head, three broken ribs, and injuries to his neck, back, pelvis, and hip. The following day, plaintiff returned to the ER complaining of dizziness; an MRI revealed that plaintiff had suffered a concussion from the accident. Slightly over a week later, on 29 April 2010, defendant filed a Form 60 with the North Carolina Industrial Commission, in which defendant accepted plaintiff's claim as compensable under the Workers' Compensation Act (Act), and described the injury as "worker involved in MVA and had multiple injuries to ribs, neck, legs and entire left side." Defendant began paying plaintiff compensation for temporary total disability and provided medical compensation for plaintiff's injuries.

Plaintiff saw numerous physicians over the next year for treatment and evaluation of continuing complaints of pain in his back and leg, ringing in his ears (tinnitus), anxiety and depression, and sleep loss. On 18 January 2011, defendant filed a Form 33 requesting that plaintiff's claim be assigned for a hearing before the Commission, stating that the "[p]arties disagree about the totality of plaintiff's complaints related to his compensable injury and need for additional medical evaluations." On 28 January 2011, plaintiff filed a Form 33 requesting an "Expedited Medical Motion" hearing, listing his work-related injuries as "head, back, depression, ringing in ears [tinnitus], memory loss, speech changes, dizziness, balance, etc.," and stating that he was "in need of additional medical treatment . . . specifically an evaluation by a neurosurgeon." After a conference call hearing on 4 February 2011, plaintiff saw Robert Lacin, M.D., a neurosurgeon; the Commission held a subsequent conference call hearing on 7 April 2011, and declined to refer plaintiff to a neuropsychiatrist.

Eventually, the matter was heard in person before Deputy Commissioner Mary C. Vilas on 21 September 2011, after which depositions of medical personnel were taken. On 1 February 2013, Deputy Commissioner Vilas entered an opinion and award determining that plaintiff's low back and leg pain, anxiety, depression, sleep disorder, tinnitus, headaches, and temporomandibular joint pain were causally related to his 21 April 2010 compensable injury. Deputy Commissioner Vilas also determined that plaintiff had established temporary total disability by demonstrating "that he is capable of some work but that it would be futile to seek work at this time because of preexisting conditions of his age, full-scale IQ of 65, education level and reading capacity at grade level 2.6, previous work history of manual labor jobs, and his physical conditions resulting from his April 21, 2010 compensable injury." Accordingly, the deputy commissioner ordered defendant to pay plaintiff temporary total disability until he returned to work or until further order of the Commission and to pay all medical expenses reasonably required to effect a cure or lessen plaintiff's period of disability. Defendant appealed to the Full Commission (Commission).

The Commission heard the case on 4 November 2013, and considered the parties' stipulations, exhibits, testimony from multiple witnesses, including plaintiff and plaintiff's wife, and depositions taken from Doctors Albernaz, Tucci, Lacin, Schulz, Hervey, and Gualtieri. The Commission found that plaintiff suffered tinnitus as a result of the 21 April 2010 accident, but that the evidence regarding his alleged anxiety and depression was conflicting. The Commission noted, for example, that "Dr. Schulz diagnosed Plaintiff with malingering along with possible mild depression," and that "Dr. Gualtieri concurred with Dr. Schulz's diagnosis of symptom exaggeration and malingering." On the other hand, "Dr. Hervey disagreed with Dr. Schulz's malingering diagnosis . . . . Dr. Hervey noted 'apparent distress' and diagnosed Plaintiff with depression and anxiety," while Dr. Tucci diagnosed Plaintiff with "severe tinnitus" and testified that the tinnitus was "wrapped up with the anxiety or depression." Accordingly, the Commission found, in relevant part:

> 34. Based on the preponderance of the evidence, including testimony by Doctors Albernaz and Tucci, the Full Commission concludes that Plaintiff has not reached maximum medical improvement with regard to his tinnitus.
>
> 35. Testimony by Plaintiff, Plaintiff's wife, and Doctors Lacin, Schulz, Hervey, and Gualtieri is conflicting

> as to whether Plaintiff is currently suffering from anxiety and depression. Based upon a preponderance of all the evidence of record, the Full Commission concludes that Plaintiff's alleged anxiety and depression was not caused by the 21 April 2010 work-related accident.

Based on these findings of fact, the Commission concluded that while plaintiff was entitled to medical compensation for his tinnitus, plaintiff had failed to meet his burden of establishing that he had anxiety and depression caused by his work-related accident, and that therefore, plaintiff was not entitled to medical compensation for those conditions. The Commission further concluded that plaintiff was not entitled to any disability payments made after 18 January 2011 (the date defendant filed a Form 33 requesting a hearing on plaintiff's claims), and that defendant was entitled to a credit for any payments it had made after that date. More specifically, the Commission made the following relevant conclusions of law:

> 2. . . . Based upon all credible evidence, the Full Commission concludes that Plaintiff has met his burden of showing that on 21 April 2010 he suffered compensable injuries [to] his head and ears leading to tinnitus as a result of a traffic accident arising out of the course and scope of his employment with Employer-Defendant.
>
> . . . .
>
> 4. Plaintiff is entitled to the payment of past and future medical expenses incurred for treatment that was reasonably required to effect a cure, provide relief or lessen any disability, including such further treatment for his tinnitus that may be recommended by Doctors Tucci and Albernaz.
>
> 5. Where depression or other emotional trauma has been caused by a compensable accident and injury, and such depression or trauma has caused disability, then total disability benefits may be allowed. Here, the evidence is conflicting as to whether Plaintiff has suffered from depression and whether any depression was caused by the 21 April 2010 work-related accident. Based upon the preponderance of the evidence, the Full Commission concludes that Plaintiff has not met his burden of showing that his alleged depression and anxiety is a result of

> the 21 April 2010 work-related accident or has caused him any temporary disability.
>
> 6. . . . The Full Commission concludes that Plaintiff has not presented evidence of a reasonable job search and has presented insufficient evidence that a job search would be futile. Thus, the Full Commission concludes that Plaintiff is entitled to temporary total disability benefits from the 21 April 2010 work-related injury until 18 January 2011, the date that Employer-Defendant filed a Form 33 requesting a hearing on Plaintiff's claims.

(Citations omitted.) On 9 April 2014, the Commission issued its opinion and award, from which plaintiff appealed.

In a unanimous opinion, the Court of Appeals first vacated the portion of the opinion and award concerning plaintiff's request for additional medical treatment for anxiety and depression. *Wilkes*, ___ N.C. App. at ___, ___, 777 S.E.2d at 287-88, 292. In light of the court's previous decisions in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), and *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005), *disc. rev. improvidently allowed per curiam*, 360 N.C. 587, 634 S.E.2d 887 (2006), the court held that the Commission erred by not applying the rebuttable *Parsons* presumption to plaintiff's anxiety and depression, and instead placing the burden on plaintiff to demonstrate causation of those conditions. *Wilkes*, ___ N.C. App. at ___, 777 S.E.2d at 285-88. The court remanded the matter to the Commission to "apply the *Parsons* presumption and then make a new determination as to whether Plaintiff's psychological symptoms are causally related to the 21 April 2010 injury." *Id.* at ___, 777 S.E.2d at 287-88.

Additionally, the court reversed the portion of the Commission's opinion and award terminating plaintiff's total temporary disability benefits. *Id.* at ___, 777 S.E.2d at 292. Noting the testimony of Kurt Voos, M.D., who "authorized Plaintiff to return to work at sedentary duty with permanent restrictions including lifting up to 10 lbs with occasional walking and standing," the court stated that based on this testimony the Commission had found that plaintiff was "incapable of returning to his previous job but is capable of working in sedentary employment." *Id.* at ___, 777 S.E.2d at 289. The court also took note of other facts found by the Commission:

> Specifically, the Commission found that Plaintiff (1) was 60 years old at the time of the hearing; (2) had been employed as a landscaper with Defendant since 2001; (3) had been

> employed in medium and heavy labor positions throughout his entire adult life; (4) attended school until the tenth grade; (5) was physically incapable of performing his former job as a landscaper/laborer; (6) has "difficulty reading and comprehending" written material as evidenced during his evaluation with Dr. Peter Schulz; and (7) has "an IQ of 65, putting him in the impaired range."

Id. at ___, 777 S.E.2d at 289. The court held that with this evidence, plaintiff had met his initial burden of showing that a job search would be futile so as to shift the burden to his employer to show that suitable jobs were available. *Id.* at ___, 777 S.E.2d at 289-90. Because defendant made no such showing, the court concluded that "the Commission erred in ruling that Plaintiff was not temporarily totally disabled," and that the Commission's "conclusions of law reaching the opposite result were not supported by the findings of fact contained within its Opinion and Award." *Id.* at ___, 777 S.E.2d at 291.

Defendant filed a petition for discretionary review, which this Court allowed on 13 April 2016.

I. Medical Compensation

[1] Here defendant argues that the Court of Appeals erred in holding that plaintiff was entitled to a presumption that his anxiety and depression were causally related to his compensable injuries. We do not agree, and affirm the Court of Appeals on this issue.

Our review of an order of the Commission is limited to determining "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 (2015). But, "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citing, *inter alia*, *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930)). "When considering a case on discretionary review from the Court of Appeals, we review the decision for errors of law." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citing N.C. R. App. P. 16(a)).

In construing the provisions of the Workers' Compensation Act, "[w]e have held in decision after decision that our Workmen's

Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependants, and its benefits should not be denied by a technical, narrow, and strict construction." *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) (citing 3 Strong's North Carolina Index: Master and Servant § 45 (1960)). But, we are mindful that the Act "was never intended to be a general accident and health insurance policy." *Weaver v. Swedish Imports Maint., Inc.*, 319 N.C. 243, 253, 354 S.E.2d 477, 483 (1987). We have also noted that "[t]he primary purpose of legislation of this kind is to compel industry to take care of its own wreckage." *Barber v. Minges*, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943); *see also Deese v. Se. Lawn & Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E.2d 140, 143 (1982) ("[I]n all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit.").

A claim for benefits under the Workers' Compensation Act "is the right of the employee, at his election, to demand compensation for such injuries as result from an accident." *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953). Under the terms of the Act, an "injury" is compensable when it is: (1) by accident; (2) arising out of employment; and (3) in the course of employment. N.C.G.S. § 97-2(6) (2015); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

When the employee suffers a compensable injury, "[m]edical compensation *shall be provided by the employer.*" N.C.G.S. § 97-25(a) (2015) (emphasis added); *Mehaffey v. Burger King*, 367 N.C. 120, 124, 749 S.E.2d 252, 255 (2013) ("The Act places upon an employer the responsibility to furnish 'medical compensation' to an injured employee."). "Medical Compensation" includes any treatment that "may reasonably be required to effect a cure or give relief" or "tend to lessen the period of disability." N.C.G.S. § 97-2(19) (2015); *see also Little v. Penn Ventilator Co.*, 317 N.C. 206, 213, 345 S.E.2d 204, 209 (1986) ("In our judgment relief embraces not only an affirmative improvement towards an injured employee's health, but also the prevention or mitigation of further decline in that health due to the compensable injury."); *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869 (" 'Logically implicit' in this statute is the requirement that the future medical treatment be 'directly related to the original compensable injury.' " (quoting *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. rev. denied*, 343 N.C. 513, 472 S.E.2d 18 (1996))). The employee's "*right to medical*

compensation" continues until "two years after the employer's last payment of medical or indemnity compensation." N.C.G.S. § 97-25.1 (2015) (emphasis added). At that point, the right to medical compensation terminates, unless, before the end of that period: "(i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation." *Id.*

The question here concerns whether, when an injury has previously been established as compensable, a presumption arises that additional medical treatment is related to the compensable injury. While we have yet to address whether a presumption arises in the context of medical compensation, the Court of Appeals first addressed this issue in *Parsons v. Pantry, Inc.*

In *Parsons* the plaintiff was working in the defendant's store late at night when two men entered. 126 N.C. App. at 540-42, 485 S.E.2d at 868. One of the men struck the plaintiff in the forehead and shot her multiple times with a stun gun. *Id.* At a hearing before the Commission, the plaintiff met her burden of establishing that as a result of the incident she suffered compensable injuries, which consisted primarily of headaches. *Id.* at 540-42, 485 S.E.2d at 868-69. Accordingly, the Commission entered an opinion and award ordering the defendant to pay the plaintiff's medical expenses and to provide additional treatment "which tends to effect a cure, give relief, or lessen the plaintiff's period of disability." *Id.* at 540-41, 485 S.E.2d at 868. When the plaintiff subsequently requested a hearing because of the defendant's failure to pay medical expenses, the Commission denied her any further medical treatment on the basis that she had "not introduced any evidence of causation between her injury and her headache complaints at the time of the hearing." *Id.* at 541, 485 S.E.2d at 868-69. On appeal, the Court of Appeals reversed and remanded, holding that it was error to place the burden on the plaintiff to prove causation in order to obtain additional medical treatment. *Id.* at 542-43, 485 S.E.2d at 869. The court explained that the plaintiff had met her burden at the initial hearing, and that "[t]o require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." *Id.* at 542, 485 S.E.2d at 869. This presumption that additional medical treatment is directly related to the compensable injury has since become known as the "*Parsons* presumption." *See Wilkes*, ___ N.C. App. at ___, 777 S.E.2d at 286 ("Once the employee meets this initial burden, however, a presumption arises—often referred

to as the *Parsons* presumption—that 'additional medical treatment is directly related to the compensable injury.' " (quoting *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292)).

The Court of Appeals has since held that the *Parsons* presumption applies both to agreements to pay compensation by means of a Form 21 ("Agreement for Compensation for Disability") and to cases involving "direct payment" accompanied by a Form 60 ("Employer's Admission of Employee's Right to Compensation (G.S. § 97-18(b))"). *See Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259-60, 523 S.E.2d 720, 723-24 (1999); *see also Perez*, 174 N.C. App. at 135-37, 620 S.E.2d at 292-94. With the filing of a Form 21, the employer agrees after a workplace injury to accept the claim as compensable pursuant to N.C.G.S. §§ 97-18 and 97-82. The statutes require the employer to file a "memorandum of agreement" in the form prescribed by the Commission; once approved, that document constitutes an award of the Commission. N.C.G.S. §§ 97-82, -87(a)(2) (2015); *see also Watkins v. Cent. Motor Lines, Inc.*, 279 N.C. 132, 138, 181 S.E.2d 588, 593 (1971) ("The agreement between the parties on Form 21, approved by the Commission . . . . constituted an award by the Commission . . . ."). The statutes also permit "direct payment" by the employer, which requires no approval either from the Commission or the employee, and allows the employer to promptly initiate payments to the employee following an injury. N.C.G.S. § 97-18(b), (d) (2015); *id.* § 97-82. In 1994, the legislature enacted direct payment by amending subsection 97-18(b), adding subsection 97-18(d), and amending N.C.G.S. § 97-82(b). The Workers' Compensation Reform Act of 1994, ch. 679, secs. 3.1, 3.2, 1993 N.C. Sess. Laws (Reg. Sess. 1994) 394, 400-03. Under the current statutory framework, when the employer proceeds with direct payment, the employer can file with the Commission a Form 60 "admit[ting] the employee's right to compensation" under N.C.G.S. § 97-18(b). *See, e.g.*, *Clark v. Wal-Mart*, 360 N.C. 41, 42, 619 S.E.2d 491, 492 (2005). In the alternative, the employer can file a Form 63 under N.C.G.S. § 97-18(d), in which the employer may initiate payments without prejudice and without admitting liability, after which the employer has ninety days to contest or accept liability for the claim. *See, e.g.*, *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 702, 599 S.E.2d 508, 510 (2004). Notably, N.C.G.S. § 97-82(b) provides that "[p]ayment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made."

We hold that plaintiff here is entitled to a presumption that additional medical treatment is related to his compensable conditions. This holding is consistent both with the statutory language and with cases pointing out that "compensability" and "disability" are separate issues. We have recognized that a presumption of ongoing disability arises only in limited circumstances—specifically, once the disability has been admitted or proved to the Industrial Commission. *Johnson*, 358 N.C. at 706, 599 S.E.2d at 512. This judicial construction of a presumption of ongoing disability arising based upon an "award of the Commission" dates back to at least 1951. *Tucker v. Lowdermilk*, 233 N.C. 185, 189, 63 S.E.2d 109, 112 (1951) ("However, if an award is made, payable during disability, and there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work."); *see also Watkins*, 279 N.C. at 137, 181 S.E.2d at 592 ("If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work . . . ."). On that basis, we held that while the employer admits *compensability* by filing a Form 60, or a Form 63 when the employer fails to contest compensability within the ninety-day period, no presumption of *disability* arises in those circumstances. *Clark*, 360 N.C. at 43-46, 619 S.E.2d at 492-94; *Johnson*, 358 N.C. at 706-07, 599 S.E.2d at 512-13.

Nonetheless, on the issue of compensability in the same circumstances, we view the plain language of N.C.G.S. § 97-82(b) as dispositive. Subsection 97-82(b) provides that "[p]ayment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, *shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made.*" (Emphasis added.) Continually placing the burden on an employee to prove that his symptoms are causally related to his admittedly compensable injury before he can receive further medical treatment "ignores this prior award." *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. Accordingly, we conclude that an admission of compensability approved under N.C.G.S. § 97-82(b) entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury. In reaching this conclusion, we note the mandatory language of N.C.G.S. § 97-25(a) (stating that "[m]edical compensation *shall be provided* by the employer" (emphasis added)), as well as the fact that medical compensation encompasses any treatment that "may reasonably be required to effect a cure or give relief," *Id.* § 97-2(19).

Defendant contends that the "award" under N.C.G.S. § 97-82(b) is merely an admission that the employee has suffered an accident arising out of and in the course of employment, and that the specifics of any injury must still be determined by an adjudication of the Commission. We conclude otherwise. Requiring the employee to repeatedly "build claims for medical compensation" for an admittedly compensable injury, as argued by defendant, would be inconsistent with the language of N.C.G.S. §§ 97-25, 97-2(19), and 97-82(b), as well as the purpose and spirit of the Act. We decline to adopt such a narrow interpretation of the Act.

Moreover, defendant's proposed interpretation would allow the employer, by "admitting" that the employee has suffered a compensable injury, to enjoy the right to direct the employee's medical treatment without accepting the accompanying responsibility to provide medical compensation for any treatment until the employee has proved its relatedness to the compensable injury. We have observed that, concomitant with the employer's duty under N.C.G.S. § 97-25 to provide, and the employee's right to receive, medical compensation, is the employer's right to direct the medical treatment that it furnishes. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 586-87, 264 S.E.2d 56, 60 (1980); *see* N.C.G.S. § 97-25 (2015). Even before compensability is established, when the employee claims compensation after an injury, the employer has the right to direct the employee to submit to an independent medical examination by one of its authorized physicians. N.C.G.S. § 97-27(a) (2015); *see also Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000) ("One of the implicit purposes of this requirement is to enable the employer to ascertain whether the injury is work-related or not and thus whether the claim is indeed compensable."), *disc. rev. denied*, 356 N.C. 303, 570 S.E.2d 725 (2002).

Finally, defendant argues that applying the *Parsons* presumption to a Form 60 filing will discourage direct payment, upset the framework of the Act, and convert the Act into general health insurance. We are unconvinced. Applying the rebuttable presumption merely removes from the employee seeking medical treatment the burden of proving every time that such treatment is for injuries or symptoms causally related to the admittedly compensable condition. *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292. The employer may rebut this presumption with evidence that the condition or treatment is not directly related to the compensable injury. *Id.* at 135, 620 S.E.2d at 292. Defendant has not identified

any marked decrease in the use of Form 60s, or any increase in related litigation and costs, since Perez was decided in 2004.[1]

Certainly, medical issues can be complex and the extent of an employee's injuries may be difficult to determine at the time of the accident. However, with N.C.G.S. § 97-27(a) (providing that an employee alleging a compensable injury is required to submit to a medical examination by the employer's authorized physician) and N.C.G.S. § 97-18(d) (authorizing payment without prejudice to later contest liability), the legislature has wisely given employers who are uncertain about the compensability of an employee's injuries the methods to investigate such injuries without admitting any liability under the Act while still providing prompt payments to injured employees.

In addition, the legislature has provided more recently for an expedited "medical motions" procedure, which was utilized here and can quickly be used to rebut the presumption if appropriate.[2] In 2007 the General Assembly amended N.C.G.S. § 97-78 to require the Commission to implement a plan to expeditiously resolve disputes involving medical compensation. Current Operations and Capital Improvements Appropriations Act of 2007, ch. 323, sec. 13.4A.(a), 2007 N.C. Sess. Laws 616, 787-88. And in 2013 the legislature amended N.C.G.S. § 97-25(f) to set forth such an expedited procedure. Act of July 9, 2013, ch. 294, sec. 4, 2013 N.C. Sess. Laws 802, 803-04. Thus, our holding on this issue is consistent with both the statutory mandate to provide treatment to the employee and with any employer's need to quickly rebut the presumption.

Here, as a result of a motor vehicle crash that occurred within the course and scope of his employment, plaintiff sustained injuries that included an abrasion on his head, three broken ribs, and injuries to

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1. To the contrary, following the enactment of direct payment and our holdings in *Johnson* and *Clark*, Forms 60 and 63 have essentially replaced Forms 21 and 26. *See North Carolina Workers' Compensation Law: A Practical Guide to Success at Every Stage of a Claim* 155-56 (Valerie A. Johnson & Gina E. Cammarano eds., 3d ed. 2016) ("The use of [Form 21 and Form 26], however, has declined dramatically since the 1994 amendments to the Act. Employers and insurance carriers instead use a Form 60 or Form 63 procedure to admit liability for a claim and pay weekly benefits, without giving rise to any presumption of disability. Thus, the presumption of continuing disability, while it still exists, is increasingly irrelevant." (citations omitted)).

2. Here, where plaintiff utilized these expedited procedures, the matter might well have been concluded speedily, had the presumption been properly applied.

his neck, back, pelvis, hip, and entire left side, as well as a concussion. Defendant filed a Form 60 accepting that plaintiff suffered compensable injuries by accident and began paying temporary total compensation and medical compensation for plaintiff's injuries. Accordingly, when plaintiff sought additional medical treatment for tinnitus, anxiety, and depression, alleging that these conditions were directly related to his compensable injuries, he was entitled to a rebuttable presumption to that effect. It is clear from the Commission's Conclusions of Law that did it not apply any presumption, and instead placed the initial burden on plaintiff to prove causation for any medical compensation he sought:

> 2. The claimant in a workers' compensation case bears the initial burden of proof, and must establish "each and every element of compensability," including a causal relationship between the injury and his employment. Based upon all credible evidence, the Full Commission concludes that Plaintiff has met his burden of showing that on 21 April 2010 he suffered compensable injuries [to] his head and ears leading to tinnitus as a result of a traffic accident arising out of the course and scope of his employment with Employer-Defendant. N.C. Gen. Stat. § 97-2(6).
>
> . . . .
>
> 5. . . . Based upon the preponderance of the evidence, the Full Commission concludes that Plaintiff has not met his burden of showing that his alleged depression and anxiety is a result of the 21 April 2010 work-related accident . . . .

(Citation omitted.) Because the Commission acted under a misapprehension of law, the Court of Appeals vacated the opinion and award on this issue and remanded for application of the presumption; we affirm this portion of the Court of Appeals' opinion. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685. We note that plaintiff was evaluated by several physicians and that the Commission found the evidence regarding plaintiff's anxiety and depression to be "conflicting." Like the Court of Appeals, "[w]e express no opinion on the question of whether the evidence of record is sufficient to rebut the presumption that Plaintiff's current complaints are directly related to his initial compensable injury." *Wilkes*, ___ N.C. App. at ___, 777 S.E.2d at 288. We leave this determination to the Commission on remand.

II. Disability

[2] On the issue of disability, the Court of Appeals, relying in part on *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), held that the uncontroverted evidence establishing plaintiff's cognitive limitations adequately demonstrated that any attempt by him to find other employment would be futile, and therefore, plaintiff was entitled to total disability benefits. Defendant argues that the Court of Appeals erred in reversing the Commission's termination of plaintiff's temporary total disability benefits. We modify and affirm that decision, and remand for further proceedings.

As we explained in *Medlin v. Weaver Cooke Construction, LLC*, "disability" is defined by the Act in N.C.G.S. § 97-2(9) 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* [*v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)], 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.["]

367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014). In 1993 the Court of Appeals issued its decision in *Russell*, apparently to provide examples of methods[3] by which a plaintiff could prove disability as defined above.

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3. "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, *Peoples*, 316 N.C. at 443, 342 S.E.2d at 809; (2) the production of evidence that he is capable of some work, but that he has, after a

Here we emphasize that this Court has not adopted *Russell*, and that the approaches taken therein are not the only means of proving disability. *See id.* at 422, 760 S.E.2d at 737 (stating that "*Hilliard* was grounded explicitly in the statutory definition of disability in section 97-2; *Russell expanded upon, and perhaps diverged from*, that grounding" and that the *Russell* methods "are neither statutory nor exhaustive" (emphases added)). In fact, the issue in Russell was "whether an injured employee seeking an award of total disability under N.C.G.S. § 97-29, who is *unemployed, medically able to work, and possesses no preexisting limitations which would render him unemployable*," presented sufficient evidence that he was unable to find work. *Russell*, 108 N.C. App. at 764-65, 425 S.E.2d at 456-57 (emphasis added). Here, where plaintiff has numerous preexisting limitations as found by the Commission (over the age of sixty, limited IQ of sixty-five, limited education and work experience), *Russell* is inapposite. Again, we have stated that, in determining loss of wage-earning capacity, the Commission must take into account age, education, and prior work experience as well as other preexisting and coexisting conditions. *Little v. Anson Cty. Sch. Food Serv.*, 295 N.C. 527, 532, 246 S.E.2d 743, 746 (1978). While plaintiff here bears the burden of proof to establish disability, once plaintiff has done so, the burden shifts to defendant "to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Johnson*, 358 N.C. at 706, 708, 599 S.E.2d at 512, 513 (quoting *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (emphasis omitted)).

Defendant argues that, in reversing the Commission, the Court of Appeals erroneously overruled an earlier decision of that court in *Fields v. H&E Equipment Services, LLC*, 240 N.C. App. 483, 771 S.E.2d 791 (2015). It is unclear whether defendant, in relying on *Fields*, is arguing that plaintiff was required to produce expert testimony to prove that engaging in a job search would be futile under *Russell*. *See Fields*, 240 N.C. App. at 483, 771 S.E.2d at 792 (concluding that the plaintiff did not establish futility because he "failed to provide competent evidence

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reasonable effort on his part, been unsuccessful in his effort to obtain employment, *id.* at 444, [342] S.E.2d at 809; 1C Arthur Larson, *The Law of Workmen's Compensation* § 57.61(d) (1992); (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, *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury[,] *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)." *Russell*, 108 N.C. App. at 765-66, 425 S.E.2d at 457.

through expert testimony of his inability to find any other work as a result of his work-related injury" (emphasis added)). Because we have held that *Russell* does not apply here, this argument is misplaced; however, we have never held, and decline to do so now, that an employee is required to produce expert testimony in order to demonstrate his inability to earn wages. A plaintiff's own testimony, as well as that of his lay witnesses, can be quite competent to explain how a plaintiff's injury and any related symptoms have affected his activities. *See Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 31, 398 S.E.2d 677, 681 (1990) ("Testimony by the plaintiff him/herself has also been found to be competent on the issue of wage earning capacity." (citing *Singleton v. D.T. Vance Mica Co.*, 235 N.C. 315, 325, 69 S.E.2d 707, 714 (1952))). If plaintiff shows total incapacity for work, taking into account his work-related conditions combined with the other factors noted above, he is not required to also show that a job search would be futile. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986) ("In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment.").

We have often stated that the Commission must make specific findings that address the "crucial questions of fact upon which plaintiff's right to compensation depends." *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955); *see also*, *e.g.*, *Singleton v. Durham Laundry Co.*, 213 N.C. 32, 34-35, 195 S.E. 34, 35 (1938) ("It is the duty of the Commission to make such specific and definite findings upon the evidence reported as will enable this Court to determine whether the general finding or conclusion should stand, particularly when there are material facts at issue."). Here the Commission found the evidence conflicting on whether plaintiff was actually suffering from anxiety and depression, and as a result, the Commission determined that plaintiff had failed to establish that his anxiety and depression were compensable or that they affected his ability to work, thus resulting in disability. The Commission found as fact, in relevant part that:

> 35. Testimony by Plaintiff, Plaintiff's wife, and Doctors Lacin, Schulz, Hervey, and Gualtieri is conflicting as to whether Plaintiff is currently suffering from anxiety and depression. Based upon a preponderance of all the evidence of record, the Full Commission concludes that Plaintiff's alleged anxiety and depression was not caused by the 21 April 2010 work-related accident.

The Commission concluded as a matter of law that:

> 5. Where depression or other emotional trauma has been caused by a compensable accident and injury, and such depression or trauma has caused disability, then total disability benefits may be allowed. Here, the evidence is conflicting as to whether Plaintiff has suffered from depression and whether any depression was caused by the 21 April 2010 work-related accident. Based upon the preponderance of the evidence, the Full Commission concludes that Plaintiff has not met his burden of showing that his alleged depression and anxiety is a result of the 21 April 2010 work-related accident or *has caused him any temporary disability.*

(Emphasis added and citations omitted.)

On the other hand, the Commission found credible plaintiff's evidence that he was actually suffering from tinnitus, noting plaintiff's numerous complaints dating back to May 2010, and found that he had not reached maximum medical improvement with regard to his tinnitus at the time of the Commission's opinion and award in April 2014. The Commission specifically found:

> 26. On 27 December 2011, Plaintiff saw Dr. Debara Tucci, a board-certified otolaryngologist at Duke University Medical Center, for an evaluation. Dr. Tucci reviewed Plaintiff's previous medical records, audiograms and physically examined Plaintiff's head and ears. Dr. Tucci diagnosed Plaintiff with severe tinnitus and testified that this condition was likely caused by the accident. Dr. Tucci further testified that the tinnitus was "wrapped up with the anxiety or depression" diagnosed in Dr. Hervey's report, which she reviewed.
>
> 27. Dr. Tucci testified that Plaintiff's tinnitus was "more likely than not" a result of the 21 April 2010 accident and was part of the "symptomatology that occurred as a result of the accident."

The Commission awarded plaintiff medical compensation for his tinnitus, including any treatment "reasonably required to effect a cure, provide relief or *lessen any disability*." (Emphasis added.) Yet, having found credible evidence of plaintiff's "severe tinnitus," the Commission made no related findings on how plaintiff's compensable tinnitus and

any related symptoms may have affected his ability to engage in wage-earning activities. Accordingly, we remand this case to the Commission to take additional evidence if necessary and to make specific findings addressing plaintiff's wage-earning capacity, considering plaintiff's compensable tinnitus in the context of all the preexisting and coexisting conditions bearing upon his wage-earning capacity. *See Medlin*, 367 N.C. at 420, 760 S.E.2d at 736; *Peoples*, 316 N.C. at 441, 342 S.E.2d at 808 ("If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience." (citing *Little*, 295 N.C. at 532, 246 S.E.2d at 746)).

Conclusion

In sum, we hold that the Commission erred in failing to give plaintiff the benefit of a presumption that the additional medical treatment he sought was for conditions related to his compensable injuries. The Commission will reevaluate its decision, applying the correct presumption. As the Court of Appeals correctly addressed this error, we affirm on this issue. On the issue of plaintiff's entitlement to additional disability benefits, we hold that the evidence raises factual issues regarding the effect of plaintiff's compensable tinnitus on his ability to earn wages, and that, on remand, the Commission must find these facts. Accordingly, on this second issue we modify and affirm the decision of the Court of Appeals. We remand this case to the Court of Appeals for further remand to the Commission for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; MODIFIED AND AFFIRMED IN PART, AND REMANDED.

NECKLES v. HARRIS TEETER

[369 N.C. 749 (2017)]

DAWSON F. NECKLES	)	
	)	
v.	)	From Wake County
	)	
HARRIS TEETER, ET AL.	)	

No. 23P17

ORDER

Defendants' petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *Wilkes v. City of Greenville*, ___ N.C. ___, ___ S.E.2d ___ (2017) (368PA15).

By Order of the Court in Conference, this 8th day of June, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of June, 2017.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

8 JUNE 2017

003P17	Kelly F. Lewis, Employee v. Transit Management of Charlotte, Employer, Self-Insured (Compensation Claims Solutions, Third-Party Administrator)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-69) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Joint Motion for Leave to Withdraw Petitions for Discretionary Review	1. --- 2. --- 3. Allowed
007P17	In the Matter of J.A.M.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-563) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for *Writ of Supersedeas*	1. Allowed 2. Allowed **01/10/2017** 3. Allowed
015P16-2	State v. Jose Luis Dominguez	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of the COA (COA16-919) 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 **Jackson, J., recused**
023P17	Dawson F. Neckles v. Harris Teeter and Travelers	Defs' PDR Under N.C.G.S. § 7A-31 (COA16-569)	Special Order
034P17	Danny Keith Hopper, Employee v. Charlton L. Allen, Chairman, The North Carolina Industrial Commission	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COAP16-921) 2. Petitioner's Petition in the Alternative for *Writ of Certiorari* to Review Order of COA 3. Petitioner's Motion for Writ of Prohibition 4. Petitioner's Motion for Addendum to PDR, Petition for *Writ of Certiorari* and Motion for Writ of Prohibition	1. Dismissed 2. Denied 3. Denied 4. Dismissed as moot
049P17	William G. Larsen and Robert Stephen Allen v. The Arlington Condominium Owners Association, Inc. and Arlington Residential Holdings, LLC	Def's (The Arlington Condominium Owners Association, Inc.) PDR Under N.C.G.S. § 7A-31 (COA16-618)	Denied

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

8 JUNE 2017

056P17	Dr. Robert Corwin as Trustee for the Beatrice Corwin Living Irrevocable Trust, on Behalf of a Class of Those Similarly Situated v. British American Tobacco PLC; Reynolds American, Inc.; Susan M. Cameron; John P. Daly; Neil R. Withington; Luc Jobin; Sir Nicholas Scheele; Martin D. Feinstein; Ronald S. Rolf; Richard E. Thornburgh; Holly K. Koeppel; Nana Mensah; Lionel L. Nowell, III; John J. Zillmer; and Thomas C. Wajnet	1. Def's (British American Tobacco PLC) Motion for Temporary Stay (COA15-1334) 2. Def's (British American Tobacco PLC) Petition for *Writ of Supersedeas* 3. Def's (British American Tobacco PLC) PDR Under N.C.G.S. § 7A-31 4. Gary A. Bornstein's Motion to be Admitted *Pro Hac Vice* 5. Jason M. Leviton's Motion to be Admitted *Pro Hac Vice* 6. W. Andrew Copenhaver's Consent Motion for Leave to Withdraw	1. Allowed **02/20/2017** 2. Allowed 3. Allowed 4. Allowed 5. Allowed 6. Allowed
064P17	In re the Appeal by Toney L. Harrell and Harrell's Land Development Co., Inc. v. The Midland Board of Adjustment and the Town of Midland	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA16-646) 2. Respondent's (Town of Midland) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
065P17	State v. Jeffrey Robert Parisi	1. State's Motion for Temporary Stay (COA16-635) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/24/2017** Dissolved **06/08/2017** 2. Denied 3. Denied
067P17	Robbie Dean Terry, et al. v. State of North Carolina, et al.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-153) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot

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

8 JUNE 2017

074P17	Nathaniel Bryant and Joseph L. Gillespie v. Charles Wilbur Bryant and Carl Bryant	1. Plt's (Nathaniel Bryant) *Pro Se* Motion for Temporary Stay 2. Plt's (Nathaniel Bryant) *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's (Nathaniel Bryant) *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Chatham County	1. Denied **03/13/2017** 2. Denied **03/14/2017** 3. Dismissed
079P17	State v. Jimmy Allen Roberts	1. Def's *Pro Se* Motion for Notice of Appeal (COAP17-135) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion for Judicial Notice	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed as moot **Ervin, J., recused**
088P17	G.S.C. Holdings, LLC; T and A Amusements, LLC; and Crazie Overstock Promotions, LLC v. Patrick McCrory, in his Official Capacity as Governor of the State of North Carolina; Frank L. Perry, in his Official Capacity as Secretary of the North Carolina Department of Crime Control and Prevention; Mark J. Senter, in his Official Capacity as Branch Head of the Alcohol Law Enforcement Division; Shannon Craddock, in his Official Capacity as the Chief of Police of the City of Archdale, North Carolina; and Maynard B. Reid, Jr., in his Official Capacity as the Sheriff of Randolph County	Defs' (McCrory, Perry, Senter and Craddock) PDR Under N.C.G.S. § 7A-31) (COA16-160)	Denied

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

8 JUNE 2017

089P17	T and A Amusements, LLC; and Crazie Overstock Promotions, LLC v. Patrick McCrory, in his Official Capacity as Governor of the State of North Carolina; Frank L. Perry, in his Official Capacity as Secretary of the North Carolina Department of Public Safety; Mark J. Senter, in his Official Capacity as Branch Head of the Alcohol Law Enforcement Division; Jody Williams, in his Official Capacity as the Chief of Police of the City of Asheboro, North Carolina; and Maynard B. Reid, Jr., in his Official Capacity as the Sheriff of Randolph County	Defs' (McCrory, Perry, Senter, and Williams) PDR Under N.C.G.S. § 7A-31) (COA16-161)	Denied
091P17	Arvel Lee Gentry, a/k/a Arvel Lee, Orville Gentry v. Gary Brooks, Steven Franklin, Sandy McDevitt, Van Franklin (Life Tenant), and J.C. Gentry	Respondents' (Brooks, Franklin, McDevitt, and Franklin) PDR Under N.C.G.S. § 7A-31 (COA16-614)	Denied
099P17	Mary N. Gurganus v. Charles M. Gurganus	Def's PDR Under N.C.G.S. § 7A-31 (COA16-163)	Denied
104P17	Alonza H. Ward, Jr., and Marie W. Ward v. Laura C. Ward	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-832) 2. Def's 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

8 JUNE 2017

106P17	Tropic Leisure Corp., Magen Point Inc. d/b/a Magens Point Resort v. Jerry A. Hailey	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA15-1254-2) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Virgin Islands Bar Association's Conditional Motion for Leave to File *Amicus* Brief	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
107P17	State v. Teon Jamell Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA16-592)	Denied
113P17	State v. Linzie Lee Swink	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-89) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
116P17	State v. Kevin Antwan Shepherd	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-9335) 2. Def's *Pro Se* PDR Under 77A	1. Dismissed *ex mero motu* 2. Denied
118P17	State v. Herbert Lee Stroud	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-59) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
119P17	State v. Tardra Eterell Bouknight	Def's PDR Under N.C.G.S. § 7A-31 (COA16-544)	Denied
121P17	State v. Manuel Enrique Santana, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-691)	Denied
124A16	Jillian Murray v. The University of North Carolina at Chapel Hill	1. Def's Motion for Judicial Notice (COA15-375) 2. State's Motion for Withdrawal of Counsel	1. Allowed 2. Allowed **12/08/2016**
125P17	State v. Paul Anthony Ramey	Def's *Pro Se* Motion for Petition for Rehearing *En Banc* (COA16-876)	Dismissed
126P17	State v. John Owen Jacobs	Def's PDR Under N.C.G.S. § 7A-31 (COA16-464)	Allowed
127P17	Plasman v. Decca Furniture (WA), Inc., et al.	Plt's Motion for Extension of Time to Respond to Motion to Dismiss Portions of PDR that are Untimely	Allowed **05/15/2017**

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

8 JUNE 2017

127P17	Christian G. Plasman, in his Individual Capacity and Derivatively for the Benefit of, on Behalf of and Right of Nominal Party Bolier & Company, LLC. v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang C. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co. Ltd., Darren Hudgins, Decca Home, LLC and Elan by Decca, LLC and Bolier & Company, LLC. v. Christian J. Plasman (a/k/a Barrett Plasman)	1. Plaintiff and Third Party Defendant's PDR Prior to a Decision of COA 2. Plaintiff and Third Party Defendant's Motion to Consolidate Appeals 3. Defs' Motion to Dismiss Portions of PDR that are Untimely	1. Denied 2. Denied 3. Allowed
128P17	In Re Alex Ohara King	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
130P17	Joan A. Meinck v. City of Gastonia, a North Carolina Municipal Corporation	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-892) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
131P17	State v. Francisco Echeverria	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-673)	Denied
133P17	State v. Michael Todd Walker	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-109) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
134A17	Hildebran Heritage & Development Association, Inc., et al. v. The Town of Hildebran, et al.	Plts' Motion to Dismiss Appeal	Allowed **05/16/2017**
139P17	State v. Mohammed Nasser Jilani	Def's *Pro Se* Motion for Writ of Prohibition	Denied

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

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141P17	State v. William Anthony Lesane, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-147)	Denied **05/05/2017**
142P17	State v. Terance Germaine Malachi	1. State's Motion for Temporary Stay (COA16-752) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/04/2017** 2.
144P17	State v. Kenrick J. Battle	1. State's Motion for Temporary Stay (COA16-1002) 2. State's Petition for W*rit of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/08/2017** Dissolved **06/08/2017** 2. Denied 3. Denied
145P17	In the Matter of A.P.	1. Petitioner's Motion for Temporary Stay (COA16-1010) 2. Petitioner's Petition for *Writ of Supersedeas*	1. Allowed **05/09/2017** 2.
147P17	State v. Salim Abdu Gould	Def's *Pro Se* Motion for Appellate Review	Dismissed
149P17	State v. Mohammed N. Jilani	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Denied
152P17	Steven M. McKenzie v. District Court	Plt's *Pro Se* Motion for Interlocutory Appeal	Dismissed
153P17	State v. Ailkeem Anthony Norman	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/17/2017** 2.
154P17	State v. Jermaine Derrick Carson, Jr.	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/18/2017**
155P17	State v. Joe Robert Reynolds	1. Def's Motion for Temporary Stay (COA16-149) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **05/19/2017** 2.
156P17	DiCesare, et al. v. The Charlotte-Mecklenburg Hospital Authority	Plts' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari*	Allowed **05/26/2017**
158P06-12	State v. Derrick D. Boger	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/12/2017**

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

8 JUNE 2017

158P06-13	State v. Derrick D. Boger	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Writ for En Banc 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied 2. Denied **05/30/2017** 3. Denied
171A17	State v. Daryl Williams	1. State's Motion for Temporary Stay (COA16-684) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/01/2017** 2.
173P17	State v. Melvin Leroy Fowler	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/05/2017** 2.
175P17	In the Matter of T.K.	1. State's Motion for Temporary Stay (COA16-1047) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/05/2017** 2.
219P16	Yili Tseng v. Harold Martin, Individually and as Chancellor of North Carolina A&T State University, Benjamin Uwakweh, Individually and as Dean of North Carolina A&T State University, and North Carolina A&T State University	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-739)	Denied
264P16	In the Matter of Appeal of Corning Incorporated from the decisions of the Cabarrus County Board of Equalization and Review concerning the valuations of certain real property for tax years 2012 and 2013	Cabarrus County's PDR Under N.C.G.S. § 7A-31 (COA15-954)	Denied

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

8 JUNE 2017

282P16-3	Jeremy Bruns and Jenny Bruns v. Rhonda Bryant, Dalton Bryant, Sr., Dalton Bryant, Jr., Pat McCrory, as Governor of North Carolina, Frank Perry, as Secretary of the North Carolina Department of Public Safety, Anthony Tata, as Secretary of the North Carolina Department of Transportation, Veronica McClain, USAA, and State of North Carolina	1. Plts' *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-699) 2. Plts' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's (Dalton Bryant, Jr.) Motion to Dismiss Appeal 4. Plts' Motion to Reject, Dismiss, and Strike Response to Notice of Appeal and PDR.	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Denied
309P15-2	State v. Reginald Underwood Fullard	Def's *Pro Se* Motion for Petition for Direct Review (COAP14-265)	Dismissed
330P13-3	State v. William Curtis Lowery, Jr.	Def's *Pro Se* Motion for Appropriate Relief	Dismissed **Ervin, J., recused**
335PA16	State v. Gyrell Shavonta Lee	1. Motion to Admit Ilya Shapiro *Pro Hac Vice* 2. Cato Institute's Motion for Leave to File Amicus Brief	1. Allowed **05/18/2017** 2. Allowed **05/18/2017**
341P14-2	State v. Robert McPhail	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, 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 **Ervin, J., recused**
345P16-4	State v. Dwayne Demont Haizlip	1. Def's *Pro Se* Motion for Petition for Rehearing 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **05/31/2017** 2. Allowed **05/31/2017** **Ervin, J., recused**

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

8 JUNE 2017

376P02-6	State v. Robert Wayne Stanley	1. State's Motion for Temporary Stay (COA16-436) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Vacate the Temporary Stay 5. Def's Motion to Dismiss State's PDR	1. Allowed **11/17/2016** Dissolved **06/08/2017** 2. Denied 3. Denied 4. Dismissed as moot 5. Dismissed as moot **Ervin, J., recused**
393P08-2	State v. Dewayne Parker	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/17/2017**
393P08-3	State v. Dewayne Parker	Def's *Pro Se* Motion for Writ for *En Banc*	Denied **06/01/2017**
427A16	Abrons Family Practice & Urgent Care, P.A., et al. v. N.C. Department of Health and Human Services and Computer Sciences Corporation	Def's (Computer Sciences Corporation) Motion to Withdraw Van H. Beckwith, Bryant C. Boren, and the Firm of Baker Botts, LLP as Counsel	Allowed **05/17/2017**
461P16	Bolier & Company, LLC and Christian G. Plasman v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang C. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co., Ltd., Darren Hudgins and Decca Home v. Christian J. Plasman a/k/a Barrett Plasman, Third-Party Defendant	Plt's (Christian G. Plasman) and Third-Party Defendant's PDR Under N.C.G.S. § 7A-31 (COA15-1219)	Denied
514PA11-2	State v. Harry Sharod James	Motion to Admit Marsha L. Levick *Pro Hac Vice*	Allowed **05/19/2017**

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

8 JUNE 2017

597P01-3	State v. Maechel Shawn Patterson	Def's *Pro Se* Petition for Writ of Certiorari to Review Order of COA (COA17-245)	Dismissed **Ervin, J., recused**

APPENDIXES

RULES OF APPELLATE PROCEDURE

INVESTITURE OF JUSTICE MORGAN

CLIENT SECURITY FUND

JUDICIAL STANDARDS FORMAL ADVISORY OPINION, 2016-01

JUDICIAL STANDARDS FORMAL ADVISORY OPINION, 2017-01

ORGANIZATION OF STATE BAR

DISCIPLINE AND DISABILITY OF ATTORNEYS

BOARD OF LAW EXAMINERS

ADMINISTRATIVE COMMITTEE

CONTINUING LEGAL EDUCATION

LEGAL SPECIALIZATION

RULES OF PROFESSIONAL CONDUCT

RULES OF APPELLATE PROCEDURE, RULE 7

JUDICIAL DISTRICT BARS

DISCIPLINE AND DISABILITY OF ATTORNEYS

LEGAL SPECIALIZATION

ORGANIZATIONS PRACTICING LAW

RULES OF PROFESSIONAL CONDUCT

PILOT CLERK MEDIATION PROGRAM

JUDICIAL STANDARDS FORMAL ADVISORY OPINION

ORDER ADOPTING THE 2017 RULES OF APPELLATE PROCEDURE

The Rules of Appellate Procedure are hereby amended and recodified to read as printed on the following pages.

These rules shall be effective on the 1st day of January, 2017, and shall apply to all cases appealed on or after that date.

These amendments shall be promulgated by publication in the North Carolina Reports and posted on the Court's web site.

Ordered by the Court in Conference, this the 20th day of December, 2016.

/s/ Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of December, 2016.

/s/ J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

JANUARY 1, 2017

These rules are promulgated by the Court under the rule-making authority conferred by Article IV, Section 13(2) of the Constitution of North Carolina. They shall be effective in all appeals taken from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative tribunals to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give. As to such appeals, these rules supersede the North Carolina Rules of Appellate Procedure, 363 N.C. 902 (2009), as amended. These rules shall be effective on the 1st day of January, 2017, and shall apply to all cases appealed on or after that date.

Appendixes are published with the rules for their helpfulness to the profession. Although authorized to be published for this purpose, they are not an authoritative source on parity with the rules.

Article I
Applicability of Rules

Article II
Appeals from Judgments and Orders of Superior Courts and District Courts

Article III
Review by Supreme Court of Appeals Originally Docketed in the Court of Appeals—Appeals of Right; Discretionary Review

Article IV
Direct Appeals from Administrative Tribunals to Appellate Division

Article V
Extraordinary Writs

North Carolina Rules of Appellate Procedure

Article I
Applicability of Rules

Rule 1. Title; Scope of Rules; Trial Tribunal Defined

(a) **Title.** The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "N.C. R. App. P. ___," is also appropriate.

(b) **Scope of Rules.** These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative tribunals to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(c) **Rules Do Not Affect Jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(d) **Definition of Trial Tribunal.** As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

History Note.

287 N.C. 671; 312 N.C. 803; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Editor's Note.

Former Rule 41, "Title," was renumbered as Rule 42 on 3 March 1994, 113 N.C. App. 841, and then later recodified as Rule 1(a) on 2 July 2009, 363 N.C. 901.

Rule 2. Suspension of Rules

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Article II
Appeals from Judgments and Orders of Superior Courts and District Courts

Rule 3. Appeal in Civil Cases—How and When Taken

(a) **Filing the Notice of Appeal.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

(b) **Special Provisions.** Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and Rules of Appellate Procedure sections noted:

(1) Juvenile matters pursuant to N.C.G.S. § 7B-2602; the identity of persons under the age of eighteen at the time of the proceedings in the trial division shall be protected pursuant to Rule 3.1(b).

(2) Appeals pursuant to N.C.G.S. § 7B-1001 shall be subject to the provisions of Rule 3.1.

(c) **Time for Taking Appeal.** In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail in Rule 27(b) of these rules and Rule 6(e) of the Rules of Civil Procedure shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party.

(d) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subsection (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26.

History Note.

287 N.C. 671; 92 N.C. App. 761; 324 N.C. 585; 324 N.C. 613; 337 N.C. 821; 345 N.C. 765; 354 N.C. 598; 354 N.C. 609; 357 N.C. 665; 358 N.C. 824; 360 N.C. 661; 360 N.C. 820; 360 N.C. 852; 363 N.C. 901.

Rule 3.1. Appeal in Qualifying Juvenile Cases—How and When Taken; Special Rules

(a) **Filing the Notice of Appeal.** Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) **Protecting the Identity of Juveniles.** For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identity of involved persons under the age of eighteen at the time of the proceedings in the trial division (covered juveniles)

shall be referenced only by the use of initials or pseudonyms in briefs, petitions, and all other filings, and shall be similarly redacted from all documents, exhibits, appendixes, or arguments submitted with such filings. If the parties desire to use pseudonyms, they shall stipulate in the record on appeal to the pseudonym to be used for each covered juvenile. Courts of the appellate division are not bound by the stipulation, and case captions will utilize initials. Further, the addresses and social security numbers of all covered juveniles shall be excluded from all filings and documents, exhibits, appendixes, and arguments. In cases subject to this rule, the first document filed in the appellate courts and the record on appeal shall contain the notice required by Rule 9(a).

The substitution and redaction requirements of this rule shall not apply to settled records on appeal; supplements filed pursuant to Rule 11(c); objections, amendments, or proposed alternative records on appeal submitted pursuant to Rule 3.1(c)(2); and any verbatim transcripts submitted pursuant to Rule 9(c). Pleadings and filings not subject to substitution and redaction requirements shall include the following notice on the first page of the document immediately underneath the title and in uppercase typeface: FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

Filings in cases governed by this rule that are not subject to substitution and redaction requirements will not be published on the Court's electronic-filing site and will be available to the public only with the permission of a court of the appellate division. In addition, the juvenile's address and social security number shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c).

(c) **Expediting Filings**. Appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) **Transcripts**. Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court-reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court-reporting coordinator shall assign a transcriptionist to the case.

When there is an order establishing the indigency of the appellant, the transcriptionist shall produce and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within thirty-five days from the date of assignment.

When there is no order establishing the indigency of the appellant, the appellant shall have ten days from the date that the transcriptionist is assigned to make written arrangements with the assigned transcriptionist for the production and delivery of the transcript of the designated proceedings. If such written arrangement is made, the transcriptionist shall produce and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within forty-five days from the date of assignment. The non-indigent appellant shall bear the cost of the appellant's copy of the transcript.

When there is no order establishing the indigency of the appellee, the appellee shall bear the cost of receiving a copy of the requested transcript.

Motions for extensions of time to produce and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) **Record on Appeal.** Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties:

(a) a notice of approval of the proposed record;

(b) specific objections or amendments to the proposed record on appeal; or

(c) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement:

(a) the appellant shall file his or her proposed record on appeal; and

(b) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the clerk of the Court of Appeals as provided herein.

(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. An appellant may file and serve a reply brief as provided in Rule 28(h). Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(d) **No-Merit Briefs.** In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a pro se brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

(e) **Calendaring Priority**. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

History Note.

360 N.C. 661; 360 N.C. 820; 360 N.C. 852; 362 N.C. 699; 363 N.C. 901.

Rule 4. Appeal in Criminal Cases—How and When Taken

(a) **Manner and Time.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by:

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order. Appeals from district court to superior court are governed by N.C.G.S. §§ 15A-1431 and -1432.

(b) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26.

(d) **To Which Appellate Court Addressed.** An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

(e) **Protecting the Identity of Juvenile Victims of Sexual Offenses.** For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identities of all victims of sexual offenses the trial court record shows were under the age of eighteen when the trial division proceedings occurred, including documents or other materials concerning delinquency proceedings in district court, shall be protected pursuant to Rule 3.1(b).

History Note.

287 N.C. 671; 295 N.C. 741; 305 N.C. 783; 322 N.C. 844; 92 N.C. App. 761; 324 N.C. 585; 324 N.C. 613; 348 N.C. 724; 354 N.C. 598; 354 N.C. 609; 357 N.C. 665; 363 N.C. 901.

Rule 5. Joinder of Parties on Appeal

(a) **Appellants.** If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may

join in appeal after having timely taken separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, or in a criminal case they may give a joint oral notice of appeal.

(b) **Appellees**. Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) **Procedure after Joinder.** After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 6. Security for Costs on Appeal

(a) **In Regular Course.** Except in pauper appeals, an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of N.C.G.S. §§ 1-285 and -286.

(b) ***In Forma Pauperis* Appeals.** A party in a civil action may be allowed to prosecute an appeal *in forma pauperis* without providing security for costs in accordance with the provisions of N.C.G.S. § 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subsection (a) or to file evidence thereof as required by subsection (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within ten days after service of the motion upon appellant or before the case is called for argument, whichever first occurs.

(a) **No Security for Costs in Criminal Appeals.** Pursuant to N.C.G.S. § 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

History Note.

287 N.C. 671; 312 N.C. 803; 324 N.C. 613; 327 N.C. 671; 354 N.C. 609; 363 N.C. 901.

Rule 7. Preparation of the Transcript; Court Reporter's Duties

(a) **Ordering the Transcript.**

(1) **Civil Cases.** Within fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to produce the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript contract with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record and upon the person designated to produce the transcript. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within fourteen days after the service of the written documentation of the appellant, shall contract for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed and the name and address of the court reporter or other neutral person designated to produce the transcript. In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate

counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

(2) **Criminal Cases.** In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall contract for the transcription of the proceedings as in civil cases.

When there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to produce the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the name, address, telephone number, and e-mail address of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) **Production and Delivery of Transcript.**

(1) **Production.** In civil cases: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript in non-capital cases and one-hundred-twenty days to produce and electronically deliver the transcript in capitally-tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the appeal entries as the "Date order delivered to transcriptionist," that person shall have sixty-five days to produce and electronically deliver the transcript in non-capital cases and one-hundred-twenty-five days to produce and electronically deliver the transcript in capitally-tried cases.

The transcript format shall comply with Appendix B of these rules.

Except in capitally-tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion and for good cause shown by the appellant, may, pursuant to Rule 27(c)(1), extend the time to produce the transcript for an additional thirty days. Any subsequent motions for additional time required to produce the transcript may only be made pursuant to Rule 27(c)(2) to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally-tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant.

(2) **Delivery**. The court reporter, or person designated to produce the transcript, shall electronically deliver the completed transcript to the parties, including the district attorney and Attorney General of North Carolina in criminal cases, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the transcript has been so delivered and shall send a copy of such certification to the appellate court to which the appeal is taken. The appellant shall promptly notify the court reporter when the record on appeal has been filed. Once the court reporter, or person designated to produce the transcript, has been notified by the appellant that the record on appeal has been filed with the appellate court to which the appeal has been taken, the court reporter must electronically file the transcript with

that court using the docket number assigned by that court.

(3) **Neutral Transcriptionist**. The neutral person designated to produce the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

History Note.

287 N.C. 671; 295 N.C. 741; 92 N.C. App. 761; 324 N.C. 585; 324 N.C. 613; 327 N.C. 671; 347 N.C. 679; 350 N.C. 857; 354 N.C. 598; 354 N.C. 609; 356 N.C. 701; 361 N.C. 732; 363 N.C. 901.

Rule 8. Stay Pending Appeal

(a) **Stay in Civil Cases.** When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an administrative tribunal to the appellate division, application for the temporary stay and writ of supersedeas may be made to the appellate court in the first instance. Application for the temporary stay and writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) **Stay in Criminal Cases.** When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of N.C.G.S. § 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under N.C.G.S. § 15A-536 or Rule 23.

History Note.

287 N.C. 671; 312 N.C. 803; 324 N.C. 613; 345 N.C. 765; 354 N.C. 609; 363 N.C. 901.

Rule 9. The Record on Appeal

(a) **Function; Notice in Cases Involving Juveniles; Composition of Record.** In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

All filings involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) shall include the following notice in uppercase typeface:

FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over persons or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event

such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other papers showing jurisdiction of the board or agency over persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other

determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; and

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for

an understanding of all issues presented on appeal, or a statement specifying that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally-tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(4) **Exclusion of Social Security Numbers from Record on Appeal.** Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal.

(b) **Form of Record; Amendments.** The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal, such as social security numbers referred to in Rule 9(a)(4). The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed

name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified.** The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)." Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal.**

a. **Additional Materials in the Record on Appeal.** If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a copy of those items on opposing counsel and shall file three copies of the items in a volume captioned "Rule 9(b)(5) Supplement to the Printed Record on Appeal." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

b. **Motions Pertaining to Additions to the Record.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or

transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal. Verbatim transcripts or narration utilized in a case subject to Rules 3(b)(1), 3.1(b), or 4(e) initiated in the trial division under the provisions of Subchapter I of Chapter 7B of the General Statutes shall be produced and delivered to the office of the clerk of the appellate court to which the appeal has been taken in the manner specified by said rules.

(1) **When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in Record.** When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that

it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record on appeal that the testimonial evidence will be presented in the verbatim transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1). When a verbatim transcript of those proceedings has been made, appellant may also designate that the verbatim transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript that has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled record on appeal and transcript to be filed pursuant to Rule 7 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal and transcript have been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) **Electronic Recordings.** When a narrative or transcript has been produced from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) **Exhibits.** Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.

(1) **Documentary Exhibits Included in the Printed Record on Appeal.** A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.

(2) **Exhibits Not Included in the Printed Record on Appeal.** A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing three copies with the clerk of the appellate court. The three copies shall be paginated. If multiple exhibits are filed, an index must be included in the filing. Copies that impair the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.

(3) **Exclusion of Social Security Numbers from Exhibits.** Social security numbers must be deleted or redacted from copies of exhibits.

(4) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a

reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

History Note.

287 N.C. 671; 303 N.C. 715; 304 N.C. 737; 312 N.C. 803; 92 N.C. App. 761; 324 N.C. 585; 324 N.C. 613; 327 N.C. 671; 345 N.C. 765; 347 N.C. 679; 354 N.C. 598; 354 N.C. 609; 358 N.C. 824; 361 N.C. 732; 363 N.C. 901; 365 N.C. 583.

Rule 10. Preservation of Issues at Trial; Proposed Issues on Appeal

(a) **Preserving Issues During Trial Proceedings.**

(1) **General.** 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

(2) **Jury Instructions.** A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) **Sufficiency of the Evidence.** In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action, or for judgment as in case of nonsuit, is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(4) **Plain Error.** In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

(b) **Appellant's Proposed Issues on Appeal.** Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the record on appeal in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record

on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.

(c) **Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law.** Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief. Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

History Note.

287 N.C. 671; 303 N.C. 715; 309 N.C. 830; 312 N.C. 803; 92 N.C. App. 761; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 11. Settling the Record on Appeal

(a) **By Agreement.** This rule applies to all cases except those subject to expedited schedules in Rule 3.1.

Within thirty-five days after the court reporter or transcriptionist certifies delivery of the transcript, if such was ordered (seventy days in capitally-tried cases), or thirty-five days after appellant files notice of appeal, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in capitally-tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve

notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.** Within thirty days (thirty-five days in capitally-tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in three copies of a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead,

the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the

request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial-settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

History Note.

287 N.C. 671; 312 N.C. 803; 92 N.C. App. 761; 324 N.C. 613; 327 N.C. 671; 345 N.C. 765; 347 N.C. 679; 354 N.C. 609; 358 N.C. 824; 361 N.C. 732; 363 N.C. 901.

Rule 12. Filing the Record; Docketing the Appeal; Copies of the Record

(a) **Time for Filing Record on Appeal.** Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal.** At the time of filing the record on

appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal *in forma pauperis* as provided in N.C.G.S. §§ 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies of Record on Appeal.** The appellant shall file one copy of the printed record on appeal, three copies of each exhibit designated pursuant to Rule 9(d), three copies of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3), one copy of any paper deposition or administrative hearing transcript, and shall cause any court proceeding transcript to be filed electronically pursuant to Rule 7. The clerk will reproduce and distribute copies of the printed record on appeal as directed by the court, billing the parties pursuant to these rules.

History Note.

287 N.C. 671; 312 N.C. 803; 92 N.C. App. 761; 324 N.C. 613; 345 N.C. 765; 354 N.C. 609; 357 N.C. 665; 361 N.C. 732; 363 N.C. 901.

Rule 13. Filing and Service of Briefs

(a) Time for Filing and Service of Briefs.

(1) **Cases Other Than Death Penalty Cases.** Within thirty days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file a brief in the office of the clerk of the appellate court and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within thirty days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(2) **Death Penalty Cases.** Within sixty days after the clerk of the Supreme Court has mailed the printed record to the parties, the appellant in a criminal appeal which includes a sentence of death shall file a brief in the office of the clerk and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within sixty days after appellant's brief has been served, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of a brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve its brief within the time allowed, the appellee may not be heard in oral argument except by permission of the court.

History Note.

287 N.C. 671; 301 N.C. 731; 312 N.C. 803; 322 N.C. 850; 324 N.C. 585; 324 N.C. 613; 354 N.C. 609; 357 N.C. 665; 359 N.C. 883; 363 N.C. 901; 365 N.C. 583.

Article III
Review by Supreme Court of Appeals Originally Docketed in the Court of Appeals—Appeals of Right; Discretionary Review

Rule 14. Appeals of Right from Court of Appeals to Supreme Court under N.C.G.S. § 7A-30

(a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the clerk of the Court of Appeals and with the clerk of

the Supreme Court and serving notice of appeal upon all other parties within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chair of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) **Content of Notice of Appeal.**

(1) **Appeal Based Upon Dissent in Court of Appeals.** In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under N.C.G.S. § 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely

raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies**. Upon the filing of a notice of appeal, the clerk of the Court of Appeals will forthwith transmit the original record on appeal to the clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction.

(d) **Briefs.**

(1) **Filing and Service; Copies.** Within thirty days after filing notice of appeal in the Supreme Court, the appellant shall file with the clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those issues upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within thirty days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within thirty days after service of

the appellant's brief upon appellee, the appellee shall similarly file and serve copies of a new brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

The parties need file but single copies of their respective briefs. The clerk will reproduce and distribute copies as directed by the Court, billing the parties pursuant to these rules.

(2) **Failure to File or Serve.** If an appellant fails to file or serve its brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed, it may not be heard in oral argument except by permission of the Court.

History Note.

287 N.C. 671; 291 N.C. 721; 301 N.C. 731; 312 N.C. 803; 322 N.C. 850; 324 N.C. 585; 324 N.C. 613; 345 N.C. 765; 354 N.C. 609; 357 N.C. 665; 359 N.C. 883; 363 N.C. 901; 365 N.C. 583.

Rule 15. Discretionary Review on Certification by Supreme Court under N.C.G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in N.C.G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes, or in valuation of exempt property under Chapter 1C of the General Statutes.

(b) **Petition of Party—Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the clerk of the Supreme Court and served on all other parties within fifteen days after the appeal is docketed in the Court of Appeals. For cases that arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. A petition for review

following determination by the Court of Appeals shall be similarly filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed.

(c) **Petition of Party—Content**. The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under N.C.G.S. § 7A-31 for discretionary review. The petition shall state each issue for which review is sought and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required, but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within ten days after service of the petition upon that party. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present issues in addition to those presented by the petitioner, those additional issues shall be stated in the response. A motion for extension of time is not permitted.

(e) **Certification by Supreme Court—How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to N.C.G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders; Filing and Service.** Any determination to certify for review and any determination not to certify made in response to a petition will be recorded by the Supreme Court in a written order. The clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the clerk of the Court of Appeals, he or she will forthwith transmit the original record on appeal to the clerk of the Supreme Court. The clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the clerk may require a deposit by the petitioner to cover the costs thereof.

(g) **Filing and Service of Briefs.**

(1) **Cases Certified Before Determination by Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed its brief in the Court of Appeals and served copies before the case is certified, the clerk of the Court of Appeals shall forthwith transmit to the clerk of the Supreme Court the original brief and any copies already reproduced for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has

not filed its brief in the Court of Appeals and served copies before the case is certified, the party shall file its brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within thirty days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within thirty days after a copy of appellant's brief is served upon the appellee. An appellant may file and serve a reply brief as provided in Rule 28(h).

(3) **Copies.** A party need file, or the clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The clerk of the Supreme Court will thereupon procure from the Court of Appeals or will reproduce copies for distribution as directed by the Supreme Court. The clerk may require a deposit by any party to cover the costs of reproducing copies of its brief. In civil appeals *in forma pauperis* a party need not pay the deposit for reproducing copies, but at the time of filing its original new brief shall also deliver to the clerk two legible copies thereof.

(4) **Failure to File or Serve**. If an appellant fails to file and serve its brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed by this Rule 15, it may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee" means a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an appellant or appellee for purposes of proceeding under this Rule 15.

History Note.

287 N.C. 671; 301 N.C. 731; 304 N.C. 737; 322 N.C. 850; 92 N.C. App. 761; 324 N.C. 585; 324 N.C. 613; 345 N.C. 765; 354 N.C. 598; 354 N.C. 609; 359 N.C. 883; 363 N.C. 901; 365 N.C. 583.

Rule 16. Scope of Review of Decisions of Court of Appeals

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except when the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the issues stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) **Scope of Review in Appeal Based Solely Upon Dissent.** When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other issues in the case may properly be presented to the Supreme Court through a petition for discretionary review pursuant to Rule 15, or by petition for writ of certiorari pursuant to Rule 21.

(c) **Appellant, Appellee Defined.** As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner and "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals and "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an "appellant" or "appellee" for purposes of proceeding under this Rule 16.

History Note.

287 N.C. 671; 309 N.C. 830; 322 N.C. 850; 324 N.C. 613; 327 N.C. 671; 354 N.C. 609; 363 N.C. 901.

Rule 17. Appeal Bond in Appeals Under N.C.G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the notice of appeal in the Supreme Court, file with the clerk of that Court a written undertaking, with good and sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that all costs awarded against the appealing party on the appeal will be paid.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subsection (a).

When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals *In Forma Pauperis*.** No undertakings for costs are required of a party appealing *in forma pauperis*.

History Note.

287 N.C. 671; 295 N.C. 741; 324 N.C. 613; 327 N.C. 671; 354 N.C. 609; 363 N.C. 901.

Article IV
Direct Appeals from Administrative Tribunals to Appellate Division

Rule 18. Taking Appeal; Record on Appeal—Composition and Settlement

(a) **General.** Appeals of right from administrative agencies, boards, commissions, or the Office of Administrative Hearings (referred to in these rules as "administrative tribunals") directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) **Time and Method for Taking Appeals.**

(1) The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise, in which case the General Statutes shall control.

(2) Any party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the administrative tribunal. The final decision of the administrative tribunal is

to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final administrative tribunal decision from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made as part of the process leading up to the final administrative tribunal decision, the appealing party may contract with a court reporter for production of such parts of the proceedings not already on file as it deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any administrative tribunal shall contain:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

(2) a statement identifying the administrative tribunal from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the administrative tribunal over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule to be filed with the administrative tribunal to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the administrative tribunal from which appeal was taken;

(6) so much of the litigation before the administrative tribunal or before any division, commissioner, deputy commissioner, or hearing officer of the administrative tribunal, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) when the administrative tribunal has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the administrative tribunal, copies of all items included in the record filed with the administrative tribunal which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other papers filed and statements of all other proceedings had before the administrative tribunal or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the administrative tribunal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(10) proposed issues on appeal relating to the actions of the administrative tribunal, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal; and

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(d) **Settling the Record on Appeal.** The record on appeal may be settled by any of the following methods:

(1) **By Agreement.** Within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting

of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.** If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 18(c) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the record on appeal in three copies of a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based

on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the administrative tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the administrative tribunal convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the administrative tribunal, shall be served upon all other parties. Each

party shall promptly provide to the administrative tribunal a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the administrative tribunal in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, nonduplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the administrative tribunal shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the administrative tribunal. The administrative tribunal or a delegate appointed in writing by the administrative tribunal shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the administrative tribunal. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the administrative tribunal is a party to the appeal, the administrative tribunal shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on

appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by administrative tribunal decision.

(e) **Further Procedures and Additional Materials in the Record on Appeal.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

History Note.

287 N.C. 671; 292 N.C. 739; 301 N.C. 731; 313 N.C. 778; 324 N.C. 613; 327 N.C. 671; 345 N.C. 765; 347 N.C. 679; 354 N.C. 609; 358 N.C. 824; 361 N.C. 732; 363 N.C. 901.

Rule 19. [Reserved]

History Note.

287 N.C. 671; 292 N.C. 739; 313 N.C. 778; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 20. Miscellaneous Provisions of Law Governing Appeals from Administrative Tribunals

Specific provisions of law pertaining to stays pending appeals from any administrative tribunal to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules that may prescribe a different procedure.

History Note.

287 N.C. 671; 313 N.C. 778; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Article V
Extraordinary Writs

Rule 21. Certiorari

(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.

(2) **Review of the Judgments and Orders of the Court of Appeals.** The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ—to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Petition for Writ—Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court.** Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post-conviction Matters—to Which Appellate Court Addressed.** Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court. If the petition is without merit, it shall be denied by the court.

(f) **Petition for Writ in Post-conviction Matters—Death Penalty Cases.** A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within sixty days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within thirty days of service of the petition.

History Note.

287 N.C. 671; 304 N.C. 737; 312 N.C. 803; 322 N.C. 844; 92 N.C. App. 761; 324 N.C. 613; 345 N.C. 765; 354 N.C. 609; 356 N.C. 701; 363 N.C. 901; 367 N.C. 954.

Rule 22. Mandamus and Prohibition

(a) **Petition for Writ—to Which Appellate Court Addressed.** Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Petition for Writ—Filing and Service; Content.** The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record that may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court.** Within ten days after service of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 23. Supersedeas

(a) **Pending Review of Trial Tribunal Judgments and Orders.**

(1) **Application—When Appropriate.** Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken, or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (1) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (2) extraordinary circumstances make it impracticable

to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Application—How and to Which Appellate Court Made.** Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except when an appeal from a superior court is initially docketed in the Supreme Court, no petition will be entertained by the Supreme Court unless application has been made first to the Court of Appeals and denied by that court.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions.** Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition for Writ—Filing and Service; Content.** The petition shall be filed with the clerk of the court to which application is being made and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and denied or vacated by that court, or shall contain facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under N.C.G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus, or prohibition.

(d) **Response; Determination by Court.** Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the

petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay.** Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted, shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

History Note.

287 N.C. 671; 301 N.C. 731; 324 N.C. 613; 345 N.C. 765; 354 N.C. 609; 363 N.C. 901.

Rule 24. Form of Papers; Copies

A party should file with the appellate court a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Article V
General Provisions

Rule 25. Penalties for Failure to Comply with Rules

(a) **Failure of Appellant to Take Timely Action.** If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court, motions to dismiss are made to

the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court, motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, the procedure shall be that provided by Rule 37 of these rules.

(b) **Sanctions for Failure to Comply with Rules.** A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these rules, including failure to pay any filing or printing fees or costs when due. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

History Note.

287 N.C. 671; 92 N.C. App. 761; 324 N.C. 613; 345 N.C. 765; 354 N.C. 609; 363 N.C. 901; 365 N.C. 582.

Rule 26. Filing and Service

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this rule.

(1) **Filing by Mail.** Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, the record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.

(2) **Filing by Electronic Means.** Filing in the appellate courts may be accomplished by electronic means by use of the electronic-filing site at https://www.ncappellatecourts.org. Many documents may be filed electronically through the use of this site. The site identifies those types of documents that may not be filed electronically. A document filed by use of the electronic-filing site is deemed filed as of the time that the document is received electronically. Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. In all cases in which a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic-transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission, and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic-filing site at https://www.ncappellatecourts.org, counsel may either have his or her account drafted electronically by following the procedures described at the electronic-filing site, or counsel must forward the applicable filing fee for the document by first class mail, contemporaneously with the transmission.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete

upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Documents Filed with Appellate Courts.**

(1) **Form of Papers.** Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. All printed matter must appear in font no smaller than 12-point and no larger than 14-point, using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. Unglazed white paper of 16- to 20-pound substance should be utilized so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. Lines of text shall be no wider than 6½ inches. The

format of all papers presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) **Index Required.** All documents presented to either appellate court other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) **Closing.** The body of the document shall at its close bear the printed name, post office address, telephone number, State Bar number and e-mail address of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document has been filed electronically by use of the electronic-filing site at https://www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

(4) **Protecting the Identity of Certain Juveniles.** Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

History Note.

287 N.C. 671; 304 N.C. 737; 306 N.C. 757; 312 N.C. 803; 322 N.C. 850; 324 N.C. 613; 327 N.C. 671; 345 N.C. 765; 351 N.C. 659; 354 N.C. 598; 354 N.C. 609; 356 N.C. 701; 356 N.C. 706; 357 N.C. 665; 358 N.C. 824; 363 N.C. 901.

Rule 27. Computation and Extension of Time

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) **Additional Time After Service.** Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, or by e-mail if allowed by these rules, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules, or by order of court, for doing any act required or allowed under these rules, or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division.** The trial tribunal for good cause shown by the appellant may extend once, for no more than thirty days, the time permitted by: (1) Rule 7(b)(1) for the person designated to prepare the transcript to produce such transcript; and (2) Rule 11 or Rule 18 for service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.** All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may be made only to the appellate court to which appeal has been taken.

(d) **Motions for Extension of Time; How Determined.** Motions for extension of time made in any court may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal

a copy of any order extending time; provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard.

History Note.

287 N.C. 671; 294 N.C. 749; 295 N.C. 741; 312 N.C. 803; 92 N.C. App. 761; 324 N.C. 613; 327 N.C. 671; 354 N.C. 598; 354 N.C. 609; 363 N.C. 901; 365 N.C. 583.

Rule 28. Briefs—Function and Content

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(b) **Content of Appellant's Brief.** An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the record on appeal shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute

or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues.** An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review, the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

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. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d). Parties must modify verbatim portions of the transcript filed pursuant to this rule in a manner consistent with Rules 3(b)(1), 3.1(b), or 4(e).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal, the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the

appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes**. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to parts of the printed record on appeal and to parts of the verbatim transcript or parts of documentary exhibits shall be to the pages where those portions appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument. Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and fourteen copies of the memorandum.

(h) **Reply Briefs.** Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply

brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

(i) **Amicus Curiae Briefs**. A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the court a motion for leave to file, served upon all parties. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the issues of law to be addressed in the amicus curiae brief, and the applicant's position on those issues. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Motions for leave to file an amicus curiae brief submitted to the court after the time within which the amicus curiae brief normally would be due are disfavored in the absence of good cause. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals.** Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules. A principal brief may contain no more than 8,750 words. A reply brief may contain no more than 3,750 words. An amicus curiae brief may contain no more than 3,750 words.

(1) **Portions of Brief Included in Word Count.** Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

(2) **Certificate of Compliance.** Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

History Note.

287 N.C. 671; 301 N.C. 731; 303 N.C. 715; 304 N.C. 737; 306 N.C. 757; 312 N.C. 803; 322 N.C. 850; 324 N.C. 585; 324 N.C. 613; 327 N.C. 671; 354 N.C. 598; 354 N.C. 609; 356 N.C. 706; 358 N.C. 824; 359 N.C. 883; 361 N.C. 732; 363 N.C. 901; 365 N.C. 583.

Rule 29. Sessions of Courts; Calendar of Hearings

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.** Each appellate court will calendar the hearing of all appeals docketed in the court. In general,

appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than thirty days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar.

History Note.

287 N.C. 671; 304 N.C. 737; 322 N.C. 844; 324 N.C. 613; 327 N.C. 671; 354 N.C. 609; 363 N.C. 901.

Rule 30. Oral Argument and Unpublished Opinions

(a) **Order and Content of Argument.**

(1) The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) In cases involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e), counsel shall refrain from using a juvenile's name in oral argument and shall refer to the juvenile pursuant to said rules.

(b) **Time Allowed for Argument.**

(1) **In General.** Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited.

Counsel is not obliged to use all the time allowed, and should avoid unnecessary repetition; the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel.** Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties.** If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) **Submission on Written Briefs.** By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.

(e) **Unpublished Opinions.**

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the Court's web site at https://appellate.nccourts.org/opinions, and reported only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing

claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and pro se parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1) and serving a copy of the motion upon all other counsel and pro se parties of record. The motion shall be filed and served within ten days of the filing of the opinion. Any objection to the requested publication by counsel or pro se parties of record must be filed within five days after service of the motion requesting publication. The panel that heard the case shall determine whether to allow or deny such motion.

(f) **Pre-Argument Review; Decision of Appeal Without Oral Argument.**

(1) At any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed

of on the record and briefs. Counsel will be notified not to appear for oral argument.

History Note.

287 N.C. 671; 288 N.C. 737; 289 N.C. 731; 296 N.C. 743; 303 N.C. 715; 324 N.C. 613; 354 N.C. 609; 355 N.C. 776; 356 N.C. 706; 358 N.C. 824; 359 N.C. 883; 363 N.C. 901.

Rule 31. Petition for Rehearing

(a) **Time for Filing; Content.** A petition for rehearing may be filed in a civil action within fifteen days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition for rehearing shall be addressed to the court that issued the opinion sought to be reconsidered.

(c) **How Determined.** Within thirty days after the petition is filed, the court will either grant or deny the petition. A determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or fewer than all points suggested in the petition. When the petition is denied, the clerk shall forthwith notify all parties.

(d) **Procedure When Granted**. Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within thirty days after the case is certified for rehearing, and the opposing party's brief, within thirty days after petitioner's brief is served. Filing and service of the new briefs shall be

in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than thirty days after the filing of the petitioner's brief on rehearing.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided by Rule 8 of these rules for stays pending appeal.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

History Note.

287 N.C. 671; 312 N.C. 803; 322 N.C. 844; 92 N.C. App. 761; 324 N.C. 613; 354 N.C. 598; 354 N.C. 609; 363 N.C. 901.

Rule 32. Mandates of the Courts

(a) **In General.** Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) **Time of Issuance.** Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk.

History Note.

287 N.C. 671; 312 N.C. 803; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 33. Attorneys

(a) **Appearances.** An attorney will not be recognized as appearing in any case unless he or she is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or

other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that the attorney represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in argument.

(b) **Signatures on Electronically-Filed Documents.** If more than one attorney is listed as being an attorney for the party or parties on an electronically-filed document, it is the responsibility of the attorney actually filing the document by computer to: (1) list his or her name first on the document, and (2) place on the document under the signature line the following statement: "I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it."

(c) **Agreements.** Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

(d) **Limited Practice of Out-of-State Attorneys.** Attorneys who are not licensed to practice law in North Carolina, but desire to appear before the appellate courts of North Carolina in a matter shall submit a motion to the appellate court fully complying with the requirements set forth in N.C.G.S. § 84-4.1. This motion shall be filed prior to or contemporaneously with the out-of-state attorney signing and filing any motion, petition, brief, or other document in any appellate court. Failure to comply with this provision may subject the attorney to sanctions and shall result in the document being stricken, unless signed by another attorney licensed to practice in North Carolina. If an attorney is admitted to practice before the Court of Appeals in a matter, the attorney shall be required to file another motion should the case proceed to the Supreme Court. However, if the required fee has been paid to the Court of Appeals, another fee shall not be due at the Supreme Court.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 598; 354 N.C. 609; 363 N.C. 901.

Rule 33.1. Secure-Leave Periods for Attorneys

(a) **Purpose; Authorization.** In order to secure for the parties to actions and proceedings pending in the appellate division, and to the public at large, the heightened level of professionalism that an attorney

is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure-leave periods each year as provided in this rule.

(b) **Length; Number.** A secure-leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure-leave periods pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(c) **Designation; Effect.** To designate a secure-leave period, an attorney shall file a written designation containing the information required by subsection (d), with the official specified in subsection (e), and within the time provided in subsection (f). Upon such filing, the secure-leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the appellate division during that secure-leave period.

(d) **Content of Designation.** The designation shall contain the following information: (1) the attorney's name, address, telephone number, State Bar number, and e-mail address; (2) the date of the Monday on which the secure-leave period is to begin and of the Friday on which it is to end; (3) the dates of all other secure-leave periods during the current calendar year that have previously been designated by the attorney pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts; (4) a statement that the secure-leave period is not being designated for the purpose of delaying, hindering, or interfering with the timely disposition of any matter in any pending action or proceeding; (5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure-leave period in any matter pending in the appellate division in which the attorney has entered an appearance; and (6) a listing of all cases, by caption and docket number, pending before the appellate court in which the designation is being filed. The designation shall apply only to those cases pending in that appellate court on the date of its filing. A separate designation shall be filed as to any cases on appeal subsequently filed and docketed.

(e) **Where to File Designation**. The designation shall be filed as follows: (1) if the attorney has entered an appearance in the Supreme Court, in the office of the clerk of the Supreme Court, even if the designation was filed initially in the Court of Appeals; (2) if the attorney has

entered an appearance in the Court of Appeals, in the office of the clerk of the Court of Appeals.

(f) **When to File Designation.** The designation shall be filed: (1) no later than ninety days before the beginning of the secure-leave period, and (2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure-leave period.

History Note.

350 N.C. 859; 354 N.C. 609; 363 N.C. 901.

Rule 34. Frivolous Appeals; Sanctions

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under subsection (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

History Note.

287 N.C. 671; 92 N.C. App. 761; 324 N.C. 613; 350 N.C. 858; 354 N.C. 609; 363 N.C. 901.

Rule 35. Costs

(a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) **Direction as to Costs in Mandate.** The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and a designation of the party against whom such costs are taxed.

(c) **Costs of Appeal Taxable in Trial Tribunals.** Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal.

(d) **Execution to Collect Costs in Appellate Courts.** Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the state; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is subject to the penalties prescribed by law for failure to make due and proper return.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 36. Trial Judges Authorized to Enter Orders Under These Rules

(a) **When Particular Judge Not Specified by Rule.** When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) **Superior Court.** The judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special superior court judge resident in the district or assigned to hold court in the district wherein the cause is docketed;

(2) **District Court.** The judge who entered the judgment, order, or other determination from which appeal was taken; the chief district court judge of the district wherein the cause is docketed; and any judge designated by such chief district court judge to enter interlocutory orders under N.C.G.S. § 7A-192.

(b) **Upon Death, Incapacity, or Absence of Particular Judge Authorized.** When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will, upon motion of any party, designate another judge to act in the matter. Such designation will be by order entered *ex parte*, copies of which will be mailed forthwith by the clerk of the Supreme Court to the judge designated and to all parties.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 37. Motions in Appellate Courts

(a) **Time; Content of Motions; Response.** An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument.

The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within ten days after a motion is served or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination.** Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties and without awaiting a response thereto. A party who has not received actual notice of such a motion, or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation, or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

(c) **Protecting the Identity of Certain Juveniles.** Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(d) **Withdrawal of Appeal in Criminal Cases.** Withdrawal of appeal in criminal cases shall be in accordance with N.C.G.S. § 15A-1450. In addition to the requirements of N.C.G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) **Withdrawal of Appeal in Civil Cases.**

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or all parties jointly may move the appellate court in which the appeal is

pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) **Effect of Withdrawal of Appeal.** The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 609; 358 N.C. 824; 361 N.C. 732; 363 N.C. 901.

Rule 38. Substitution of Parties

(a) **Death of a Party.** No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by the personal representative, or, if there is no personal representative, by the attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) **Substitution for Other Causes.** If substitution of a party to an appeal is necessary for any reason other than death, substitution

shall be effected in accordance with the procedure prescribed in subsection (a).

(c) **Public Officers; Death or Separation from Office.** When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the person's successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 39. Duties of Clerks; When Offices Open

(a) **General Provisions.** The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) **Records to Be Kept.** The clerk of each of the courts of the appellate division shall keep and maintain the records of that court on paper, microfilm, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion, and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

History Note.

287 N.C. 671; 92 N.C. App. 761; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901.

Rule 40. Consolidation of Actions on Appeal

Two or more actions that involve common issues of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by Rule 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

History Note.

287 N.C. 671; 324 N.C. 613; 354 N.C. 598; 354 N.C. 609; 363 N.C. 901.

Rule 41. Appeal Information Statement

(a) The Court of Appeals has adopted an Appeal Information Statement (AIS) which will be revised from time to time. The purpose of the AIS is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file, and serve the AIS as set out in this rule.

(1) The clerk of the Court of Appeals shall furnish an AIS form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the AIS with the clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the AIS upon all other parties to the appeal pursuant to Rule 26. The AIS may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(3) If any party to the appeal concludes that the AIS is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within seven days of the service of the AIS and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written

statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

History Note.

287 N.C. 671; 324 N.C. 613; 113 N.C. App. 841; 354 N.C. 609; 358 N.C. 824; 363 N.C. 901.

Editor's Note.

Former Rule 41, "Title," was renumbered as Rule 42 on 3 March 1994, 113 N.C. App. 841, and then later recodified as Rule 1(a) on 2 July 2009, 363 N.C. 901.

Rule 42. [Reserved]

History Note.

113 N.C. App. 841; 354 N.C. 598; 354 N.C. 609; 363 N.C. 901.

Editor's Note.

Former Rule 41, "Title," was renumbered as Rule 42 on 3 March 1994, 113 N.C. App. 841, and then later recodified as Rule 1(a) on 2 July 2009, 363 N.C. 901.

APPENDIXES TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

APPENDIX A. TIMETABLES FOR APPEALS

Timetable of Appeals from Trial Division and Administrative Tribunals Under Articles II and IV of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (Civil)	30	Entry of Judgment (Unless Tolled)	3(c)
Cross-Appeal	10	Service and Filing of a Timely Notice of Appeal	3(c)
Taking Appeal (Administrative Tribunal)	30	Receipt of Final Administrative Tribunal Decision (Unless Statutes Provide Otherwise)	18(b)(2)
Taking Appeal (Criminal)	14	Entry of Judgment (Unless Tolled)	4(a)
Ordering Transcript (Civil, Administrative Tribunal)	14	Filing Notice of Appeal	7(a)(1) 18(b)(3)
Ordering Transcript (Criminal Indigent)	14	Order Filed by Clerk of Superior Court	7(a)(2)
Preparing and Delivering Transcript		Service of Order for Transcript	7(b)(1)
(Civil, Non-Capital Criminal)	60		
(Capital Criminal)	120		
Serving Proposed Record on Appeal		Notice of Appeal (No Transcript) or Court Reporter's Certificate of Delivery of Transcript	11(b) 18(d)
(Civil, Non-Capital Criminal)	35		
(Administrative Tribunal)	35		
Serving Proposed Record on Appeal (Capital)	70	Court Reporter's Certificate of Delivery	11(b)
Serving Objections or Proposed Alternative Record on Appeal			
(Civil, Non-Capital Criminal)	30	Service of Proposed Record	11(c)
(Capital Criminal)	35		
(Administrative Tribunal)	30	Service of Proposed Record	18(d)(2)
Requesting Judicial Settlement of Record	10	Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc.	11(c) 18(d)(3)

Judicial Settlement of Record	20	Service on Judge of Request for Settlement	11(c) 18(d)(3)
Filing Record on Appeal in Appellate Court	15	Settlement of Record on Appeal	12(a)
Filing Appellant's Brief (or Mailing Brief Under Rule 26(a))	30	Clerk's Mailing of Printed Record (60 Days in Death Cases)	13(a)
Filing Appellee's Brief (or Mailing Brief Under Rule 26(a))	30	Service of Appellant's Brief (60 Days in Death Cases)	13(a)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	28(h)
Oral Argument	30	Filing Appellant's Brief (Usual Minimum Time)	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (Civil Action Only)	15	Mandate	31(a)

Timetable of Appeals from Trial Division Under Article II, Rule 3.1, of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal	30	Entry of Judgment	3.1(a); N.C.G.S. § 7B-1001
Notifying Court-Reporting Coordinator (Clerk of Superior Court)	1 (Business)	Filing Notice of Appeal	3.1(c)(1)
Assigning Transcriptionist (Court-Reporting Coordinator)	2 (Business)	Receipt of Notification Court-Reporting Coordinator	3.1(c)(1)
Preparing and Delivering a Transcript of Designated Proceedings (Indigent Appellant)	35	Assignment by Court-Reporting Coordinator	3.1(c)(1)
Preparing and Delivering a Transcript of Designated Proceedings (Non-Indigent Appellant)	45	Assignment of Transcriptionist	3.1(c)(1)
Serving Proposed Record on Appeal	10	Receipt of Transcript	3.1(c)(2)
Serving Notice of Approval, or Objections, or Proposed Alternative Record on Appeal	10	Service of Proposed Record	3.1(c)(2)

Filing Record on Appeal When Parties Agree to a Settled Record Within 20 Days of Receipt of Transcript	5 (Business)	Settlement of Record	3.1(c)(2)
Filing Record on Appeal if *All* Appellees Fail Either to Serve Notices of Approval, or Objections, or Proposed Alternative Records on Appeal	5 (Business)	Last Date on Which *Any* Appellee Could so Serve	3.1(c)(2)
Appellant Files Proposed Record on Appeal and Appellee(s) Files Objections and Amendments or an Alternative Proposed Record on Appeal When Parties Cannot Agree to a Settled Record on Appeal Within 30 Days After Receipt of the Transcript	5 (Business)	Last Date on Which the Record Could be Settled by Agreement	3.1(c)(2)
Filing Appellant's Brief	30	Filing of Record on Appeal	3.1(c)(3)
Filing Appellee's Brief	30	Service of Appellant's Brief	3.1(c)(3)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	3.1(c)(3);28(h)

Timetable of Appeals to the Supreme Court from the Court of Appeals Under Article III of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review Prior to Determination	15	Docketing Appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or From Order of Court of Appeals Denying Petition for Rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	Filing of First Notice of Appeal	14(a)
Response to Petition for Discretionary Review	10	Service of Petition	15(d)
Filing Appellant's Brief (or Mailing Brief Under Rule 26(a))	30	Filing Notice of Appeal Certification of Review	14(d) 15(g)(2)
Filing Appellee's Brief (or Mailing Brief Under Rule 26(a))	30	Service of Appellant's Brief	14(d) 15(g)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	28(h)
Oral Argument	30	Filing Appellee's Brief (Usual Minimum Time)	29

Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (Civil Action Only)	15	Mandate	31(a)

All of the critical time intervals outlined here except those for taking an appeal, petitioning for discretionary review, responding to a petition for discretionary review, or petitioning for rehearing may be extended by order of the court in which the appeal is docketed at the time. Note that Rule 7(b)(1) authorizes the trial tribunal to grant only one extension of time for production of the transcript and that the trial tribunal lacks such authority in criminal cases in which a sentence of death has been imposed. Note also that Rule 27 authorizes the trial tribunal to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in these rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c)).

History Note.

287 N.C. 671; 306 N.C. 757; 314 N.C. 683; 324 N.C. 585; 324 N.C. 613; 327 N.C. 671; 345 N.C. 765; 354 N.C. 598; 354 N.C. 609; 357 N.C. 665; 359 N.C. 883; 363 N.C. 901.

Editor's Note.

The former "Appendix of Tables and Forms," 287 N.C. 671, was repealed and replaced with Appendixes A through F on 7 December 1982, 306 N.C. 757.

APPENDIX B. FORMAT AND STYLE

All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16- to 20-pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using font no smaller than 12-point and no larger than 14-point using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia, Century, Century Schoolbook, and Century Old Style typeface. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by Rules 3(b)(1), 3.1(b), and 4(e); the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA)
or)
(Name of Plaintiff)) From (Name) County
)
v) No. _____
)
(Name of Defendant))

****
(TITLE OF DOCUMENT)
****

The caption should reflect the title of the action (all parties named except as provided by Rules 3(b)(1), 3.1(b), and 4(e)) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a 5" line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions of the printed record on appeal that correspond to the items asterisked (*) in the sample index above would be omitted if the transcript option were selected under Rule 9(c). In their place, counsel should insert a statement in substantially the following form:

> "Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of volumes) volumes and (# of pages) pages, numbered (1) through (last page #), is electronically filed pursuant to Rule 7."

Entire transcripts should not be inserted into the printed record on appeal, but rather should be electronically filed by the court reporter pursuant to Rule 7. Transcript pages inserted into the record on appeal will be treated as a narration and will be printed at the standard page charge. Counsel should note that transcripts will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of *The Bluebook: A Uniform System of Citation*. Citations to regional reporters shall include parallel citations to official state reporters.

FORMAT OF BODY OF DOCUMENT

Paragraphs within the body of the record on appeal should be single-spaced, with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important because the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made using a parenthetical in the text: (R pp 38-40). References to the transcript, if used, should be made in a similar manner: (T p 558, line 21).

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin

to margin. Sub-issues should be presented in similar format, but block indented ½" from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase Roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by Arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

Unless filed pro se, all original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the paper, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) [LAW FIRM NAME]

By: _____
[Name]

By: _____
[Name]

Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

(Appointed) _____
[Name]

Attorney for Defendant-Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

History Note.

287 N.C. 671; 306 N.C. 757; 324 N.C. 585; 324 N.C. 613; 354 N.C. 598; 354 N.C. 609; 356 N.C. 701; 356 N.C. 706; 358 N.C. 824; 359 N.C. 883; 363 N.C. 901.

Editor's Note.

The former "Appendix of Tables and Forms," 287 N.C. 671, was repealed and replaced with Appendixes A through F on 7 December 1982, 306 N.C. 757.

APPENDIX C. ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables and that are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions for including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the printed record if the transcript option of Rule 9(c) is used and a transcript of the items exists.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(1)a
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pretrial order

*10. Plaintiff's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

*11. Motion for directed verdict, with ruling thereon

*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

*13. Plaintiff's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)

19. Judgment
20. Items, including Notice of Appeal, required by Rule 9(a)(1)i
21. Statement of transcript option as required by Rule 9(a)(1)i and 9(a)(1)l
22. Statement required by Rule 9(a)(1)m when a record supplement will be filed
23. Entries showing settlement of record on appeal, extensions of time, etc.
24. Proposed Issues on Appeal per Rule 9(a)(1)k
25. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY DECISION

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(2)a
3. Statement of organization of superior court, per Rule 9(a)(2)b
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received

9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Items required by Rule 9(a)(2)h
11. Entries showing settlement of record on appeal, extensions of time, etc.
12. Proposed issues on appeal, per Rule 9(a)(2)i

13. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(3)a
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. *Voir dire* of jurors

*10. State's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

11. Motions at close of State's evidence, with rulings thereon (* if oral)

*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

13. Motions at close of defendant's evidence, with rulings thereon (* if oral)

*14. State's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f and 10(a)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries

21. Entries showing settlement of record on appeal, extensions of time, etc.

22. Proposed issues on appeal, per Rule 9(a)(3)j

23. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 4

PROPOSED ISSUES ON APPEAL

A. Examples related to pretrial rulings in civil actions

1. Did the trial court err in denying defendant's motion to dismiss for lack of personal jurisdiction under N.C. R. Civ. P. 12(b)(2)?

2. Did the trial court err in denying defendant's motion to dismiss for failure to state a claim upon which relief may be granted under N.C. R. Civ. P. 12(b)(6)?

3. Did the trial court err in denying defendant's motion to require plaintiff to submit to an independent physical examination under N.C. R. Civ. P. 35?

4. Did the trial court err in denying defendant's motion for summary judgment under N.C. R. Civ. P. 56?

B. Examples related to civil jury trial rulings

1. Did the trial court err in admitting the hearsay testimony of E.F.?

2. Did the trial court err in denying defendant's motion for a directed verdict?

3. Did the trial court err in instructing the jury on the doctrine of last clear chance?

4. Did the trial court err in instructing the jury on the doctrine of sudden emergency?

5. Did the trial court err in denying defendant's motion for a new trial?

C. Examples related to civil non-jury trials

1. Did the trial court err in denying defendant's motion to dismiss at the close of plaintiff's evidence?

2. Did the trial court err in its finding of fact No. 10?

3. Did the trial court err in its conclusion of law No. 3?

History Note.

287 N.C. 671; 306 N.C. 757; 324 N.C. 585; 324 N.C. 613; 327 N.C. 671; 354 N.C. 598; 354 N.C. 609; 363 N.C. 901.

Editor's Note.

The former "Appendix of Tables and Forms," 287 N.C. 671, was repealed and replaced with Appendixes A through F on 7 December 1982, 306 N.C. 757.

APPENDIX D. FORMS

Captions for all documents filed in the appellate division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

NOTICES OF APPEAL

(1) To Court of Appeals from Trial Division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in (District)(Superior) Court, _____ County, (describing it).

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number,
State Bar Number, and E-mail
Address)

(2) To Supreme Court from a Judgment of the Superior Court Including a Sentence of Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment entered by (name of Judge) in Superior Court, _____ County, on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(3) To Supreme Court from a Judgment of the Court of Appeals

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under N.C.G.S. § 7A-30. The appealing party shall enclose a clear copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . . .

(Constitutional question—N.C.G.S. § 7A-30(1)) . . . directly involves a substantial question arising under the Constitution(s) (of the United States)(and)(or)(of the State of North Carolina) as follows:

(Here describe the specific issues, citing constitutional provisions under which they arise and showing how such issues were timely raised below and are set out in the record of appeal, e.g.:

Issue 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's challenge to the denial of (his)(her) Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of the constitutional right to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and

warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7-10). This constitutional issue was determined erroneously by the Court of Appeals.)

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—N.C.G.S. § 7A-30(2)) . . . was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues that are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues. Any additional issues desired to be raised in the Supreme Court when the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31

To seek review of the opinion and judgment of the Court of Appeals when petitioner contends the case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant contends that such appeal lies of right due to substantial constitutional questions under N.C.G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from N.C.G.S. § 7A-31 that provide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal arguments to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is significant to the jurisprudence of the State or of significant public interest. If the Court is persuaded to take the case, the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to Be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those that are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number, State
Bar Number, and E-mail Address)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

PETITION FOR WRIT OF CERTIORARI

To seek review: (1) by the appropriate appellate court of judgments or orders of trial tribunals when the right to prosecute an appeal has been lost or when no right to appeal exists; and (2) by the Supreme Court of decisions and orders of the Court of Appeals when no right to appeal or to petition for discretionary review exists or when such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the Rules of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; non-appealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from court reporter, statement should include estimate of date of availability and supporting affidavit from the court reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments to justify issuance of writ: e.g., reasons why interlocutory order makes it impracticable for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed issues, etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [(Superior)(District) Court, _____ County]

[North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon issues stated as follows: (here list the issues, in the manner provided for in the petition for discretionary review); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of service upon opposing parties)

(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in the petition.)

PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay under Rule 23(e) is appropriate to seek an immediate stay of execution on an *ex parte* basis pending the Court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution)(enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the

judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited under N.C.G.S. § _____ inadequate; trial judge has refused to stay execution upon motion therefor by petitioner; circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments for justice of issuing the writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if it is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court, _____ County)] [North Carolina Court of Appeals] staying (execution)(enforcement) of its (judgment)(order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (appeal)(discretionary review)(review by extraordinary writ)(now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of Service upon opposing party)

Rule 23(e) provides that in conjunction with a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included as part of the main petition or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judgment)(order)(decree) that is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual arguments for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the superior court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court, _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to N.C.G.S. § 15A-2000(d)(1), there is an automatic appeal of this matter to the Supreme Court of North Carolina, and defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the date scheduled for execution.

WHEREFORE, the defendant prays the Court to enter an order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

PROTECTING THE IDENTITY OF CERTAIN JUVENILES; NOTICE

In cases governed by Rules 3(b), 3.1(b), and 4(e), the notice requirement of Rules 3.1(b) and 9(a) is as follows:

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

FILED PURSUANT TO RULE [3(b)(1)][3.1(b)][4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

History Note.

287 N.C. 671; 306 N.C. 757; 324 N.C. 585; 324 N.C. 613; 345 N.C. 765; 354 N.C. 598; 354 N.C. 609; 361 N.C. 732; 363 N.C. 901.

Editor's Note.

The former "Appendix of Tables and Forms," 287 N.C. 671, was repealed and replaced with Appendixes A through F on 7 December 1982, 306 N.C. 757.

APPENDIX E. CONTENT OF BRIEFS

CAPTION

Briefs should use the caption as shown in Appendix B. The title of the document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF, or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (when the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

* * * * *

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the index. Page references should be made to each citation of authority, as shown in the example below.

TABLE OF CASES AND AUTHORITIES

* * * * *

ISSUES PRESENTED

The inside caption is on page 1 of the brief, followed by the Issues Presented. The phrasing of the issues presented need not be identical to that set forth in the proposed issues on appeal in the record. The

appellee's brief need not restate the issues unless the appellee desires to present additional issues to the Court.

ISSUES PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

STATEMENT OF THE CASE

If the Issues Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Issues Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, [name], was convicted of first-degree rape at the [date], Criminal Session of the Superior Court, _____ County, the Honorable [name] presiding, and received _____ sentence for the _____ felony. The defendant gave written notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on [date]. The transcript was ordered on [date] and was delivered to the parties on [date].

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on [date]. The record was filed and docketed in the Supreme Court on [date].

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under N.C.G.S. § 7A-27(b). If the appeal is based on N.C. R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory

order or determination based on a substantial right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the issues presented. The facts should be stated objectively and concisely and should be limited to those that are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used instead. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute over the facts, may restate the facts as they appear from the appellee's viewpoint.

ARGUMENT

Each issue will be set forth in uppercase typeface as the party's contention, e.g.:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

The standard of review for each issue presented shall be set out in accordance with Rule 28(b)(6).

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Rule 9(c), the appendix to the brief may be needed, as described in Rule 28 and below.

When statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief, as required by Rule 28(d)(1)c.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's typed or printed name, mailing address, telephone number, State Bar number, and e-mail address, all indented to the center of the page.

The Certificate of Service is then shown with a centered, uppercase heading. The certificate itself, describing the manner of service upon the opposing party with the complete mailing address of the party or attorney served, is followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts from the transcript considered essential to the understanding of the arguments presented.

Counsel are encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be compiled into an appendix to the brief to be placed at the end of the brief, following all signatures and certificates. Counsel should not attach the entire transcript as an appendix to support issues involving a directed verdict, sufficiency of the evidence, or the like.

The appendix should be prepared to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed. The appendix should include a table of contents, showing the items contained in the appendix and the pages in the appendix where those items appear. The appendix shall be paginated separately from the text of the brief. For example:

CONTENTS OF APPENDIX

* * * * *

The appendix will be printed as submitted with the brief to which it is appended. Therefore, clarity of image is extremely important.

History Note.

287 N.C. 671; 306 N.C. 757; 324 N.C. 585; 324 N.C. 613; 354 N.C. 598; 354 N.C. 609; 356 N.C. 701; 359 N.C. 883; 363 N.C. 901.

Editor's Note.

The former "Appendix of Tables and Forms," 287 N.C. 671, was repealed and replaced with Appendixes A through F on 7 December 1982, 306 N.C. 757.

APPENDIX F. FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows and should be submitted with the document to which they pertain, made payable to the clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, i.e., docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

An appeal bond or cash deposit of $250.00 is required in civil cases per Rules 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the court allows the petition.

Costs for printing documents are $1.75 per printed page. The appendix to a brief under the transcript option of Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief. Both appellate courts will bill the parties for the costs of printing their documents.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed, or when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first twenty-five pages and $.20 for each page thereafter.

The fee for a certified copy of an appellate court decision, in addition to photocopying charges, is $10.00.

History Note.

287 N.C. 671; 306 N.C. 757; 314 N.C. 683; 324 N.C. 585; 324 N.C. 613; 327 N.C. 671; 343 N.C. 769; 354 N.C. 598; 354 N.C. 609; 363 N.C. 901.

Editor's Note.

The former "Appendix of Tables and Forms," 287 N.C. 671, was repealed and replaced with Appendixes A through F on 7 December 1982, 306 N.C. 757.

Investiture of

Michael Rivers Morgan

Associate Justice
Supreme Court of North Carolina

Law and Justice Building
Raleigh, North Carolina

January 4, 2017
2:00 p.m.

Michael Rivers Morgan was born in Cherry Point, North Carolina to Barbara and the late Leander R. Morgan and is the eldest of five children. The family resided in Washington, DC until young Mike was the age of six, when the family relocated to his mother's hometown of New Bern, North Carolina. As an eight-year-old fifth grader in 1964, Mike was the first black student to attend all-white Trent Park Elementary School, becoming one of five black students that year to integrate the New Bern public school system city-wide. In the eleventh grade, he became the first black drum major of the marching band of New Bern Senior High School.

Upon graduating from the New Bern public school system at the age of sixteen, Mike earned his Bachelor of Arts Degree in both History and Sociology from Duke University. He went on to obtain his Juris Doctor Degree with honors from North Carolina Central University School of Law, where he served as the student body president during his final year of law school.

Justice Morgan served on the legal staff of the North Carolina Department of Justice for ten years following law school, first as a research assistant, then as an Associate Attorney General, and later as an Assistant Attorney General. In 1989, he was appointed as an Administrative Law Judge with the North Carolina Office of Administrative Hearings. While in this capacity, he administered the oath of office to his father, the first and only African-American to serve as mayor of the City of New Bern. This historic event was featured nationally in an article titled "Swearing in His Dad" in the February 19, 1990 issue of Jet Magazine. In 1994, Justice Morgan was appointed as a Wake County District Court Judge by Governor James B. Hunt, Jr., and he was subsequently elected to the judgeship by the voters of Wake County in 1996 and again in 2000. He was elected to the Superior Court bench in 2004 for an eight-year term and was re-elected to the post in 2012. In his first statewide quest for elective office, Justice Morgan was elected in November 2016 to be an Associate Justice of the Supreme Court of North Carolina.

Justice Morgan is married to the former Audrey Phillips of Raleigh. Between them, they have an adult daughter, an adult son, a daughter-in-law, and five grandchildren. Justice Morgan and his wife are active members of Rush Metropolitan AME Zion Church in Raleigh, where he serves as Chair of the Steward Board, a member of the Male Chorus, and in several other capacities.

PROGRAM

Sounding of the Gavel	Bryan Boyd Clerk Supreme Court of North Carolina
Invocation	Reverend Dr. Maurice A. Harden Pastor Rush Metropolitan AME Zion Church Raleigh, 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	Joshua H. Stein Attorney General State of North Carolina
Administration of Oath	Chief Justice Mark D. Martin
Remarks	Michael Rivers Morgan Associate Justice Supreme Court of North Carolina
Benediction	Reverend Dr. Dumas A. Harshaw, Jr. Pastor First Baptist Church Raleigh, North Carolina
Adjournment	Bryan Boyd

Reception following ceremony at
The 214 East Martin in City Market, Raleigh, N.C.

REMARKS BY JUSTICE MORGAN

Chief Justice Martin, thank you, and I will make them from a standing position, if I may. Thank you.

Thanks to all of you for being here today: those of you that are present in this courtroom, those of you that are in the overflow rooms, and those of you that are watching by way of modern technology. I thank all of you for being present. Those of you that are in the overflow rooms: all of you are certainly very important—it's just a matter of limited space here in the courtroom—but indeed I feel the presence of all of you at this time. I also want to thank those that are associated with the Supreme Court of North Carolina—my colleagues on this great bench, along with the executive assistants and the research assistants—that have all worked mightily to put all of this together to make sure that it worked, hopefully seamlessly, in terms of having this auspicious occasion to take place. I am honored and humbled to be here, and I thank all of those that are associated with the Court—the justices, the executive assistants, the research assistants, the staff, security, and all that are involved with the Administrative Office of the Courts—for welcoming me and my staff, my executive assistant and my law clerks as we join this great body.

I thank my Lord and Savior, Jesus Christ, from Whom all of my blessings flow, and I am certainly especially appreciative of this blessing that He is allowing me to experience. I thank my lovely wife, Audrey, for her love and support. You're the wind beneath my wings, and I thank you so incredibly much. To my mother, Barbara Morgan, I thank you and my late father, Leander Morgan, for giving me life and also instilling in me the values that have helped me to be what I know you and Daddy wanted me to be, and although he's not here, Ma, I know that he is. And to my precious daughter, Marissa, you are the apple of my eye. I do all that I can to make you proud of your dad, and I hope this is just another chapter in that book today. I also thank my siblings Robbie, Lisa, Gary and Marc for being what they've always been to me as we've grown up, and I appreciate you in childhood and I appreciate you in adulthood. To my mother-in-law, Rosa Rich, my father-in-law, Thomas Rich—not being able to be here at the last minute—I thank you for welcoming me into the family and allowing me to have the privilege of marrying your daughter. I'm your son-in-law, Ms. Rich, but I know I can just remove the "in-law," because you treat me like a son and I thank you so much. I thank also my sisters-in-law who again are like sisters, and I thank them so much for their support of me as well. And to those nieces and that

nephew of mine, I thank all of them for their love and for gently letting Uncle Mike know that he's not nearly as cool as he thinks he is and always making sure that I stay well-grounded in terms of how I feel that I am. I also thank my cousins, my aunts, my uncles—many of whom have traveled great distances to be here—and I am so thankful for their love and support as well.

I thank all of those who have meant something to me, whether it was in a sustained relationship or whether it was just a fleeting moment, because indeed everyone has poured into me something that has allowed me to be at this place at this particular juncture in my life, all the way from that classmate of mine in the sixth grade that punched me in the stomach for no reason because of how he saw me, all the way to that 93-year-old woman who I had the pleasure to meet in Greensboro this past year who told me that she needed me to get here because of how she saw me.

I thank as well the myriad of officials who have taken time from their busy schedules in order to be here today to share this moment with my family and me. Governor, I thank you so much for your leadership and taking time today out of your valuable schedule to be here to enjoy this with me. Likewise, I thank the Attorney General for being here as well and presenting the Commission and verifying that indeed I can be here. And I thank you so much as well for your leadership.

I thank also, lest I stray too far from what I'm hoping I am able to convey, I want to also thank those other program participants, my pastor, Reverend Doctor Maurice Harden, for his presence today, and those as well that belong to my church, Rush Metropolitan AME Zion Church, here in Raleigh. I appreciate them so much in terms of their support of me. I also appreciate those that have come from New Bern, my hometown, who are present in one of the rooms. I thank them as well and certainly thank those who attend St. Peter's AME Zion Church in New Bern, the church of my youth. I also thank those members of Omega Psi Phi Fraternity, Incorporated and Sigma Pi Phi Fraternity, Incorporated, organizations to which I am proud to be a member of each. I also, in advance, thank Reverend Doctor Dumas Harshaw of First Baptist Church, who will render the benediction, but I promise I'll be done—finished talking—by the time he comes forward.

Also, as I look out and I see all of these leaders, I am proud to join all of you on the statewide level as one of those who represents our branches of government. I am proud to associate myself and to be asso-

ciated with all of you. Indeed, North Carolina is a great state, and we're all blessed to be a part of it. I had an opportunity to travel a great deal over the course of the past year and during the course of that time, I had a chance, as I was pursuing this quest to be a member of the North Carolina Supreme Court, I had a chance to be reminded of the greatness of this great institution which I'm now privileged to join. I remember being in Halifax County, holding court for Superior Court and being in the judge's chambers and seeing a photograph of a young justice named Joseph Branch who was seated in the very seat that I take now. And I hearken back to the time when I first stepped foot in the Supreme Court and argued a case right there where I'll now be hearing lawyers present their cases and that young Joseph Branch, by the time I got to that podium, was then Chief Justice Branch.

I remembered, as I passed along during the course of the past year, attending those meetings as a member of the Susie Sharp Inn of Court—a legal society of which I was privileged to be its president six years ago—and as I thought about Susie Sharp being a Chief Justice here at this court, I remembered, hearkening back to being a young lawyer, and seeing her and Justice Bobbitt as they would walk along Fayetteville Street as I was coming and going to and from my office. I remember going to Wilson County where I held court and, after court was over, I went around the courtroom and saw a portrait of Louis Meyer. And as I saw that portrait and thought about how I appeared before him in this courtroom, I looked at the plate beneath his portrait that said, "Louis Meyer, Supreme Court Justice, Superior Court Judge," and thought about the fact that I had that same pathway, going from Superior Court Judge now successfully, to Supreme Court Justice. Fortuitously, I just happened to, along the way, run into Justice Willis Whichard, just running an everyday errand, but had a chance to see him along the way of the past year. Also, on several occasions, saw Chief Justice Parker at a local eating establishment that we both frequent, and as I thought about these folks that I was seeing, it reminded me of the greatness of the justices that have served on this august bench.

Added to that, while I have that kinship now with them, there's also that kinship that I'm proud to say that I share with Chief Justice Henry Frye, Justice G.K. Butterfield, Justice James Wynn, Justice Patricia Timmons-Goodson, and my colleague on the bench currently, Justice Cheri Beasley, because as they are the only African-Americans that have served before me on this bench, I am proud to join such an esteemed group as African-Americans who serve on this court. And while I'm honored to be able to have my name uttered in the same breath with

them, by the same token, I have much I need to do before I can rise to the lofty standards that they have set for this bench.

And as I think overall about all those names that I have mentioned, the men and the women from different geographic areas and being of different races and different genders, it just reminds me of the strength of diversity that this bench is able to enjoy and has enjoyed for the many decades that it has been in existence. I am happy and proud and humbled to be able to add to that diversity, that richness, that fullness that this court now even more reflects, because North Carolina indeed is stronger and greater and better because of its diversity.

During the course of the past year, I've had a chance to travel from Waynesville to Wilmington, from Newland to New Bern, and in the course of doing that I've found that North Carolinians want out of their court system what anyone would want, no matter where they live in this state. Whether it's Charlotte or whether it's Shallotte, they want justice. Whether it is from the Crystal Coast to the Outer Banks to the Sandhills to the Triad or the Triangle, they want fairness. Whether it is the Coastal Plains, the Piedmont or the Mountains, they want equality. And whether it is Salisbury or Gumberry or all those little towns reminiscent of Mayberry, what they want is consistency. Everybody that I met wants the same thing, and that is to make sure that the Supreme Court and all of the courts of North Carolina are fair, honest, respectful and respectable in terms of making sure that justice, fairness and equality reign supreme from this high court. That was instilled and imbued in me through all of my travels as I sought to be able to occupy a seat on this high court.

And I'm privileged to say that I'm here, I'm honored to be here, and I know I'm ready to be here. I know I'm ready to be here because I've served with some of the greatest state administrative law judges that any state can produce. I've served with some of the greatest District Court judges that any state can produce. I have served with the greatest Superior Court judges that any state can produce. I've worked with Court of Appeals judges that are as good and better than any state can produce. I've been educated by lawyers who have argued their cases fervently and competently and educated me in the law, such that I know that they're among the best ever and I know that they've equipped me as well.

And finally, as I join this esteemed group of jurists, with whom I am privileged and honored to serve, I know that they do a tremendous job,

not merely from deciding cases on this bench, but also those that have precedential value to lead the other courts to understand and allow the people to understand what the law is and what the law represents in our great state. What an honor it is to serve! I've enjoyed judicial service for the last 27 years and I am privileged to be able to now, from this seat, be broader, deeper, greater and better in service to the citizens of North Carolina in entrusting this place to me on the North Carolina Supreme Court. It's a wonderful situation, and I'm thankful for it.

In closing, God bless America, God bless North Carolina, God bless this great Supreme Court, and God bless all of you for joining me in this great occasion today, as I pledge to you and to all that I will make this, to the best of my ability, so help me God, a great day for justice in the State of North Carolina.

God bless you, and thank you.

IN RE CLIENT SECURITY FUND OF)
THE NORTH CAROLINA STATE BAR)

ORDER

This matter came on to be considered before the Supreme Court of North Carolina in conference duly assembled on the 18th day of November 2016 upon request of the North Carolina State Bar, and it appearing from information provided by the State Bar that the balance of the Client Security Fund has fallen below the minimum balance of $1,000,000 prescribed by the Court when the Fund was established, and that to restore the required minimum balance and accomplish the purpose of the Fund during 2017, it will be necessary to increase the amount of the annual assessment previously imposed by the Court in its continuing order of 2007 from Twenty-five ($25) to Fifty Dollars ($50);

Now, therefore, it is hereby ordered that the continuing order of 2007 be superseded and that for the purposes of 2017, each active member of the North Carolina State Bar be assessed the sum of Fifty Dollars ($50) in support of the Client Security Fund, it being understood that for the purposes of 2018 and all succeeding years, the amount of the assessment shall again be Twenty-five Dollars ($25), unless and until the Court enters another superseding order.

This the 18th day of November 2016.

s/Ervin, J.
JUSTICE, FOR THE COURT

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 21st day of November 2016.

s/J. Bryan Boyd
J. Bryan Boyd
Clerk of the Supreme Court

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2016-01

November 18, 2016

QUESTIONS:

The Judicial Standards Commission issues this Formal Advisory Opinion with respect to two questions relating to ethical limits on the conduct of district court judges presiding over certain domestic matters involving self-represented litigants:

1) Is it ethically permissible for a judge to question a witness regarding the statutory factors in an uncontested divorce involving only *pro se* parties?

2) Is it ethically permissible for a judge to question a witness in a child custody determination involving only *pro se* parties if necessary to allow the judge to consider the relevant statutory factors to determine the best interests of the child?

CONCLUSION:

These questions relate to the limits on a trial judge's discretion to question witnesses during hearings to grant an uncontested divorce or make a child custody determination in cases involving only self-represented (*pro se*) litigants. This opinion does not address what additional ethical duties may apply in cases where only one party is proceeding *pro se* and the other is represented. Rule 614(b) of the North Carolina Rules of Evidence allows judges to engage in such questioning, and provides that the "court may interrogate witnesses, whether called by itself or by a party." The Commission advises that a judge may ethically question witnesses under Rule 614(b) in both uncontested divorce cases and custody determinations involving only *pro se* parties, so long as it is done so (1) in order to render a full and fair decision based on adequate, reliable and credible evidence (Canon 3A(1) and (4)); (2) the questions and method of questioning are neutral and do not reasonably call into question the integrity or impartiality of the judge (Canon 2A and Canon 3); and (3) in asking the questions, the judge is "patient, dignified and courteous" (Canon 3A(3)). In addition, and as a general matter, use of Rule 614(b) may be beneficial to discharge the judge's other ethical duties to maintain order and decorum in the courtroom (Canon 3A(2)) and to dispose promptly of the business of the court (Canon 3A(5)).

DISCUSSION:

Under North Carolina law, the trial judge must at times make findings of fact supported by the evidence in child custody determinations and divorce cases. N.C.G.S. Section 50-13.2(a) identifies the relevant factors in custody awards and provides that "[a]n order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child." A trial judge also must make certain factual findings in divorce cases under N.C.G.S. Section 50-6 (divorce after separation for one year) and N.C.G.S. Section 50-10 (requiring certain findings by the trial judge). In divorce and custody determinations involving only *pro se* parties, there is the risk that the evidence presented can either be confusing or fail to address each required statutory factor that must be considered by the trial judge. Under these circumstances, therefore, a judge may properly use the Rule 614(b) authority to fulfill his or her obligations under Canon 3A(1), which requires a judge to be faithful to the law, and Canon 3A(4), which requires the judge to accord each litigant a full opportunity to be heard according to law.

Despite the benefits of exercising Rule 614(b) authority to fulfill the judge's duties under Canon 3A in these circumstances, there are several important limitations on questioning of witnesses in uncontested divorce cases and child custody cases involving only *pro se* parties. First, the judge in an effort to determine necessary facts should not offer legal assistance or advocacy on behalf of any self-represented party in violation of Canon 5F, which prohibits judges from practicing law. Second, the judge should not ask the questions in a manner that creates the appearance of bias in favor of a particular party in violation of Canon 2A and Canon 3, which both require the judge to conduct himself or herself in a manner that promotes impartiality in judicial decision-making. When judges are engaged in questioning of witnesses in these circumstances, therefore, judges must be vigilant in ensuring that the questions are neutral and fair and do not indicate a desire to provide legal assistance to or otherwise benefit a particular party. An explanation to the self-represented litigants as to why the judge must ask such questions is also permissible.

References:

North Carolina Code of Judicial Conduct Canon 1, Canon 2A, Canon 3A(1)-(5), Canon 5F
North Carolina Rule of Evidence 614(b)
N.C.G.S. Section 50-6
N.C.G.S. Section 50-10
N.C.G.S. Section 50-13.2(a)

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2017-01

May 15, 2017

QUESTION:

Is a sitting judge required to resign the judge's judicial office before becoming a candidate in a public primary or general election for the office of district attorney?

CONCLUSION:

Yes. Canon 7B(5) of the North Carolina Code of Judicial Conduct provides that a judge must "resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for non-judicial office." As the office of district attorney is a non-judicial office, resignation is required before becoming a candidate in a public primary or general election for such office.

DISCUSSION:

Canon 7B(5) of the North Carolina Code of Judicial Conduct provides that a judge must "resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for non-judicial office." This restriction serves the important purpose of furthering the fundamental values of impartiality, independence and integrity that underlie the Code of Judicial Conduct in general. While a judge's impartiality and independence would not be threatened by a campaign for another judicial office that requires the same impartiality and independence, the same cannot be said for running for an elected office that in fact depends on partiality. The Commission finds that it would be particularly concerning if a sitting judge who presides over criminal cases was simultaneously campaigning for district attorney. Campaigning for prosecutorial office could raise reasonable questions as to the judge's impartiality in cases he or she must adjudicate in accordance with the Code of Judicial Conduct. See, e.g., Canon 2B (a judge "should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"); Canon 3 ("A judge should perform the duties of the judge's office impartially and diligently"); Canon 3A(1) ("A judge should be unswayed by partisan interests, public clamor, or fear of criticism"); Canon 3C(1) ("a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned.").

With respect to Canon 7B(5) in particular, the Commission in Formal Advisory Opinion No. 2009-05 advised that the office of clerk of superior court is a judicial office of the General Court of Justice as set forth in N.C. Const. Article IV, Section 9 and N.C. Gen. Stat. Chapter 7A, Article 12. In addition, N.C. Gen. Stat. § 7A-40 provides that the "clerk of superior court in the exercise of the judicial power conferred upon him . . . is a judicial officer of the Superior Court Division . . . ." As such, resignation of judicial office is not required to seek election as clerk of court. By contrast, the District Attorney exercises no judicial power and instead prosecutes, in the name of the State of North Carolina, "all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district" and performs such other duties as authorized pursuant to N.C. Gen Stat. § 7A-61. While the District Attorney does possess some calendaring authority, *see e.g.* N.C. Gen. Stat. § 7A-49.4, and is administratively assigned to the North Carolina Administrative Office of the Courts for certain purposes, these facts do not transform the District Attorney as an officer of the court into a judicial officer who exercises judicial power in the State of North Carolina. The District Attorney thus cannot be considered a judicial officer for purposes of Canon 7B(5).

References:

Canons 2B, 3, 3A, 3C and 7B(5) of the North Carolina Code of Judicial Conduct
Formal Advisory Opinion No. 2009-05
N.C. Const. Art. IV, Section 9
N.C. Gen. Stat. Chapter 7A, Art. 12
N.C. Gen. Stat. § 7A-40
N.C. Gen. Stat. § 7A-49.4
N.C. Gen. Stat. § 7A-61

AMENDMENTS TO THE RULES CONCERNING THE ORGANIZATION OF THE 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 22, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) Executive Committee. ...

(8) Technology and Social Media Committee. It shall be the duty of this committee to stay abreast of technological developments that might enable the North Carolina State Bar to better serve and communicate with its members and the public, and to develop processes, procedures and policies for the deployment and use of social media and other means of disseminating official information.

(b) Boards ...

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on July 22, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0114 ~~Formal Hearing~~ Proceedings Before the Disciplinary Hearing Commission: General Rules Applicable to All Proceedings

(a) Applicable Procedure ~~Complaint and Service~~ - Except where specific procedures are provided by these rules, pleadings and proceedings before a hearing panel will conform as nearly as practicable with the requirements of the North Carolina Rules of Civil Procedure and for trial of nonjury civil cases in the superior courts. Any specific procedure set out in these rules controls, and where specific procedures are set out in these rules, the Rules of Civil Procedure will be supplemental only. ~~Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.~~

~~(b) Service - Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure~~.

(b)~~(c)~~ Continuances - The chairperson of the hearing panel may continue any hearing for good cause shown. After a hearing has commenced, continuances will only be granted pursuant to Rule .0116(b). ~~Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.~~

(c)~~(d)~~ Appearance By or For the Defendant ~~Designation of Hearing Committee and Date of Hearing~~ - The defendant may appear *pro se* or may be represented by counsel. The defendant may not act *pro se* if he or she is represented by counsel. ~~Within 20 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing panel from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing panel. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the last complaint upon the defendant. By agreement between the parties and with the consent of the chair, the date for the initial setting of the hearing may be set less than 90 days after the date of service on the defendant.~~

(1) *Pro Se* Defendant's Address - When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the clerk, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from the address on record with the State Bar's membership department.

(2) Notice of Appearance - When a defendant is represented by an attorney in a proceeding, the attorney will file with the clerk a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing will be sent to defendant's attorney of record in lieu of transmission to the defendant.

(d)~~(e)~~ Filing Time Limits ~~Answer~~ - Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the clerk of the commission within the time limits, if any, for such filing. The date of the receipt by the clerk, and not

the date of deposit in the mail, is determinative. ~~- Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing panel upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.~~

(e)~~(f)~~ Form of Papers ~~Default~~ - All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The clerk will require a party to refile any paper that does not conform to this size. ~~Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing panel for a default order imposing discipline, and the hearing panel will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing panel may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing panel may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing panel upon the defendant's default, the hearing panel may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.~~

(f)~~(g)~~ Subpoenas ~~Discovery~~ - The hearing panel will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing as permitted in civil cases under the North Carolina Rules of Civil Procedure. Such process will be issued in the name of the hearing panel by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. The plaintiff and the defendant have the right to invoke the powers of the panel with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents. ~~Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing panel. The chairperson of the hearing panel may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.~~

(g)~~(h)~~ Admissibility of Evidence ~~Settlement~~ - In any hearing, admissibility of evidence will be governed by the rules of evidence applicable in the superior court of North Carolina at the time of the hearing. The chairperson of the hearing panel will rule on the admissibility of evidence, subject to the right of any member of the panel to question the ruling. If a member of the panel challenges a ruling relating to admissibility of evidence, the question will be decided by a majority vote of the hearing panel. ~~The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. If the panel rejects a proposed settlement, another hearing panel must be empaneled to try the case, unless all parties consent to proceed with the original panel. The parties may submit a proposed settlement to a second hearing panel, but the parties shall not have the right to request a third hearing panel if the settlement order is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hear the disciplinary matter.~~

(h) Defendant as Witness – The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either party.

~~(i) Pre-Hearing Conference - At the discretion of the chairperson of the hearing panel, and upon five days' notice to parties, a conference may be ordered before the date set for commencement of the hearing for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the panel designated by its chairperson, who shall have the power to issue such orders as may be appropriate. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the following:~~

~~(1) the simplification of the issues;~~

~~(2) the exchange of exhibits proposed to be offered in evidence;~~

~~(3) the stipulation of facts not remaining in dispute or the authenticity of documents;~~

~~(4) the limitation of the number of witnesses;~~

~~(5) the discovery or production of data;~~

~~(6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.~~

The chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

(j) Pretrial Motions - The chairperson of the hearing panel, without consulting the other panel members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing panel. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing panel.

(k) Continuance of Hearing Date - The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing panel for good cause shown.

(l) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) Public Hearing - The defendant will appear in person before the hearing panel at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing panel 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 the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) Procedure for Pleadings and Proceedings - Pleadings and proceedings before a hearing panel will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) Filing Time Limits - Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary within the time limits, if any, for such filing.

~~The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.~~

~~(p) Form of Papers - All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.~~

~~(q) Pro Se Defendant's Address - When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.~~

~~(r) Notice of Appearance - When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.~~

~~(s) Subpoenas - The hearing panel will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the panel by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the panel with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.~~

~~(t) Admissibility of Evidence - In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing panel will rule on the admissibility of evidence, subject to the right of any member of the hearing panel to question the ruling. If a member of the hearing panel challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing panel.~~

(u) Orders - If the hearing panel finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing panel finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing panel will enter an order of discipline. In either instance, the panel will file an order which will include the panel's findings of fact and conclusions of law.

(v) Preservation of the Record - The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing panel will then consider any evidence relevant to the discipline to be imposed.

(1) Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser discipline is insufficient to adequately protect the public. The following factors shall be considered in imposing suspension or disbarment:

(A) intent of the defendant to cause the resulting harm or potential harm;

(B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;

(C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;

(D) elevation of the defendant's own interest above that of the client;

(E) negative impact of defendant's actions on client's or public's perception of the profession;

(F) negative impact of the defendant's actions on the administration of justice;

(G) impairment of the client's ability to achieve the goals of the representation;

(H) effect of defendant's conduct on third parties;

(I) acts of dishonesty, misrepresentation, deceit, or fabrication;

(J) multiple instances of failure to participate in the legal profession's self-regulation process.

~~(2) Disbarment shall be considered where the defendant is found to engage in:~~

~~(A) acts of dishonesty, misrepresentation, deceit, or fabrication;~~

~~(B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts;~~

~~(C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source;~~

~~(D) commission of a felony.~~

~~(3) In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:~~

~~(A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;~~

~~(B) remoteness of prior offenses;~~

~~(C) dishonest or selfish motive, or the absence thereof;~~

~~(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;~~

~~(E) indifference to making restitution;~~

~~(F) a pattern of misconduct;~~

~~(G) multiple offenses;~~

~~(H) effect of any personal or emotional problems on the conduct in question;~~

~~(I) effect of any physical or mental disability or impairment on the conduct in question;~~

~~(J) interim rehabilitation;~~

~~(K) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;~~

~~(L) delay in disciplinary proceedings through no fault of the defendant attorney;~~

~~(M) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;~~

~~(N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;~~

~~(O) refusal to acknowledge wrongful nature of conduct;~~

(P) remorse;

(Q) character or reputation;

(R) vulnerability of victim;

(S) degree of experience in the practice of law;

(T) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint;

(U) imposition of other penalties or sanctions;

(V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

(x) Stayed Suspensions - In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing panel as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing panel that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing panel and the time and place for the hearing. After such a hearing, the hearing panel may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing panel finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing panel will include in its order findings of fact and conclusions of law in support of its decision.

(y) Service of Orders - All reports and orders of the hearing panel will be signed by the members of the panel, or by the chairperson of the panel on behalf of the panel, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested or personal service. A defendant who cannot, with due diligence, be served

by certified mail or personal service shall be deemed served by the mailing of a copy of the order to the defendant's last known address on file with the N.C. State Bar. Service by mail shall be deemed complete upon deposit of the report or order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United Sates Postal Service.

(z) Posttrial Motions

(1) Consent Orders After Trial - At any time after a disciplinary hearing and prior to the execution of the panel's final order pursuant to Rule .0114(y) above, the panel may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

(2) New Trials and Amendment of Judgments

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing panel's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing panel which heard the disciplinary case no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

(3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section

~~will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.~~

~~(4) Effect of Filing Motion - The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.~~

.0115 Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure

(a) Complaint and Service - The counsel will file the complaint with the clerk of the commission. The counsel will cause a summons and a copy of the complaint to be served upon the defendant and will inform the clerk of the date of service. The clerk will deliver a copy of the complaint to the chairperson of the commission and will inform the chairperson of the date that service on the defendant was effected. Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.

(b) Notice Pleading - Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(c) Answer - Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the commission or of the hearing panel upon good cause shown, the defendant will file an answer to the complaint with the clerk of the commission and will serve a copy on the counsel.

(d) Designation of Hearing Panel - Within 20 days after service of the complaint upon the defendant, the chairperson of the commission will designate a hearing panel from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing panel.

(e) Scheduling Conference - The chairperson of the hearing panel will hold a scheduling conference with the parties within 20 days after the filing of the answer by the defendant unless another time is set by the chairperson of the commission. The chairperson of the hearing panel will notify the counsel and the defendant of the date, time, and venue (e.g., in person, telephone, video conference) of the scheduling conference. At the scheduling conference, the parties will discuss anticipated issues, amendments, motions, any settlement conference, and discovery. The chairperson of the hearing panel will set dates for the completion of discovery and depositions, for the filing of motions, for the pre-hearing

conference, for the filing of the stipulation on the pre-hearing conference, and for the hearing, and may order a settlement conference. The hearing date shall not be less than 60 days from the final date for discovery and depositions unless otherwise consented to by the parties. The chairperson of the hearing panel may impose sanctions against any party who willfully fails to participate in good faith in the scheduling conference or willfully fails to comply with a scheduling order issued pursuant to this section. The sanctions which may be imposed include but are not limited to those enumerated in Rule 37(b) of the NC Rules of Civil Procedure.

(f) Failure to File an Answer - Failure to file an answer admitting or denying the allegations of the complaint or asserting the grounds for failing to do so within the time specified by this rule will be grounds for entry of the defendant's default. If the defendant fails to file an answer to the complaint, the allegations contained in the complaint will be deemed admitted.

(g) Default

(1) The clerk will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise.

(2) The counsel may thereupon apply to the hearing panel for default orders as follows:

(A) For an order making findings of fact and conclusions of law. Upon such motion, the hearing panel shall enter an order making findings of fact and conclusions of law as established by the facts deemed admitted by the default. The hearing panel shall then set a date for hearing at which the sole issue shall be the discipline to be imposed.

(B) For an order of discipline. Upon such motion the hearing panel shall enter an order making findings of fact and conclusions of law as established by the facts deemed admitted by the default. If such facts provide sufficient basis, the hearing panel shall enter an order imposing the discipline deemed to be appropriate. The hearing panel may, in its discretion, set a hearing date and hear such additional evidence as it deems necessary to determine appropriate discipline prior to entering the order of discipline.

(3) For good cause shown, the hearing panel may set aside the entry of default.

(4) After an order imposing discipline has been entered by the hearing panel upon the defendant's default, the hearing panel may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(h) Discovery - Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed by the date set in the scheduling order unless the time for discovery is extended by the chairperson of the hearing panel for good cause shown. Upon a showing of good cause, the chairperson of the hearing panel may reschedule the hearing to accommodate completion of reasonable discovery.

(i) Settlement - The parties may meet by mutual consent prior to the hearing to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. If the panel rejects a proposed settlement, another hearing panel must be empanelled to try the case, unless all parties consent to proceed with the original panel. The parties may submit a proposed settlement to a second hearing panel, but the parties shall not have the right to request a third hearing panel if the settlement order is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hold a hearing upon the allegations of the complaint.

(j) Settlement Conference - Either party may request, or the chair of the hearing panel may order, appointment of a commission member to conduct a settlement conference.

(1) Such request shall be filed with the clerk of the commission and must be made no later than 60 days prior to the date set for hearing.

(2) Upon such request, the chairperson of the commission shall select and assign a commission member not assigned to the hearing panel in the case to conduct a settlement conference and shall notify the parties of the commission member assigned and the date by which the settlement conference must be held. The settlement conference must be no later than 30 days prior to the date set for hearing.

(3) The commission member conducting the settlement conference will set the date, time, and manner.

(4) At the settlement conference, the parties will discuss their positions and desired resolution and the commission member will provide input regarding the case and resolution.

(5) The commission member's evaluation and input shall be advisory only and not binding.

(6) All statements and/or admissions made at the settlement conference shall be for settlement purposes only and shall not be admissible at any hearing in the case. Evidence that is otherwise discoverable, however, shall not be excluded from admission at hearing merely because it is presented in the course of the settlement conference.

(k) Prehearing Conference and Order

(1) Unless default has been entered by the clerk, the parties shall hold a prehearing conference. The prehearing conference shall be arranged and held by the dates established in the scheduling order.

(2) Prior to or during the prehearing conference, the parties shall: exchange witness and exhibit lists; discuss stipulations of undisputed facts; discuss the issues for determination by the hearing panel; and exchange contested issues if the parties identify differing contested issues.

(3) Within five days after the date of the prehearing conference, each party shall provide the other with any documents or items identified as exhibits but not previously provided to the other party.

(4) The parties shall memorialize the prehearing conference in a document titled "Stipulation on Prehearing Conference" that shall address the items and utilize the format in the sample provided to the parties by the clerk. By the date set in the scheduling order, the parties shall submit the Stipulation on Prehearing Conference to the clerk to provide to the hearing panel.

(5) Upon five days' notice to the parties, at the discretion of the chairperson of the hearing panel, the chairperson may order the parties to meet with the chairperson or any designated member of the hearing panel for the purpose of promoting the efficiency of the hearing. The participating member of the panel shall have the power to issue such orders as may be appropriate. The venue (e.g., telephone, videoconference, in person) shall be set by the hearing panel member.

(6) The chairperson of the hearing panel may impose sanctions against any party who willfully fails to participate in good faith in a prehearing conference or hearing or who willfully fails to comply with a prehearing order issued pursuant to this section. The sanctions which may be imposed include but are not limited to those enumerated in Rule 37(b) of the NC Rules of Procedure.

(7) Evidence or witnesses not included in the Stipulation on Prehearing Conference may be excluded from admission or consideration at the hearing.

(l) Prehearing Motions - The chairperson of the hearing panel, without consulting the other panel members, may hear and dispose of all prehearing motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing panel. The following procedures shall apply to all prehearing motions, including motions which could result in dismissal of all or any of the allegations or could result in final judgment for either party on all or any claims:

(1) Parties shall file motions with the clerk of the commission. Parties may submit motions by regular mail, overnight mail, or in person. Motions transmitted by facsimile or by email will not be accepted for filing except with the advance written permission of the chairperson of the hearing panel. Parties shall not deliver motions or other communications directly to members of the hearing panel unless expressly directed in writing to do so by the chairperson of the hearing panel.

(2) Motions shall be served as provided in the NC Rules of Civil Procedure.

(3) The non-moving party shall have ten days from the filing of the motion to respond. If the motion is served upon the non-moving party by regular mail only, then the non-moving party shall have 13 days from the filing of the motion to respond. Upon good cause shown, the chairperson of the hearing panel may shorten or extend the time period for response.

(4) Any prehearing motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing panel. The chairperson shall set the time, date, and manner of oral argument. The chairperson may order that argument on any prehearing motion may be heard in person or by telephone or electronic means of communication.

(5) Any motion included in or with a defendant's answer will not be acted upon, and no response from the non-moving party will be due, unless and until a party files a notice requesting action by the deadline for filing motions set in the scheduling order. The due date for response by the non-moving party will run from the date of the filing of the notice.

.0116 Proceedings Before the Disciplinary Hearing Commission: Formal Hearing

(a) Public Hearing - The defendant will appear in person before the hearing panel at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing panel 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 the defendant.

(b) Continuance After a Hearing Has Commenced - After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(c) Burden of Proof

(1) Unless otherwise provided in these rules, the State Bar shall have the burden of proving by clear, cogent, and convincing evidence that the defendant violated the Rules of Professional Conduct.

(2) In any complaint or other pleading or in any trial, hearing, or other proceeding, the State Bar is not required to prove the nonexistence of any exemption or exception contained in the Rules of Professional Conduct. The burden of proving any exemption or exception shall be upon the person claiming its benefit.

(d) Orders - At the conclusion of any disciplinary case, the hearing panel will file an order which will include the panel's findings of fact and conclusions of law. When one or more rule violations has been established by summary judgment, the order of discipline will set out the undisputed material facts and conclusions of law established by virtue of summary judgment, any additional facts and conclusions of law pertaining to discipline, and the disposition. All final orders will be signed by the members of the panel, or by the chairperson of the panel on behalf of the panel, and will be filed with the clerk.

(e) Preservation of the Record - The clerk will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The clerk will preserve the record and the pleadings, exhibits, and briefs of the parties.

(f) Discipline - If the charges of misconduct are established, the hearing panel will consider any evidence relevant to the discipline to be imposed.

(1) Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser discipline is insufficient to adequately protect the public. The following factors shall be considered in imposing suspension or disbarment:

(A) intent of the defendant to cause the resulting harm or potential harm;

(B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;

(C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;

(D) elevation of the defendant's own interest above that of the client;

(E) negative impact of defendant's actions on client's or public's perception of the profession;

(F) negative impact of the defendant's actions on the administration of justice;

(G) impairment of the client's ability to achieve the goals of the representation;

(H) effect of defendant's conduct on third parties;

(I) acts of dishonesty, misrepresentation, deceit, or fabrication;

(J) multiple instances of failure to participate in the legal profession's self-regulation process.

(2) Disbarment shall be considered where the defendant is found to engage in:

(A) acts of dishonesty, misrepresentation, deceit, or fabrication;

(B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts;

(C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source; or

(D) commission of a felony.

(3) In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:

(A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;

(B) remoteness of prior offenses;

(C) dishonest or selfish motive, or the absence thereof;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) indifference to making restitution;

(F) a pattern of misconduct;

(G) multiple offenses;

(H) effect of any personal or emotional problems on the conduct in question;

(I) effect of any physical or mental disability or impairment on the conduct in question;

(J) interim rehabilitation;

(K) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;

(L) delay in disciplinary proceedings through no fault of the defendant attorney;

(M) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(O) refusal to acknowledge wrongful nature of conduct;

(P) remorse;

(Q) character or reputation;

(R) vulnerability of victim;

(S) degree of experience in the practice of law;

(T) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint;

(U) imposition of other penalties or sanctions;

(V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

(g) Service of Final Orders - The clerk will serve the defendant with the final order of the hearing panel by certified mail, return receipt

requested, or by personal service. A defendant who cannot, with reasonable diligence, be served by certified mail or personal service shall be deemed served when the clerk deposits a copy of the order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service addressed to the defendant's last known address on file with the NC State Bar.

.0117 Proceedings Before the Disciplinary Hearing Commission: Posttrial Motions

(a) New Trials and Amendments of Judgments (N.C. R. Civ. 59)

(1) Either party may request a new trial or amendment of the hearing panel's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(2) A motion for a new trial or amendment of judgment will be filed with the clerk no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(3) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(4) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, order oral argument.

(b) Relief from Judgment or Order (N.C. R. Civ. 60)

(1) Either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(2) A motion for relief from the final judgment or order will be filed with the clerk no later than one year after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(3) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(4) The clerk will promptly transmit the motion and any response to the chairperson of the commission, who will appoint a hearing

panel. The chairperson will appoint the members of the hearing panel that originally heard the matter wherever practicable.

(5) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, order oral argument.

(c) Effect of Filing Motion - The filing of a motion requesting a new trial, amendment of the judgment, or relief from the final judgment or order under this section will not automatically stay or otherwise affect the effective date of an order of the commission.

.0118 Proceedings Before the Disciplinary Hearing Commission: Stayed Suspension

(a) Procedures: Non-compliance with Conditions - In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. The following procedures apply during a stayed suspension:

(1) If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the clerk of the commission specifying the violation and seeking an order lifting the stay and activating the suspension. The counsel will serve a copy of the motion upon the defendant.

(2) The clerk will promptly transmit the motion to the chairperson of the commission. The chairperson will appoint a hearing panel to hold a hearing, appointing the members of the hearing panel that originally heard the matter wherever practicable. The chairperson of the commission will notify the counsel and the defendant of the composition of the hearing panel and the time and place for the hearing.

(3) At the hearing, the State Bar will have the burden of proving by the greater weight of the evidence that the defendant violated a condition of the stay.

(4) If the hearing panel finds by the greater weight of the evidence that the defendant violated a condition of the stay, the panel may enter an order lifting the stay and activating the suspension, or any portion thereof. Alternatively, the panel may allow the stay to remain in effect for the original term of the stay, may extend the term of the stay, and/or may include modified or additional conditions for the suspension to remain stayed. If the panel finds

that the defendant violated a condition of the stay, the panel may tax the defendant with administrative fees and costs.

(A) In any order lifting a stay and activating a suspension in whole or in part, the panel may include a provision allowing the defendant to apply for a stay of the activated suspension on such terms and conditions as the panel concludes are appropriate.

(B) The panel may impose modified or additional conditions: (a) which the defendant must satisfy to obtain a stay of an activated suspension; (b) with which the defendant must comply during the stay of an activated suspension; and/or (c) which the defendant must satisfy to be reinstated to active status at the end of the activated suspension period.

(C) If the panel activated the entire period of suspension, in order to be reinstated at the end of the activated suspension, the defendant must comply with the requirements of Rule .0129(b) of this subchapter and with any requirements imposed in previous orders entered by the commission.

(D) If the panel activated only a portion of the suspension, in order to be returned to active status at the end of the period of activated suspension the defendant must file a motion with the commission seeking a stay of the remainder of the original term of suspension. If the defendant is granted a stay of the remainder of the original term of suspension, the panel may impose modified and/or additional conditions with which the defendant must comply during the stayed suspension.

(5) If the panel finds that the greater weight of the evidence does not establish that the defendant violated a condition of the stay, it will enter an order continuing the stay.

(6) In any event, the panel will include in its order findings of fact and conclusions of law in support of its decision.

(b) Completion of Stayed Suspension; Continuation of Stay if Motion Alleging Lack of Compliance is Pending

(1) Unless there is pending a motion or proceeding in which it is alleged that the defendant failed to comply with the conditions of the stay, the defendant's obligations under an order of discipline end upon expiration of the period of the stay.

(2) When the period of the stay of the suspension would otherwise have terminated, if a motion or proceeding is pending in which it is alleged that the defendant failed to comply with the conditions

of the stay, the commission retains jurisdiction to lift the stay and activate all or any part of the suspension. The defendant's obligation to comply with the conditions of the existing stay remains in effect until any such pending motion or proceeding is resolved.

(c) Applying for Stay of Suspension - The following procedures apply to a motion to stay a suspension:

(1) The defendant shall file a motion for stay with the clerk and serve a copy of the motion and all attachments upon the counsel. Such motion shall be filed no earlier than 60 days before the first date of eligibility to apply for a stay. The commission will not consider any motion filed earlier than 60 days before the first date of eligibility to apply for a stay. The commission will not consider any motion unless it is delivered to the clerk and served upon the counsel contemporaneously.

(2) The motion must identify each condition for stay and state how the defendant has met each condition. The defendant shall attach supporting documentation establishing compliance with each condition. The defendant has the burden of proving compliance with each condition by clear, cogent, and convincing evidence.

(3) The counsel shall have 30 days after the motion is filed to file a response.

(4) The clerk shall transmit the motion and the counsel's response to the chairperson of the commission. Within 14 days of transmittal of the motion and the response, the chairperson shall issue an order appointing a hearing panel and setting the date, time, and location for the hearing. Wherever practicable, the chairperson shall appoint the members of the hearing panel that entered the order of discipline.

(d) Hearing on Motion for Stay

(1) The defendant bears the burden of proving compliance with all conditions for a stay by clear, cogent, and convincing evidence.

(2) Any hearing on a motion for stay will conform as nearly as practicable with the requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts.

(3) The decision to grant or deny a defendant's motion to stay a suspension is discretionary. The panel should consider whether the defendant has complied with Rule .0128 and Rule .0129 of this section, and any conditions in the order of discipline, as well as

whether reinstatement of the defendant will cause harm or potential harm to clients, the profession, the public, or the administration of justice.

(e) Order on the Motion for Stay - The hearing panel will determine whether the defendant has established compliance with all conditions for a stay by clear, cogent, and convincing evidence. The panel must enter an order including findings of fact and conclusions of law. The panel may impose modified and/or additional conditions: (a) for the suspension to remain stayed; (b) for eligibility for a stay during the suspension; and/or (c) for reinstatement to active status at the end of the suspension period. The panel may tax costs and administrative fees in connection with the motion.

~~.0115~~ .0119 Effect of a Finding of Guilt in Any Criminal Case

~~(a) Criminal Offense Showing Professional Unfitness - Any member who has been found guilty of or has tendered and has had accepted a plea of guilty or no contest to a criminal offense showing professional unfitness in any state or federal court, may be suspended from the practice of law as set out in Rule .0115(d) below.~~

~~(b)~~(a) Conclusive Evidence of Guilt - A certified copy ~~certificate~~ of the conviction of an attorney for any crime or a certified copy ~~certificate~~ of ~~the~~ a judgment entered against an attorney where a plea of guilty, *nolo contendre*, or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member. For purposes of any disciplinary proceeding against a member, such conviction or judgment shall conclusively establish all elements of the criminal offense and shall conclusively establish all facts set out in the document charging the member with the criminal offense.

~~(c) Discipline Based on Criminal Conviction - Upon receipt of a certified copy of a jury verdict showing a verdict of guilty, a certificate of the conviction of a member of a criminal offense showing professional unfitness, or a certificate of the judgment entered against an attorney where a plea of nolo contendre or no contest has been accepted by the court, the Grievance Committee, at its next meeting following notification of the conviction, may authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. §84-28(d)(1). Such a stay shall not present the North Carolina State Bar from~~

~~proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.~~

~~(d)~~(b) Interim Suspension- ~~Upon the receipt of a certificate of conviction of a member of a criminal offense showing professional unfitness, or a certified copy of a plea of guilty or no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the commission chairperson may, in the chairperson's discretion, enter an order suspending the member pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension~~. Any member who has been convicted of, pleads guilty to, pleads no contest to, or is found guilty by a jury of a criminal offense showing professional unfitness in any state or federal court may be suspended from the practice of law as set out below.

(1) The counsel shall file with the clerk of the commission and serve upon the member a motion for interim suspension accompanied by proof of the conviction, plea, or verdict.

(2) The member shall have ten days in which to file a response.

(3) The chairperson of the commission may hold a hearing to determine whether the criminal offense is one showing professional unfitness and whether, in the chairperson's discretion, interim suspension is warranted. In determining whether interim suspension is warranted, the chairperson may consider harm or potential harm to a client, the administration of justice, the profession, or members of the public, and impact on the public's perception of the profession. The parties may present additional evidence pertaining to harm or to the circumstances surrounding the offense, but the member may not collaterally attack the conviction, plea or verdict.

(4) The chairperson shall issue an order containing findings of fact and conclusions of law addressing whether there is a qualifying conviction, plea, or verdict, and whether interim suspension is warranted, and either granting or denying the motion.

(5) If the member consents to entry of an order of interim suspension, the parties may submit a consent order of interim suspension to the chairperson of the commission.

(6) The provisions of Rule .0128(c) of this subchapter will apply to the interim suspension.

~~(e) Criminal Offense Which Does Not Show Professional Unfairness - Upon the receipt of a certificate of conviction of a member of a criminal offense which does not show professional unfitness, or a certificate of judgment against a member upon a plea of no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the Grievance Committee will take whatever action, including authorizing of the filing of a complaint, it may deem appropriate. In a hearing on any such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of th4e disciplinary action as set out in G.S. §84 28(d)(1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceedings.~~

~~In addition to the other powers contained herein, in proceedings before any subcommittee or panel of the Grievance Committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the panel contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.~~

~~.0116~~ .0120 Reciprocal Discipline & Disability Proceedings

...

[Renumbering all remaining rules and internal cross-references to rules.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on July 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100 be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100 Discipline and Disability of Attorneys

.0129 Confidentiality

(a) Allegations of Misconduct or Alleged Disability - Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice;

(5) the member files an affidavit of surrender of license; ~~or~~

(6) a member is transferred to disability inactive status pursuant to Rule .0118(g). In such an instance, the order transferring the member shall be public. Any other materials, including the medical evidence supporting the order, shall be kept confidential unless and until the member petitions for reinstatement pursuant to Rule .0118(c), unless provided otherwise in the order.

(b) Disciplinary Complaints filed pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4)-

The State Bar may disclose that it filed the complaint before the Disciplinary Hearing Commission pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4):

(1) after proceedings before the Disciplinary Hearing Commission have concluded; or

(2) while proceedings are pending before the Disciplinary Hearing Commission, in order to address publicity not initiated by the State Bar.

(c)~~(b)~~ Letter of Warning or Admonition

...

(d)~~(c)~~ Attorney's Response to a Grievance

...

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE BOARD OF LAW EXAMINERS

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 22, 2016.

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 Board of Law Examiners, as particularly set forth in 27 N.C.A.C. 1C, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0100, Rules Governing the Board of Law Examiners and the Training of Law Students

.0105 Approval of Law Schools

Every applicant for admission to the ~~N.C.~~ North Carolina State Bar must meet the requirements set out in at least one of the numbered paragraphs below:

(1) …

(4) The applicant holds an LL.B. or J.D. degree from a law school that was approved for licensure purposes in another state of the United States or the District of Columbia and was licensed in such state or district., ~~and, at the time of the application for admission to the North Carolina State Bar, has been an active member in good standing of the bar in that state or district in each of the ten years immediately preceding application.~~

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Administrative Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement.

...

(c) Requirements for Reinstatement.

(1) Completion of Petition.

...

(4) Additional CLE Requirements.

If more than 1 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, 6 hours may be taken online; and 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) Bar Exam Requirement If Inactive 7 or More Years.

...

(d) Service of Reinstatement Petition.

...

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

...

(d) Requirements for Reinstatement.

(1) Completion of Petition.

...

(3) Additional CLE Requirements.

If more than 1 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, 6 hours may be taken online; and 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.

...

(e) Procedure for Review of Reinstatement Petition.

...

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Administrative Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0905 Pro Bono Practice of Out-of-State Lawyers

(a) A lawyer licensed to practice in another state but not North Carolina who desires to provide legal services free of charge to indigent persons may file a petition with the secretary addressed to the council setting forth: ...

(b) ...

(d) Upon receipt of a petition and other information satisfying the provisions this rule, the council may, in its discretion, enter an order permitting the petitioner to provide legal services to indigent persons on a *pro bono* basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1. The order shall become effective immediately upon entry by the council. A copy of the order shall be mailed to the petitioner and to the supervising member. No person permitted to practice pursuant to such an order shall pay any membership fee to the North Carolina State Bar or any district bar or any other charge ordinarily imposed upon active members, nor shall any such person be required to attend continuing legal education courses.

(e) ...

(g) Permission to practice under this rule terminates upon notice from the member identified in the petition pursuant to Rule .0905(a)(3) above, or from the nonprofit corporation employing such member, that the out-of-state lawyer is no longer supervised by any member employed by the

corporation. In addition, ~~Permission to~~ practice under this rule being entirely discretionary on the part of the council, the order granting such permission may be withdrawn by the council for good cause shown ~~pursuant to the procedure set forth in Rule .0903 of this subchapter~~ without notice to the out-of-state lawyer or an opportunity to be heard.

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 arolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1512 Source of Funds

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) ...

(b) ...

(c) No Refunds for Exemptions and Record Adjustments.

(1) Exemption Claimed. If a credit hour of attendance is reported to the board, the fee for that credit hour is earned by the board regardless of an exemption subsequently claimed by the member pursuant to Rule .1517 of this subchapter. No paid fees will be refunded and the member shall pay the fee for any credit hour reported on the annual report form for which no fee has been paid at the time of submission of the member's annual report form.

(2) Adjustment of Reported Credit Hours. When a sponsor is required to pay the sponsor's fee, there will be no refund to the sponsor or to the member upon the member's subsequent adjustment, pursuant to Rule .1522(a) of this subchapter, to credit hours reported on the annual report form. When the member is required to pay the attendee's fee, the member shall pay the fee for any credit hour reported after any adjustment by the member to credit hours reported on the annual report form.

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1517 Exemptions

(a) Notification of Board.

...

(b) Government Officials and Members of Armed Forces. The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly, full-time principal chiefs and vice-chiefs of any Indian tribe officially recognized by the United States or North Carolina state governments, and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) Judiciary and Clerks.

...

(d) Nonresidents.

...

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 2016.

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

Rule .1804 Appeal to the Council

(a) Appealable Decisions. An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because it is not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. The rejection of an application because it is incomplete shall not be appealable. ~~(Persons who appeal the board's decision are referred to herein as appellants.)~~

(b) Filing the Appeal. An appeal from a decision of the board as described in paragraph (a) may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the date of the notice of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

~~(c) Time and Place of Hearing. The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.~~

~~(d) Record on Appeal to the Council.~~

~~(1) The record on appeal to the council shall consist of all documents and oral statements by witnesses offered at any reconsideration~~

~~hearing. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.~~

~~(2) If a court reporter was present at a reconsideration hearing at the election of the appellant, the appellant shall make prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.~~

~~(e) Parties Appearing Before the Council. The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.~~

(c) ~~(f)~~ Appeal Procedure. ~~The council shall consider the appeal *en banc*. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the hearing may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.~~ The appeal to the council shall be under such rules and regulations as the council may prescribe.

(d) ~~(g)~~ Scope of Review. Review by the council shall be limited to whether the ~~appellant~~ applicant was provided with procedural rights and whether the board, or the reconsideration panel where applicable, applied the correct procedural standards and State Bar rules in rendering its decision. The ~~appellant~~ applicant shall have the burden of making a clear and convincing showing of arbitrary, capricious, or fraudulent denial of procedural rights or misapplication of the procedural standards or State Bar rules.

(e) ~~(h)~~ Notice of the Council's Decision. The ~~appellant~~ applicant shall receive written notice of the council's decision.

(f) Costs. The council may tax the costs attributable to the proceeding against the applicant.

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
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 were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2016.

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 .2400 be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2400 Certification Standards for the Family Law Specialty

.2406 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2405(b) of this subchapter; however, for the purpose of continued certification, service as a district court judge in North Carolina hearing a substantial number of family law cases may be substituted, year for year, for the experience required to meet the five-year requirement.

(b) 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 July 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 2016.

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 .2700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2700, Certification Standards for Workers' Compensation Law Specialty

.2706 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2706(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - ...

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited continuing legal education (CLE) credits in workers' compensation law and related fields during the five years preceding application. ~~Not less than six credits may be earned in any one year~~. Of the 60 hours of CLE, at least 30 hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; insurance; mediation; medical injuries, medicine, or anatomy; labor and employment law; Social Security disability law; and the law relating to long-term disability or Medicaid/Medicare claims. ~~Effective March 10, 2011,~~ Tthe specialist must earn not less than six credits in courses on workers' compensation law each year and the balance of credits may be earned in courses on workers' compensation law or any of the related fields previously listed.

(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 April 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
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 22, 2016.

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, deletions are interlined except where noted):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.0, Terminology

(h) ~~"Partner"~~ "Principal" denotes a member of a partnership for the practice of law, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law, or a lawyer having management authority over the legal department of a company, organization, or government entity.

Rule 1.17, Sale of a Law Practice

...

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing ~~partners~~ principals of law firms. *See* Rules 5.4 and 5.6.

Rule 5.1, Responsibilities of Partners Principals, Managers, and Supervisory Lawyers

(a) A ~~partner~~ principal in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a ~~partner~~ principal or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Comment

[1] ...

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's or organization's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm or organization, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated ~~senior partner~~ principal or special committee. *See* Rule 5.2. Firms and organizations, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and the ~~partners~~ principals and managing lawyers may not assume that all lawyers associated with the firm or organization will inevitably conform to the Rules.

[4] ...

[5] Paragraph (c)(2) defines the duty of a ~~partner~~ principal or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. ~~Partners~~ Principals and lawyers with comparable authority have

at least indirect responsibility for all work being done by the firm, while a ~~partner~~ principal or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a ~~partner~~ principal or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] ...

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a ~~partner~~ principal, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] ...

Rule 5.3, Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a ~~partner~~ principal, 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) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a ~~partner~~ principal or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, ~~partner~~ principal, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) ...

(b) ...

Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law

...

Comment

[1] ...

[2] There are occasions in which lawyers admitted to practice in another United States jurisdiction, but not in North Carolina, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in North Carolina under circumstances that do not create an unreasonable risk to the interests of their clients, the courts, or the public. ... 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 North Carolina. *See also* Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is ~~partner~~ a principal, 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.

...

Rule 7.5, Firm Names and Letterheads

...

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic."...A firm name that includes the surname of a deceased or retired ~~partner~~ principal is, strictly speaking, a trade name. However, the use of such names, as well as designations such as "Law Offices of John Doe," "Smith and Associates," and "Jones Law Firm" are useful means of identification and are permissible without registration with the State Bar. However, it is misleading to use the surname of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired ~~partner~~ principal may be used in the name of a law firm only if the ~~partner~~ principal has ceased the practice of law.

[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 July 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2016.

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 22nd day of September, 2016.

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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

ORDER AMENDING RULE 7 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Pursuant to the authority vested in this Court by Article IV of the Constitution of North Carolina, Rule 7 of the North Carolina Rules of Appellate Procedure is amended as follows:

Rule 7. Preparation of the Transcript; Court Reporter's Duties

(a) **Ordering the Transcript.**

(1) **Civil Cases.** Within fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to produce the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript contract with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record and upon the person designated to produce the transcript. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within fourteen days after the service of the written documentation of the appellant, shall contract for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed and the name and address of the court reporter or other neutral person designated to produce the transcript. In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

(2) **Criminal Cases.** In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall contract for the transcription of the proceedings as in civil cases.

When there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to produce the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the name, address, telephone number, and e-mail address of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) **Production and Delivery of Transcript.**

(1) **Production.** In civil cases: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript in non-capital cases and one-hundred-twenty days to produce and electronically deliver the transcript in capitally-tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the appeal entries as the "Date order delivered to transcriptionist," that person shall have sixty-five days to produce and electronically deliver the transcript in non-capital cases and one-hundred-twenty-five days to produce and electronically deliver the transcript in capitally-tried cases.

The transcript format shall comply with ~~Appendix B of these rules~~ standards set by the Administrative Office of the Courts.

Except in capitally-tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion and for good cause shown by the appellant, may, pursuant to Rule 27(c)(1), extend the time to produce the transcript for an additional thirty days. Any subsequent motions for additional time required to produce the transcript may only be made pursuant to Rule 27(c)(2) to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally-tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant.

(2) **Delivery.** The court reporter, or person designated to produce the transcript, shall electronically deliver the completed transcript to the parties, including the district attorney and Attorney General of North Carolina in criminal cases, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the transcript has been so delivered ~~and shall send a copy of such certification to the appellate court to which the appeal is taken~~. The appellant shall promptly notify the court reporter when the record on appeal has been filed. Once the court reporter, or person designated to produce the transcript, has been notified by the appellant that the record on appeal has been filed with the appellate court to which the appeal has been taken, the court reporter must electronically file the transcript with that court using the docket number assigned by that court.

(3) **Neutral Transcriptionist.** The neutral person designated to produce the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

This amendment to the North Carolina Rules of Appellate Procedure shall be effective immediately.

This amendment shall be promulgated by publication in the North Carolina Reports and posted on the Court's web site.

Ordered by the Court in Conference, this the 16th day of March, 2017.

s/Michael R. Morgan
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of March, 2017.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT BARS

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 27, 2017.

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 .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. The judicial district bar shall notify the North Carolina State Bar of its election to assess an annual membership fee each year at least thirty days prior to mailing to its members the first invoice therefore, specifying the amount of the annual membership fee, the date after which payment will be delinquent, and the amount of any late fee for delinquent payment.

(b) Accounting to State Bar. …

(c) Delinquency Date. The date upon which the annual membership fee shall be delinquent if not paid shall be not later than ninety days after, and not sooner than thirty days after, the date of the first invoice for the annual membership fee. The delinquency date shall be stated on the invoice and the invoice shall advise each member that failure to pay the annual membership fee must be reported to the North Carolina State Bar and may result in suspension of the member's license to practice law.

(d) Late Fee. Each judicial district bar may impose, but shall not be required, to impose a late fee of any amount not to exceed fifteen dollars ($15.00) for non-payment of the annual membership fee on or before the stated delinquency date.

(e) Members Subject to Assessment. ….

(f) Members Exempt from Assessment…..

(g) Hardship Waivers. ….

(h) Reporting Delinquent Members to State Bar. ~~Twelve~~ Three to six months after the delinquency date ~~of the first invoice~~ for the annual membership fee, the judicial district bar shall report to the North Carolina State Bar all of its members who have not paid the annual membership fee or any late fee.

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 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

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 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

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 27, 2017.

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 discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0116 Proceedings Before the Disciplinary Hearing Commission: Formal Hearing

(a) Public Hearing

(1) The defendant will appear in person before the hearing panel at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing panel 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 the defendant.

(2) Media Coverage -- Absent a showing of good cause, the chairperson of the hearing panel shall permit television, motion picture and still photography cameras, broadcast microphones and recorders (electronic media) to record and broadcast formal hearings. A media outlet shall file a motion with the clerk of the commission seeking permission to utilize electronic media to record or broadcast a hearing no less than 48 hours before the hearing is scheduled to begin. The chairperson will rule on the motion no less than 24 hours before the hearing is scheduled to begin. Any order denying a motion to permit the use of electronic media to record or broadcast a formal hearing shall contain written findings of fact setting forth the facts constituting good cause to support that decision. Except as otherwise provided in this paragraph, the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts (Electronic Media and Still Photography Coverage of Public Judicial Proceedings) shall apply to electronic media coverage of hearings before the commission.

(b) Continuance After a Hearing Has Commenced …

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 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

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 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF 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 27, 2017.

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 Plan of Legal Specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2500 Certification Standards for the Criminal Law Specialty

Section .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 - ….

(b) ….

(c) ….

(d) Peer Review

(1) Each applicant for certification as a specialist in criminal law and the subspecialty of state criminal law must make a satisfactory showing of qualification through peer review.

(2) …..

(3) …..

(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~~ eight recent cases ~~serious (Class G or higher) felony cases~~ tried by the applicant to verdict or entry of order.

(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 January 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

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 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATIONS PRACTICING LAW

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 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning organizations practicing law, as particularly set forth in 27 N.C.A.C. 1E, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Section .0100, Regulations for Organizations Practicing Law

.0103 Registration with the North Carolina State Bar

(a) Registration of Professional Corporation ….

(b) Registration of a Professional Limited Liability Company ….

(e) Renewal of Certificate of Registration - The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) Renewal of Certificate of Registration for Professional Corporation

….

(2) Renewal of Certificate of Registration for a Professional Limited Liability Company …

(3) Renewal Fee - An application for renewal of a certificate of registration for either a professional corporation or a professional limited liability company shall be accompanied by a renewal fee of $25;

(4) Refund of Renewal Fee

…

(5) Failure to Apply for Renewal of Certificate of Registration - In the event a professional corporation or a professional limited liability

company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, ~~the secretary shall send a notice to shows cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee and a late fee of $10, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application, the renewal fee, and the late fee within said thirty days, or to show cause within said time period, shall result in the suspension of~~ the certificate of registration for the delinquent professional corporation or professional limited liability company shall be suspended and ~~the issuance of a notification to~~ the secretary of state will be notified of the suspension of said certificate of registration;

(6) Reinstatement of Suspended Certificate of Registration - Upon (a) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees and late fees; and (b) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

(7) Inactive Status Pending Dissolution

...

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 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of March, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

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 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendment to the Rules of Professional Conduct of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 1.6, Confidentiality of Information, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.6, Confidentiality of Information

(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) …

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client, ~~and~~ Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients<u>, and Rule 8.6 for a lawyer's duty to disclose information to rectify a wrongful conviction.</u>

[2] …

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 of Professional Conduct 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 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of March, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

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This the 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 3.8, Special Responsibilities of a Prosecutor, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 3.8, Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) ….

(g) When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:

(1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence or information to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction; or

(2) if the conviction was obtained in another jurisdiction, promptly disclose that evidence or information to the prosecutor's office in the jurisdiction of the conviction or to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction of conviction.

(h) A prosecutor who concludes in good faith that evidence or information is not subject to disclosure under paragraph (g) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict or to uphold a conviction. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence….

[2] ….

[8] When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a defendant did not commit an offense for which the defendant was convicted in the prosecutor's district, paragraph (g)(1) requires prompt disclosure to the defendant. However, if disclosure will harm the defendant's interests or the integrity of the evidence or information, disclosure should be made to the defendant's lawyer if any. Disclosure must be made to North Carolina Indigent Defense Services (NCIDS) or, if appropriate, the federal public defender, under all circumstances regardless of whether disclosure is also made to the defendant or the defendant's lawyer. If there is a good faith basis for not disclosing the evidence or information to the defendant, disclosure to NCIDS or the federal public defender and to any counsel of record satisfies this rule. If the conviction was obtained in another jurisdiction, paragraph (g)(2) allows the prosecutor promptly to disclose the evidence or information to the prosecutor's office in the jurisdiction of conviction in lieu of any other disclosure. The prosecutor in the jurisdiction of the conviction then has an independent duty of disclosure under paragraph (g)(1). In lieu of disclosure to the prosecutor's office in the jurisdiction of conviction, paragraph (g)(2) requires disclosure to the defendant or to the defendant's lawyer, if any, and to NCIDS or, if appropriate, the federal public defender.

[9] The word "new" as used in paragraph (g) means evidence or information unknown to a trial prosecutor at the time of the conviction or, if known to a trial prosecutor at the time of the conviction, never previously disclosed to the defendant or defendant's legal counsel. When analyzing new evidence or information, the prosecutor must evaluate the substance of the information received, and not solely the credibility of the source, to determine whether the evidence or information creates a reasonable likelihood that the defendant did not commit the offense.

[10] Nevertheless, a prosecutor who receives evidence or information relative to a conviction may disclose that evidence or information as directed in paragraph (g)(1) and (2) without examination to determine whether it is new, credible, or creates a reasonable likelihood that a convicted defendant did not commit an offense. A prosecutor who receives evidence or information subject to disclosure under paragraph (g) does

not have a duty to undertake further investigation to determine whether the defendant is in fact innocent.

[11] A prosecutor's independent judgment, made in good faith, that the new evidence or information is not of such nature as to trigger the obligations of paragraph (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

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 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

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 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct be amended to include an entirely new rule concerning a lawyer's duty upon receiving information about a possible wrongful conviction, which will be codified as 27 N.C.A.C. 2, Rule 8.6 and will read as follows:

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 8.6, Information About a Possible Wrongful Conviction

(a) Subject to paragraph (b), when a lawyer knows of credible evidence or information, including evidence or information otherwise protected by Rule 1.6, that creates a reasonable likelihood that a defendant did not commit the offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence or information to the prosecutorial authority for the jurisdiction in which the defendant was convicted and to North Carolina Office of Indigent Defense Services or, if appropriate, the federal public defender for the district of conviction.

(b) Notwithstanding paragraph (a), a lawyer shall not disclose evidence or information if:

(1) the evidence or information is protected from disclosure by law, court order, or 27 N.C. Admin. Code Ch. 1B §.0129;

(2) disclosure would criminally implicate a current or former client or otherwise substantially prejudice a current or former client's interests; or

(3) disclosure would violate the attorney-client privilege applicable to communications between the lawyer and a current or former client.

(c) A lawyer who in good faith concludes that information is not subject to disclosure under this rule does not violate the rule even if that conclusion is subsequently determined to be erroneous.

(d) This rule does not require disclosure if the lawyer knows an appropriate governmental authority, the convicted defendant, or the defendant's lawyer already possesses the information.

COMMENT

[1] The integrity of the adjudicative process faces perhaps no greater threat than when an innocent person is wrongly convicted and incarcerated. The special duties of a prosecutor with respect to disclosure of potentially exonerating post-conviction information are set forth in Rule 3.8(g) and (h). However, as noted in the comment to Rule 3.3, *Candor Toward the Tribunal*, the special obligation to protect the integrity of the adjudicative process applies to all lawyers. Under Rule 3.3(b), this obligation may require a lawyer to disclose fraudulent testimony to a tribunal even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. Similarly, the need to rectify a wrongful conviction and prevent or end the incarceration of an innocent person justifies extending the duty to disclose potentially exculpatory information to all members of the North Carolina State Bar, regardless of practice area and limited only by paragraph (b). It also justifies the disclosure of information otherwise protected by Rule 1.6. For prosecutors, compliance with Rule 3.8(g) and (h) constitutes compliance with this rule.

[2] This rule may require a lawyer to disclose credible evidence or information, whether protected by Rule 1.6 or not, if the evidence or information creates a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted. To determine whether disclosure is required, a lawyer must not only consider the credibility of the evidence or information and its source but must also evaluate the substance of the evidence or information to determine whether it creates a reasonable likelihood that the defendant did not commit the offense.

[3] The duty to disclose is qualified in paragraph (b) by legal obligations and client loyalty. A lawyer may not disclose evidence or information if prohibited by law, court order, or the administrative rule that makes the proceedings of the State Bar's Grievance Committee confidential (27 N.C. Admin. Code Ch. 1B §.0129). The latter prohibition insures a lawyer's response to a grievance does not inadvertently impose a duty to disclose on the lawyers in the State Bar Office of Counsel or on the State Bar Grievance Committee. In addition, paragraph (b) specifies that a lawyer may not disclose evidence or information if doing so would criminally implicate the lawyer's client or the evidence or information was received in a privileged communication between the client and the lawyer. Disclosure is also prohibited when it would result in substantial prejudice the client's interests. Substantial prejudice to a client's

interests includes bodily harm, loss of liberty, or loss of a significant legal right or interest such as the right to effective assistance of counsel or the right against self-incrimination.

[4] When disclosure of information protected by Rule 1.6 is permitted, the lawyer should counsel the client confidentially, advising the client of the lawyer's duty to disclose and, if possible, seeking the client's cooperation.

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 27, 2017.

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s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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This the 16th day of March, 2017.

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 17th day of March, 2017.

s/Michael R. Morgan
For the Court

ORDER WAIVING RULE 2A, 2B, AND 7B OF THE RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT DURING PILOT CLERK MEDIATION PROGRAM

WHEREAS, on May 23, 2005, the General Assembly enacted G.S. § 7A-38.3B establishing a Clerk Mediation Program (Program) to provide for mediation of matters pending before clerks of superior court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) provided that this Court adopt program rules and amendments to rules implementing the Program, and

WHEREAS, this Court adopted Rules Implementing Mediation In Matters Before the Clerk of Superior Court (Rules) on January 26, 2006, and

WHEREAS, the Program was implemented without benefit of a pilot phase, and

WHEREAS, this Court is aware that the Program has been underutilized since its inception, and

WHEREAS, in an effort to reinvigorate the Program, the NC Dispute Resolution Commission (NCDRC) has established an Ad Hoc Clerk Mediation Program Committee (Committee) and charged it with establishing a pilot program to evaluate the viability and potential of the Program, and

WHEREAS, Rules 2.A and 2.B of the Rules provide that mediators conducting mediations referred to the Program are to be certified by the NCDRC, and

WHEREAS, Rule 7.B of the Rules provides that clerk appointed mediators conducting mediations referred to the Program shall be compensated at the rate of $150.00 per hour for mediation services, and

WHEREAS, Clerks who have agreed to participate in the pilot program have expressed concern that Rules 2.A, 2.B, and 7.B limit their ability to recruit mediators in whom they have the utmost confidence, who are willing to travel to their counties, and who are willing and able to volunteer their services, and

WHEREAS, the NCDRC has recommended that the requirements of Rules 2.A and 2.B and 7.B be waived during the duration of the pilot in order to permit parties and clerks in counties participating in the pilot maximum flexibility to select and appoint mediators in whom they have confidence, whether certified or not, and to permit those mediators to waive their fees for the first two hours of mediation.

NOW, THEREFORE, pursuant to G.S. § 7A-38.3B and the Rules Implementing Mediation In Matters Before the Clerk of Superior Court, this Court waives the requirements of Rules 2A, 2B, and 7.B of the Rules Implementing Mediation In Matters Before the Clerk of Superior Court, in pilot site counties for the duration of the pilot in order to permit both certified and non-certified mediators, in the discretion of pilot site clerks and the Commission, to serve pilot sites and to permit mediators to waive their fees for the first two (2) hours of pilot program mediations.

Adopted by the Court in conference the 16th day of March, 2017.

s/Michael R. Morgan
For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 16th day of March, 2017.

s/J. Bryan Boyd
J. Bryan Boyd
Clerk of the Supreme Court

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2017-02

September 13, 2017

QUESTION:
Under what circumstances can delay in convening court sessions rise to the level of a violation of the Code of Judicial Conduct?

CONCLUSION:
A judge has an ethical obligation under Canon 3A(4) to "dispose promptly of the business of the court." This obligation requires not only promptness in issuing decisions and orders, but punctuality in convening court. In addition, judges have ethical obligations under Canon 1 and Canon 2 to observe personal standards of conduct that ensure public confidence in the integrity, impartiality and independence of the judiciary. Canon 3A(3) further requires a judge to be "courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity." Finally, Canon 3B(1) provides that a judge should diligently discharge the judge's administrative responsibilities and maintain professional competence in judicial administration. Repeated or unjustified tardiness of a judge in opening court sessions runs afoul of these ethical rules and can lead to the imposition of judicial discipline. If a recess is required to attend to other official business that must be considered before the court session may proceed, the judge should as a best practice open court on time and communicate either personally or through court staff to those present in the courtroom when court will be reconvened and the reasons for the recess.

DISCUSSION:
Delay is one of the most common complaints of judicial misconduct, whether it arises from excessive grants of continuances, delays in rendering decisions under advisement, lengthy periods of time in issuing written orders, or the judge's regular tardiness in appearing at scheduled court times. These delays raise the costs of litigation, increase frustration with the judicial system and diminish public confidence in the courts. This concern was recently emphasized in the Final Report of the Public Trust and Confidence Committee of the North Carolina Commission on the Administration of Law and Justice, which noted as follows: "As stewards of public resources and individual citizens' time, Judicial Branch officials must strive to operate a court system that facilitates the just, timely, and economical scheduling and disposition of

cases." Final Report, North Carolina Commission of the Administration of Law and Justice, March 2017, at 69.

In the specific context of convening court sessions, a judge's ethical duty under Canon 3A(5) to "dispose promptly of the business of the court" includes the duty to be punctual and open court sessions as scheduled. Tardiness in convening court also calls into question whether a judge is meeting his or her obligation under Canon 3B(1) to "diligently discharge the judge's administrative duties and maintain professional competence in judicial administration. In addition, Canon 1 and Canon 2A of the Code of Judicial Conduct require judges to observe personal standards of conduct that ensure public confidence in the integrity, impartiality and independence of the judiciary. Canon 3A(3) further requires a judge to be "courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity." Repeated or unjustified delays in convening court sessions threaten public confidence in the judiciary and display a lack of courtesy towards litigants, lawyers, victims, law enforcement, court personnel and all those who are required to be punctual in arriving to court. A judge's tardiness also exacerbates wait times associated with calendar calls and increases the costs of litigation for represented litigants. Poor communication about when the judge will arrive and the reasons for the delay heightens frustration among individuals present in the courtroom, many of whom have taken time away from work or traveled long distances to appear at the required time under threat of sanction if late. In these circumstances, when a judge repeatedly or unjustifiably fails to open court on time, the attending frustration impairs public confidence in the courts.

Accordingly, a violation of the Code of Judicial Conduct occurs where a judge engages in repeated or unjustified tardiness in convening court. A judge should open court on time, and if a recess is required to attend to other official business that must be considered before the court session continues, the judge should as a best practice open court on time and communicate either personally or through court staff to those present in the courtroom when court will be reconvened and the reasons for the recess.

References:

Canons 1, 2, 3A and 3B of the North Carolina Code of Judicial Conduct

Final Report, North Carolina Commission of the Administration of Law and Justice (March 2017)

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

JURISDICTION—Continued

has the power to define the jurisdiction of the Court of Appeals. N.C.G.S. § 7A-32(c) empowers the Court of Appeals to review trial court rulings on motions for appropriate relief by writ of certiorari, and this default rule controls unless a more specific statute restricts jurisdiction. Here, if the trial court's sua sponte motion was pursuant to subsection 15A-1415(b), the holding in *State v. Stubbs*, 368 N.C. 40 (2015), controlled and the Court of Appeals had jurisdiction. And if the motion was pursuant to subsection 15A-1420(d), the Court of Appeals had jurisdiction because nothing in the General Statutes revoked the jurisdiction conferred by subsection 7A-32(c). **State v. Thomsen, 22.**

JUVENILES

Breaking and entering investigation—interview—request for parent—ambiguous—In a prosecution for felonious breaking and entering and other charges in which a sixteen-and-one-half-year-old defendant was interviewed by investigators, his statement, "Um, can I call my mom?" was not a clear and unambiguous invocation of his right to have his parent or guardian present during questioning. Defendant never gave any indication that he wanted to have his mother present for his interrogation, did not condition his interview on first speaking with her, and had just signed the juvenile rights form expressing his desire to proceed on this own. The purpose of the call was never established and law enforcement officers had no duty to ask clarifying questions or to cease questioning. Defendant's statutory juvenile rights, which included the equivalent of the Miranda warnings, were not violated. **State v. Saldierna, 401.**

Confession—two-pronged review—A breaking and entering case involving a sixteen-and-one-half-year-old defendant was remanded where defendant asked during an interview with an investigator if he could call his mom, did so, and confessed after the conversation with the investigator resumed. The admissibility of a juvenile defendant's confession is a two-pronged inquiry. Even though defendant's N.C.G.S. § 7B-2101(a)(3) right was not violated, defendant's confession is not admissible unless he knowingly, willingly, and understandingly waived his rights. The Court of Appeals did not reach this question. **State v. Saldierna, 401.**

LANDLORD AND TENANT

Public housing—drug activity—ejectment—exercise of discretion by landlord—Summary ejectment was inappropriate in a case involving drug activity in federally subsidized housing where plaintiff-Housing Authority did not exercise discretion before pursuing defendant's eviction, as required by federal law. **E. Carolina Reg'l Housing Auth. v. Lofton, 8.**

LARCENY

Mistaken deposit—constructive possession—The State presented sufficient evidence to support defendant's larceny convictions where defendant, a truck driver and independent contractor, passively but knowingly received an overpayment by direct deposit and then proceeded to withdraw the excess funds against the wishes of the rightful possessor. The company for which defendant was driving (West) had the intent and capability to maintain control and dominion over the funds by effecting a reversal of the deposit; the fact that the reversal order was not successful did not indicate that West lacked constructive possession. Defendant had no possessory interest in the funds for the same reasons. **State v. Jones, 631.**

MOTOR VEHICLES—Continued

had committed a driving while impaired offense. The record showed that defendant stopped his vehicle at a congested intersection in the middle of the day, left the vehicle while wearing his sweater backwards, stumbled across four lanes of traffic, had a bottle of rum in his possession, and had vomited on himself and in his vehicle before exiting the vehicle. When police arrived, defendant was incoherent with slurred speech; his eyes were bloodshot; he smelled strongly of alcohol; and he could not stand or sit without assistance. Reasonable grounds in this context is equivalent to probable cause. **State v. Romano, 678.**

RAPE

Attempted—evidence sufficient—completed rape—Evidence tending to show that a completed rape occurred in the victim's bedroom was sufficient to support defendant's conviction for attempted rape of a child, and the trial court did not err in denying defendant's motion to dismiss the attempted rape charge for insufficiency of the evidence. **State v. Baker, 586.**

SEARCH AND SEIZURE

Driving while impaired—blood draw—unconscious—In a prosecution for impaired driving, the trial court correctly suppressed blood test results taken from a highly inebriated defendant at a hospital without a warrant. The officer did not attempt to obtain a warrant for defendant's blood, did not believe any exigency existed, and instead expressly relied upon the statutory authorization set forth in N.C.G.S. § 20-16.2(b), allowing the taking and testing of blood from a person who has committed a driving while impaired offense if the person is unconscious or otherwise incapable of refusal. However, unlike breath tests, blood tests require an intrusive piercing of the skin and give law enforcement a sample that can be preserved and from which more than a blood alcohol reading can be determined. The United States Supreme Court has concluded that the Fourth Amendment does not permit warrantless blood tests incident to arrest for drunk driving. The analysis here is limited to N.C.G.S. § 20-16.2(b) and does not address any other provision of the implied-consent statute. **State v. Romano, 678.**

Search warrant—house—probable cause—Where there was an anonymous tip that the resident (Michael Turner, with whom defendant was staying) was "selling, using and storing narcotics at" his house, and where a detective's affidavit in support of the search warrant listed his training and experience, Turner's history of drug-related arrests, and the detective's discovery of both marijuana residue and correspondence addressed to Turner in trash from Turner's residence, under the totality of the circumstances there was probable cause for issue of a search warrant for the house. **State v. Lowe, 360.**

Search warrant—house—rental car in curtilage—nature of items to be seized—A rental car parked in the curtilage of a residence was within the scope of a search warrant and could be searched pursuant to the warrant to search the house. It was undisputed that when officers arrived at the target residence to execute the warrant, the rental car parked in the driveway was within the curtilage of the home and the nature of the items to be seized was such that the items could be easily stored in a vehicle. **State v. Lowe, 360.**