368 N.C.—No. 2 **Pages 300-435**

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING *PRO BONO* PRACTICE; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION, AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA; AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP; AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM; ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA CODE OF JUDICIAL CONDUCT; THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MARCH 16, 2016

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE SUPREME COURT
OF
NORTH CAROLINA

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[1] Appointed 3 November 2015.

SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 25 SEPTEMBER 2016 AND 6 NOVEMBER 2015

ORDERS

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

HEADNOTE INDEX

APPEAL AND ERROR

Constitutionality of an act of General Assembly—required holding—record on appeal—Appeals from orders by a three-judge panel in Wake County concerning the constitutionality of the Boone Act were dismissed where two orders entered on 29 December 2014 did not hold that an act of the General Assembly was facially unconstitutional, as required by the plain text of the statute under which appeal was sought, N.C.G.S. § 7A-27(a1) (2014). Appeal of a subsequent July order that was otherwise appealable by right under that statute was premature because the parties had not settled and filed an appropriate record on appeal. **Town of Boone v. State of North Carolina, 420.**

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Findings—required only for material conflict—Case law requires findings of fact at a suppression hearing only when there is a material conflict in the evidence and allows the trial court to make these findings either orally or in writing. Cases that suggested otherwise were disavowed. **State v. Bartlett, 309.**

Material conflict—finding by second judge—suppression hearing required—A new evidence suppression hearing was required where one judge made an inadequate oral finding resolving a material conflict in the evidence, left office, and another judge resolved the evidentiary conflict without holding another suppression hearing. **State v. Bartlett, 309.**

GUARANTY

Guarantors—anti-deficiency legislation—waiver—Guarantors were among the class of obligors eligible to claim the benefit of N.C.G.S. § 45-21.36. A guarantor is protected by the provision of statute that provides for a judicial method of determining the indebtedness. It is not the type of "defense or offset" which is subject to waiver. Further, because anti-deficiency legislation is so narrowly tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guaranty agreement would violate public policy. **High Point Bank and Trust Co. v. Highmark Properties, LLC, 301.**

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Injury to personal property—owned by multiple entities—The Court of Appeals erred by holding that the indictment charging defendant with injury to personal property was fatally flawed for failure to allege that each owner of the property was an entity capable of owning property. When an indictment alleges that injury to personal property was committed against multiple entities, at least one of which was capable of owning property, the indictment is not facially invalid. **State v. Ellis, 342.**

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Discipline—improper courtroom conduct—In a judicial discipline case involving inappropriate conduct by a district court judge in the courtroom, the North Carolina Supreme Court concluded that the Judicial Standards Commission's findings of fact were supported by clear, cogent, and convincing evidence in the record and that its findings of fact supported its conclusions of law. The Supreme Court concluded and adjudged that the judge should be publicly reprimanded. **In re Hill, 410.**

LOANS

Refinancing—no misrepresentation by lender—small business loan not available—BB&T was entitled to summary judgment in its favor as to all of plaintiff's claims and as to all but the interest claim stated in BB&T's counterclaim in a contract and tort action arising from a commercial loan from BB&T to plaintiff. The small business, government-backed loan that plaintiff expected was not available and BB&T made a new commercial loan to plaintiff, with subsequent modifications, thereby consolidating plaintiff's debts and giving him additional cash. It was undisputed that this occurred several months after plaintiff became aware that the desired government-backed loan was not available and thus learned of his potential claims against BB&T. The record reveals no misrepresentation inducing plaintiff to obtain this second loan, and plaintiff then executed a series of six modifications, all of which unambiguously reaffirmed the obligation and expressly waived any offsets and defenses against the indebtedness or the bank. **Ussery v. Branch Banking and Trust Co., 325.**

PARTIES

Guarantors—permissive joinder—Plaintiff argued that joinder of Highmark was improper because N.C.G.S. § 26-12 did not apply to guarantors in this case. However, the law allows permissive or discretionary joinder and that statute allows joinder for the explicit purpose of giving the surety access to all defenses available to the

SCHEDULE FOR HEARING APPEALS DURING 2016

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

February 15, 16, 17
March 21, 22
May 17, 18
August 29, 30, 31
September 1
October 10, 11, 12, 13
November 15 ,16, 17, 18
December 12, 13, 14, 15

STATE OF NORTH CAROLINA
v.
BO ANDERSON TAYLOR

No. 1A15

Filed 25 September 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 585 (2014), finding error in judgments entered on 16 September 2011 by Judge Charles H. Henry in Superior Court, New Hanover County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 2 September 2015.

Roy Cooper, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *for defendant-appellee.*

PER CURIAM.

For reasons stated in the dissenting opinion, the opinion of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for consideration of defendant's remaining issue on appeal.

REVERSED AND REMANDED.

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

HIGH POINT BANK AND TRUST COMPANY
v.
HIGHMARK PROPERTIES, LLC, MITCHELL BLEVINS, CYNTHIA BLEVINS, CHARLES WILLIAMS, AND JANICE WILLIAMS

No. 8PA14

Filed 25 September 2015

1. Guaranty—guarantors—anti-deficiency legislation—waiver

Guarantors were among the class of obligors eligible to claim the benefit of N.C.G.S. § 45-21.36. A guarantor is protected by the provision of statute that provides for a judicial method of determining the indebtedness. It is not the type of "defense or offset" which is subject to waiver. Further, because anti-deficiency legislation is so narrowly tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guaranty agreement would violate public policy.

2. Parties—guarantors—permissive joinder

Plaintiff argued that joinder of Highmark was improper because N.C.G.S. § 26-12 did not apply to guarantors in this case. However, the law allows permissive or discretionary joinder and that statute allows joinder for the explicit purpose of giving the surety access to all defenses available to the primary borrower. Guarantors were permitted to move for joinder and the trial court committed no abuse of discretion by joining Highmark to this action.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 750 S.E.2d 886 (2013), finding no error in orders entered on 19 September 2011 and 4 October 2011 by Judge Ronald E. Spivey and a judgment entered on 11 July 2012 by Judge Stuart Albright, in Superior Court, Guilford County. On 6 March 2014, the Supreme Court allowed defendants' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 17 November 2014.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for plaintiff-appellant/appellee.

Jenkins Law Group PLLC, by Ellis B. Drew, III and Ann G. Sugg, for defendant-appellees/appellants.

Goldsmith, Goldsmith & Dews, P.A., by Frank Goldsmith; and Martin & Jones, PLLC, by G. Christopher Olson, for North Carolina Advocates for Justice, amicus curiae.

JACKSON, Justice.

In this case we consider whether non-mortgagor guarantors of a loan may raise the anti-deficiency defense set forth in section 45-21.36 of the North Carolina General Statutes in order to reduce their outstanding indebtedness to the primary borrower's lender. In addition, we consider whether the primary borrower properly was joined in the action. We hold that joinder was proper and that, irrespective of the primary borrower's presence in the litigation, guarantors may assert the anti-deficiency defense.

Defendant Highmark Properties, LLC (Highmark) is a North Carolina limited liability company involved in real estate development. Defendants Mitchell and Cynthia Blevins and Charles and Janice Williams (guarantors) are the members of the LLC.

Plaintiff issued two loans to Highmark: one in January 2007 for $4,700,000 (the First Note) and the other in May 2007 for $1,750,000 (the Second Note). In addition to promissory notes executed by Highmark, the loans were guaranteed by guarantors and were secured by deeds of trust on two parcels of real property owned by Highmark in Forsyth County. Each guarantor executed "Commercial Guaranty" forms supplied by the Bank on 18 January 2007 and on 2 May 2007.

Subsequently, Highmark defaulted, leaving an indebtedness of $3,541,356 on the First Note and $1,336,556 on the Second Note as of 8 February 2011. On 19 October 2010, plaintiff filed a complaint in Superior Court, Guilford County, seeking a judgment against Highmark and the guarantors, both jointly and severally, for the outstanding indebtedness. Plaintiff then exercised the power of sale pursuant to its deeds of trust and sold the two properties at a foreclosure proceeding. Plaintiff was the sole bidder on both properties, paying $2,578,070 for one property and $720,000 for the other property.

In July 2011, plaintiff filed a motion for summary judgment. Three weeks later, plaintiff voluntarily dismissed without prejudice all claims against Highmark. Shortly thereafter, guarantors filed a motion to join Highmark as a defendant in the action pursuant to section 26-12 of the General Statutes and Rules 19 and 20 of the North Carolina Rules of Civil Procedure. Guarantors also sought leave to file a third-party complaint against Highmark for indemnity and contribution.

Plaintiff filed a motion *in limine* arguing, *inter alia*, that guarantors intended to raise an anti-deficiency defense and that this defense is not available to non-mortgagor guarantors of payment. On 19 September 2011, the trial court entered an order ruling that joinder of Highmark was "appropriate under N.C.G.S. § 26-12," and that, pursuant to the North Carolina Rules of Civil Procedure, Highmark was a necessary party pursuant to Rule 19, or a permissive party pursuant to Rule 20, and therefore "should be joined." The trial court found that Highmark "is a going concern; is not in bankruptcy; is not dissolved; and is subject to the jurisdiction of this Court." The court further noted that Highmark previously was a party until 18 August 2011, when plaintiff dismissed Highmark without prejudice. The trial court denied guarantors' motion to file a third-party complaint against Highmark.

In an order dated 4 October 2011, the trial court entered summary judgment against guarantors "on the issue of [their] liability for payment of the deficiency under the Notes." The order stated that "[t]he value of the property securing payment of the Notes and its effect, if any, on the deficiency owed are the sole unresolved issues remaining for trial." Highmark and guarantors all sought to amend their answers to assert the anti-deficiency defense, which the trial court allowed.

The parties stipulated to the following relevant facts by pretrial order: (1) "[A]ll parties have been correctly designated, and there is no question as to misjoinder"; (2) "The total deficiency on the First Note following the foreclosure sale . . . was . . . $963,286"; (3) "The total deficiency on the Second Note following the foreclosure sale . . . was . . . $616,556"; (4) "The single remaining issue for trial is the Defendants' affirmative defense under N.C. Gen. Stat. § 45-21.36"; and (5) Determination of this issue requires the court to find whether the amounts paid by plaintiff at the foreclosure sales for the two parcels of land were "substantially less than [the] true value" of the properties.

The case was tried in Superior Court, Guilford County, beginning in September 2011. On 20 April 2012, the jury found that the amounts paid by plaintiff for the parcels of real property at foreclosure were substantially less than the fair market values of the parcels on the date of sale. The jury determined the fair market value of the first parcel as $3,723,000 and that of the second parcel as $1,034,000. Accordingly, the trial court ruled that Highmark's indebtedness on the First Note was reduced to $0.00, because the jury had determined that the fair market value of the first parcel was greater than Highmark's remaining debt of $3,541,356. Next, the trial court ruled that Highmark's indebtedness on the Second Note was reduced to $302,556—the difference between

the jury's determination of the fair market value of the second parcel and Highmark's remaining debt of $1,336,556. The trial court ruled that Highmark and guarantors were jointly and severally liable and ordered payment to plaintiff in the amount of $302,556 for the remaining uncollected debt, plus attorney's fees and interest. Plaintiff appealed.

The Court of Appeals affirmed the trial court's rulings on 3 December 2013. *High Point Bank & Tr. v. Highmark Props., LLC*, ___ N.C. App. ___, 750 S.E.2d 886 (2013). The panel was unanimous in concluding that the trial court did not abuse its discretion in joining Highmark to the action and that the reduction in guarantors' liability pursuant to section 45-21.36 was proper. *Id.* at ___, 750 S.E.2d at 891. But the majority and concurrence differed as to whether the statute provided incidental or direct relief to guarantors. The majority determined that once Highmark was joined as a party, guarantors were entitled to benefit from Highmark's use of section 45-21.36. *Id.* at ___, 750 S.E.2d at 890-91. The concurring judge reached the same result as the majority by concluding that guarantors could assert the anti-deficiency defense provided by section 45-21.36 even if Highmark was not a party. *Id.* at ___, 750 S.E.2d at 892 (Dillon, J., concurring in the result only in part). We allowed plaintiff's Petition for Discretionary Review and defendants' Conditional Petition for Discretionary Review.

This matter presents a question of statutory interpretation, which we review de novo. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012) (citation omitted). "When applying de novo review, we 'consider[ ] the case anew and may freely substitute' our own ruling for the lower court's decision." *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806-07 (2012) (alteration in original) (quoting *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjust.*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011)).

[1] Plaintiff first argues that a guarantor is not among the class of obligors eligible to claim the benefit of section 45-21.36 because the statute applies only to a "mortgagor, trustor, or other maker of any such obligation whose property has been so purchased." Next, plaintiff contends that even if a guarantor is among those eligible to utilize the statute, according to the express language contained in the guaranty here, the guarantors have waived their right to the statutory defense. We disagree with both assertions. This Court previously has addressed the essence of these arguments. We held a guarantor is within the group of those who enjoy the protection of section 45-21.36. *See Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 112, 232 S.E.2d 667, 679 (1977) ("The

statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale . . . he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court.") (quoting *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.* (*Richmond Mortgage*), 210 N.C. 29, 185 S.E. 482 (1936), *aff'd*, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937)). The effect is that the section establishes an equitable method of calculating the indebtedness; therefore, it is not a "defense" in the usual sense which can be waived.

A guaranty, as it operates here, is a promise to repay the "indebtedness." Section 45-21.36 simply provides the method of calculating that amount as follows:

> 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 . . . 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 a 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[.]

N.C.G.S. § 45-21.36 (2013). The statute currently codified as section 45-21.36 was part of Chapter 275 of the 1933 Session Laws, a group of depression era laws designed to protect debtors. As such, our Court has stated, "we are compelled to construe [such a] statute more broadly" to ensure the legislative purposes are fulfilled. *Ross Realty Co. v. First Citizens Bank & Tr. Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979).[1]

1. In *Ross Realty*, we explained that we found particularly helpful a 1960 *Duke Law Journal* discussion on the history of anti-deficiency legislation, noting the relevant portion:

In *Virginia Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938), we addressed an anti-deficiency statute that contained language nearly identical to the present-day section 45-21.36. In *Dunlop* a creditor made a loan secured by real estate and guaranteed by agreement with a guarantor. *Id.* at 196, 198 S.E. at 645. The borrower defaulted, and the creditor foreclosed on the collateral, but the net proceeds of the foreclosure sale failed to satisfy the debt fully. *Id.* at 197, 198 S.E. at 645. The high bidder at the foreclosure sale was a subsidiary of the creditor. *Id.* at 197, 198 S.E. at 645-46.

The guarantor died, and the creditor sued the guarantor's estate, but did not sue the borrower. *Id.* at 196-97, 198 S.E. at 645. The estate raised the anti-deficiency defense currently found in section 45-21.36, and the creditor moved to strike the defense, arguing that it was not available because the estate was not a "mortgagor, trustor, or other maker of any such obligation whose property has been so purchased (at foreclosure)," as required by the anti-deficiency statute. *Id.* at 197-98, 198 S.E. at 645. We determined that

> a proper construction of the statute should regard the act of a mortgagee, or trustee, or holder of the notes secured by the mortgage, in acquiring the mortgaged premises at a foreclosure sale had at its instigation and for its benefit, as an act going to the discharge of the instrument and giving the guarantor the benefit of this defense . . . . It would not be an unreasonable interpretation of the statute to hold that it proceeds upon the equitable assumption that the debtor [sic] has received payment in full when, by his own choice, he takes the land, and that the purpose of the law is, under such circumstances, to discharge the debt.

Id. at 198, 198 S.E. at 646. Consequently, we concluded that the guarantor, and thus the estate, had the right to utilize the statutory protection at trial. *Id.* at 198-99, 198 S.E. at 646.

> The year 1933 was one of deep depression, and North Carolina, along with other states, was concerned with the economic distress associated with wholesale mortgage foreclosures. The act . . . chapter thirty-six of the Laws of 1933 — was the first in a series of legislative attempts at the same session to deal with the mortgage problem. . . .

Id. at 370-71, 250 S.E.2d at 273-74 (quoting Brainerd Currie & Mark S. Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1 Duke L.J. 1, 11 (1960) (footnotes omitted)). We also observed that the authors of the article "concluded . . . that the 1933 General Assembly intended to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees." *Id.* at 371, 250 S.E.2d at 274.

Our holding in *Dunlop* is further illustrated by our prior decision in *Richmond Mortgage*. There, the debtor raised the statutory defense, and the creditor argued the statute was unconstitutional because it impaired the power to contract. Our Court held the statute constitutional and stated that its purpose was to protect a debtor from a creditor unilaterally determining the amount to be applied to a debt resulting from the trustee's sale of collateral. We stated:

> The statute recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of sale.

Richmond Mortgage, 210 N.C. at 34-35, 185 S.E. at 485. In sum, the statute protects a debtor by calculating the debt based upon the fair market value of the collateral instead of the amount bid by the creditor at the trustee's sale. A creditor

> shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court. 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.

Id. Thus, the statute is an equitable method of calculating the indebtedness, and as such is not subject to waiver.

Our holdings in *Dunlop* and *Richmond Mortgage* are controlling here. Just as a guarantor may raise this defense, he similarly is entitled to its benefits should it be determined that the property's fair market value exceeded the purchase price paid by the creditor at the trustee's foreclosure sale. In the instant case, plaintiff opted to satisfy Highmark's debt backed by guarantors by first exercising the power of sale pursuant to the deed of trust. As such, guarantors had the right to have the court determine the outstanding indebtedness by application of the fair market value of the collateral at the time of sale. Accordingly, we re-affirm

our prior holdings that a guarantor is protected by the provision of section 45-21.36 that provides for a judicial method of determining the indebtedness. As the guarantors only guaranteed the repayment of the indebtedness, the amount of the indebtedness is calculated pursuant to the statute. Accordingly, it is not the type of "defense or offset" which is subject to waiver.

In contrast, we held in *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 426-27, 762 S.E.2d 188-89 (2014) that a group of guarantors waived prospective claims and defenses to a guaranty in a subsequent forbearance agreement, including claims arising from the lender's alleged violation of the Equal Credit Opportunity Act that potentially served as affirmative defenses to the agreement. The defense at issue there was in the form of a claim against the lender for a statutory violation, whereas here section 45-21.36 simply allows guarantors the right to a judicial method of debt calculation that accounts for the fair market value of the property at the time of a foreclosure sale. Accordingly, notwithstanding the waiver language contained in the guaranty agreements, guarantors did not waive their right to the protection of section 45-21.36.

We have stated that "[a] person sui juris may waive practically any right he has unless forbidden by law or public policy." *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949). While we have determined that section 45-21.36 is an equitable method of debt calculation as opposed to a traditional defense that is subject to waiver, we further conclude that because anti-deficiency legislation is so narrowly tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guaranty agreement would violate public policy. Plaintiff's argument is without merit.

[2] Finally, plaintiff argues that joinder of Highmark was improper because section 26-12 did not apply to guarantors in this case. We review the trial court's order joining Highmark as a party to the action for abuse of discretion. *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (citation omitted).

Upon a plain review of section 26-12, we conclude, as did the Court of Appeals, that the law allows permissive or discretionary joinder. Section 26-12 states that "[w]hen any surety is sued by the holder of the obligation, *the court, on motion of the surety may join the principal* as an additional party defendant." N.C.G.S. § 26-12(b) (2013) (emphasis added). A " 'surety' " includes guarantors." *Id.* § 26-12(a) (2013). Plaintiff's argument that the standard of review for discretionary joinder

should shift based upon a party's future course of action as a result of the joinder is unpersuasive, because section 26-12 allows joinder for the explicit purpose of giving the surety access to all defenses available to the primary borrower. As such, we hold that guarantors were permitted to move for joinder and the trial court committed no abuse of discretion by joining Highmark to this action.

In sum, we hold: (1) Guarantors are permitted to stand in the shoes of the principal borrower and thus raise the section 45-21.36 anti-deficiency defense in their own right; (2) Guarantors did not waive the protection offered by section 45-21.36 despite certain provisions in the guaranty agreements they executed; and (3) Highmark properly was joined as a defendant in this action pursuant to N.C.G.S. § 26-12. Accordingly, except as modified herein, the opinion of the Court of Appeals is affirmed.

MODIFIED AND AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
RANDY BENJAMIN BARTLETT

No. 19PA14

Filed 25 September 2015

1. Evidence—findings—required only for material conflict

Case law requires findings of fact at a suppression hearing only when there is a material conflict in the evidence and allows the trial court to make these findings either orally or in writing. Cases that suggested otherwise were disavowed.

2. Evidence—findings—material conflict in the evidence—insufficient explanation of rationale

Disagreement between two expert witnesses created a material conflict in the evidence at a suppression hearing where the experts differed on defendant's apparent degree of impairment, a fact essential to the probable cause determination. A finding of fact, whether written or oral, was required to resolve this conflict, but

the judge made no such finding. Although he did attempt to explain his rationale for granting the motion, none of his statements could be construed as a definitive finding of fact that resolved the material conflict in the evidence. Without such a finding, there could be no meaningful appellate review of the trial judge's decision.

3. Evidence—material conflict—finding by second judge—suppression hearing required

A new evidence suppression hearing was required where one judge made an inadequate oral finding resolving a material conflict in the evidence, left office, and another judge resolved the evidentiary conflict without holding another suppression hearing.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 752 S.E.2d 237 (2013), affirming an oral ruling rendered by Judge Abraham P. Jones on 18 December 2012 and a written order signed by Judge Orlando F. Hudson Jr. and entered on 22 February 2013, both in Superior Court, Durham County. Heard in the Supreme Court on 21 April 2015.

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

Staples S. Hughes, *Appellate Defender*, *by David W. Andrews*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Chief Justice.

When the superior court conducts a pretrial hearing on a motion to suppress pursuant to N.C.G.S. § 15A-977, only the judge who presides at the hearing may make findings of fact concerning the evidence presented. When findings of fact are necessary to resolve a material conflict in the evidence and the judge who presides at the hearing does not make them, a new suppression hearing is required. In this case, a material conflict in the evidence arose from a disagreement between two expert witnesses, and a judge who did not hear the testimony of either expert resolved that conflict. Accordingly, a new suppression hearing is required.

After the State charged defendant with impaired driving in violation of N.C.G.S. § 20-138.1, defendant was found guilty in District Court, Durham County. Defendant appealed the judgment to the Superior Court, Durham County, where he also filed a pretrial motion to suppress

all evidence obtained after his arrest. In his motion, defendant argued that there was insufficient evidence of his impairment to establish probable cause for the arrest. Defendant's motion was heard before the Honorable Abraham P. Jones on 18 December 2012. At the suppression hearing, the State called the arresting officer as its sole witness. After being qualified as an expert in field sobriety testing, the officer described defendant's performance on a variety of field sobriety tests. The officer testified that, in his opinion, defendant's performance indicated appreciable impairment. Defendant did not contradict the officer's description of what happened during the field sobriety tests, but he did offer testimony from his own expert suggesting that defendant's performance did not indicate impairment. At the close of the hearing, Judge Jones orally granted defendant's motion and asked counsel to prepare a written order reflecting his decision.

But Judge Jones was not able to sign the proposed order before his term of office expired on 31 December 2012. Defendant subsequently presented the proposed order to the Honorable Orlando F. Hudson Jr., who was presiding at the 18 February 2013 criminal session of the Superior Court, Durham County. Over the State's objection, Judge Hudson signed the order granting defendant's motion to suppress without hearing any evidence himself. The order specifically found that defendant's expert was credible, gave weight to the expert's testimony, and used the expert's testimony to conclude that no probable cause existed to support defendant's arrest.

The State appealed, contending that Judge Hudson was without authority to sign the order. The Court of Appeals found it unnecessary to reach the State's contention because the court considered the oral ruling by Judge Jones to be sufficient. *State v. Bartlett*, ___ N.C. App. ___, ___, 752 S.E.2d 237, 239 (2013). Relying on the two-part test that it had previously articulated in *State v. Williams*, 195 N.C. App. 554, 673 S.E.2d 394 (2009), the Court of Appeals observed that a trial court must issue a written order "unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing." *Bartlett*, ___ N.C. App. at ___, 752 S.E.2d at 239 (quoting *Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395). Applying this test, the court determined that "there was no material conflict in the evidence presented at the suppression hearing" because the evidence concerning defendant's performance on the field sobriety tests was undisputed. *Id.* at ___, 752 S.E.2d at 239. The court also stated that Judge Jones adequately "supplied the rationale for his ruling from the bench." *Id.* at ___, 752 S.E.2d at 239. Based on this application of *Williams*, the court

affirmed the oral ruling rendered by Judge Jones. *Id.* at ___, 752 S.E.2d at 239. We allowed discretionary review and now reverse the decision of the Court of Appeals.

[1] In determining whether evidence should be suppressed, the trial court "shall make findings of fact and conclusions of law which shall be included in the record." N.C.G.S. § 15A-974(b) (2013); *see also id.* § 15A-977(f) (2013) ("The judge must set forth in the record his findings of facts and conclusions of law."). A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012). Although the statute's directive is in the imperative form, only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. *State v. Salinas*, 366 N.C. 119, 123-24, 729 S.E.2d 63, 66 (2012); *State v. Ladd*, 308 N.C. 272, 278, 302 S.E.2d 164, 168 (1983). When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996). Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing. To the extent that cases such as *Williams* suggest otherwise, they are disavowed.

[2] At the suppression hearing in this case, disagreement between two expert witnesses created a material conflict in the evidence. Although defendant did not dispute the officer's testimony about what happened during the field sobriety tests, defendant's expert sharply disagreed with the officer's opinion on whether defendant's performance indicated impairment. Expert opinion testimony is evidence, and the two expert opinions in this case differed from one another on a fact that is essential to the probable cause determination—defendant's apparent degree of impairment. Thus, a finding of fact, whether written or oral, was required to resolve this conflict.

Here, Judge Jones made no such finding. Although he did attempt to explain his rationale for granting the motion, we cannot construe any of his statements as a definitive finding of fact that resolved the material conflict in the evidence. Without such a finding, there can be no meaningful appellate review of the trial judge's decision. *See Salinas*, 366 N.C. at 124, 729 S.E.2d at 66. Accordingly, the oral ruling by Judge Jones did not comply with N.C.G.S. §§ 15A-974 and 15A-977.

[3] Because the oral ruling was inadequate, we now consider whether Judge Hudson had the authority to resolve the evidentiary conflict in his written order even though he did not conduct the suppression hearing. For the following reasons, we conclude that Judge Hudson did not have this authority and that a new suppression hearing is required.

Section 15A-977 of the General Statutes prescribes the procedure that the superior court must follow to decide a motion to suppress evidence. Pursuant to subsection (d) of this statute, "[i]f the motion is not determined summarily the judge must make the determination after a hearing and finding of facts." N.C.G.S. § 15A-977(d) (2013). Section 15A-977 contemplates that the same trial judge who hears the evidence must also find the facts. The trial judge who presides at a suppression hearing "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 91 S. Ct. 2266 (1971). For this reason, our appellate courts treat findings of fact made by the trial court as "conclusive on appeal if they are supported by the evidence." *Id.* at 41, 178 S.E.2d at 601; *State v. Hughes*, 353 N.C. 200, 207-08, 539 S.E.2d 625, 630-31 (2000); *State v. Cooke*, 306 N.C. 132, 134-35, 291 S.E.2d 618, 619-20 (1982). "The logic behind this approach is clear. In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties . . . and to discern the sincerity of their responses to difficult questions." *In re Estate of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991). But a trial court is in no better position than an appellate court to make findings of fact if it reviews only the cold, written record. *See Smith*, 278 N.C. at 41, 178 S.E.2d at 601. We therefore reject an interpretation of N.C.G.S. § 15A-977 that would diminish the trial court's institutional advantages in the fact-finding process.

Notwithstanding the procedures set forth in section 15A-977, defendant contends that subsection 15A-1224(b) of the General Statutes permits Judge Hudson to sign an order on behalf of Judge Jones. Section 15A-1224 is part of the Criminal Procedure Act and is codified in Article 73, which is entitled "Criminal Jury Trial in Superior Court." Subsection 15A-1224(b) allows a substitute judge to complete an ongoing criminal trial unless the substitute judge concludes that he cannot perform that function, in which case he must order a mistrial. N.C.G.S. § 15A-1224(b) (2013). By its plain terms, subsection 15A-1224(b) applies only to criminal trials, not suppression hearings. Defendant's contention that subsection 15A-1224(b) is dispositive of this matter is therefore without merit.

Accordingly, we hold that N.C.G.S. § 15A-977 requires the judge who presides at the suppression hearing to make the findings of fact necessary to decide the motion. In this case, the testimony of the experts at the suppression hearing created a material conflict in the evidence that the presiding judge did not resolve. Although a second judge made the findings of fact necessary to resolve this conflict, he did so without hearing any evidence himself. Under these circumstances, a new suppression hearing is required. We therefore reverse the decision of the Court of Appeals and remand this matter to that court for further remand consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
SHAWN ADRIAN PENDERGRAFT

No. 49A15

Filed 25 September 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 674 (2014), affirming judgments entered on 19 July 2013 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 2 September 2015.

Roy Cooper, *Attorney General*, *by Phillip K. Woods*, *Special Deputy Attorney General*, *for the State.*

W. Michael Spivey for defendant-appellant.

PER CURIAM.

Justice ERVIN took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See*, *e.g.*, *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010).

AFFIRMED.

BURLEY v. U.S. FOODS, INC.

[368 N.C. 315 (2015)]

VINCENT BURLEY, EMPLOYEE
v.
U.S. FOODS, INC., EMPLOYER

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER
(GALLAGHER BASSETT SERVICES, INC., THIRD-PARTY ADMINISTRATOR)

No. 123A14

Filed 25 September 2015

Workers' Compensation—employment contract—made in another state—modified in North Carolina

The Court of Appeals erred by holding that the North Carolina Industrial Commission had jurisdiction over plaintiff's workers' compensation claim. Section 97-36 does not apply to an employment contract initially made in another state and subsequently modified in North Carolina.

Justice HUDSON dissenting.

Justices BEASLEY and ERVIN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 756 S.E.2d 84 (2014), reversing an opinion and award filed on 28 June 2013 by the North Carolina Industrial Commission, and remanding for rehearing. Heard in the Supreme Court on 17 March 2015.

Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Raymond J. Williams, III and Jordan Benton, for defendant-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Nicole C. Shoemaker and M. Duane Jones, for North Carolina Association of Defense Attorneys, amicus curiae.

JACKSON, Justice.

In this case we consider whether an employment contract was "made in this State" when it was formed in South Carolina and allegedly modified in North Carolina. N.C.G.S. § 97-36 (2013). We conclude that the modification that occurred here did not alter the state in which the

contract was made. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiff is a resident of Augusta, Georgia. In May 2000, U.S. Foods, Inc. extended plaintiff an offer of employment, which plaintiff accepted by signing the offer letter. According to plaintiff's testimony, he was in Fort Mill, South Carolina, when he signed the offer letter. Subsequently, plaintiff began working for U.S. Foods as a delivery truck driver. Plaintiff's job responsibilities included driving a planned route with stops in Georgia and South Carolina, but no travel in North Carolina was involved.

As the result of a merger with another company in 2002, U.S. Foods ceased operating in the Columbia, South Carolina location where plaintiff was assigned. U.S. Foods then gave plaintiff the choice either to terminate his employment and receive a severance package or to have supervision of his employment transferred to Charlotte, North Carolina, or Lexington, South Carolina. Plaintiff elected to transfer to the company's Charlotte division, and the transfer was approved by U.S. Foods' Human Resources Department in Charlotte. Throughout the transfer, plaintiff was employed by U.S. Foods continuously. Thereafter, he performed the same job, and his title and responsibilities did not change. Plaintiff made deliveries to different customers after the transfer, and he earned more money because of a change in the way his pay was calculated. But although plaintiff's supervision was transferred to Charlotte, plaintiff never had a route that involved any deliveries in North Carolina during his employment with U.S. Foods.

On 23 September 2009, plaintiff received a back injury during a delivery in Georgia. Plaintiff's claim for benefits was accepted by defendants pursuant to the Georgia Workers' Compensation Act, and plaintiff began receiving disability and medical compensation according to Georgia law. On 8 July 2011, plaintiff filed a claim for benefits with the North Carolina Industrial Commission. After a hearing on 17 April 2012, Deputy Commissioner Philip A. Baddour, III concluded that the Commission did not have subject matter jurisdiction over plaintiff's claim. Plaintiff appealed to the Full Commission, which affirmed Deputy Commissioner Baddour's ruling.

Plaintiff appealed, and in a divided opinion, the Court of Appeals reversed, holding that the Commission has jurisdiction over plaintiff's claim. *Burley v. U.S. Foods, Inc.*, ___ N.C. App. ___, ___, 756 S.E.2d 84, 90 (2014). The majority concluded that plaintiff's transfer to U.S. Foods' Charlotte division involved a modification of plaintiff's employment

contract, *id.* at ___, 756 S.E.2d at 90, and that such a modification "may be a proper basis to find a contract is 'made' within North Carolina" for purposes of establishing the jurisdiction of the Commission pursuant to N.C.G.S. § 97-36, *id.* at ___, 756 S.E.2d at 88. Judge Dillon dissented, maintaining that modification of plaintiff's existing contract, in light of the facts presented here, is insufficient to confer jurisdiction upon the Commission. *Id.* at ___, 756 S.E.2d at 91 (Dillon, J., dissenting). Based upon the dissent, defendants appealed to this Court as of right pursuant to N.C.G.S. § 7A-30(2).

On appeal defendants argue that once an employment contract has achieved an identifiable situs, that situs is not changed by a subsequent modification of the contract in another state. Defendants therefore contend that, notwithstanding the alleged modification in the case *sub judice*, plaintiff's employment contract was not made in North Carolina and does not establish the Commission's jurisdiction pursuant to section 97-36. We agree.

Generally, appellate review of the Commission's decisions is limited to "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (alterations in original) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). But "the Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (citing, *inter alia*, *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976)). Accordingly, this Court must review the evidence and make findings of fact independently. *Id.* at 637, 528 S.E.2d at 904 (quoting *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261). "The Commission's conclusions of law are reviewed *de novo*." *McRae*, 358 N.C. at 496, 597 S.E.2d at 701 (citing *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998)).

Section 97-36 specifies when an employee may be entitled to compensation for an accident that occurs during employment outside of North Carolina. This statute states in pertinent part:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State,

> then the employee or his dependents or next of kin shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State . . . .

N.C.G.S. § 97-36. Because the only issue addressed by the dissenting opinion concerns whether the Court of Appeals correctly concluded that plaintiff's employment contract was "made in this State," *Burley*, ___ N.C. App. at ___, 756 S.E.2d at 91; *see also id.* at ___ n.1, 756 S.E.2d at 87 n.1 (majority), we consider only that basis for compensation pursuant to section 97-36, *see* N.C. R. App. P. 16(b). "Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 785 (1986) (citing *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 227, 176 S.E.2d 784, 787 (1970)); *see also Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 925-26 (1990), *disc. rev. denied*, 328 N.C. 576, 403 S.E.2d 522 (1991).

Although this case involves a matter of first impression in North Carolina, courts of several other states that have considered similar factual situations long have held that a modification of a contract did not change the location where the contract was made. In *Sims v. Truscon Steel Co.*, 343 Mo. 1216, 126 S.W.2d 204, *cert. denied*, 307 U.S. 646, 59 S. Ct. 1045, 83 L. Ed. 1526 (1939), a company hired a worker via a contract made in Missouri, but later argued that a new contract was entered into by correspondence between the employee, who was then working in Kansas, and the employer's Illinois office. *Id.* at 1220, 126 S.W.2d at 206. The Missouri Supreme Court rejected this contention, concluding that, although the correspondence resulted in "additional duties and additional pay" for the employee, there still was "only one contract of employment": the original contract made in Missouri. *Id.* at 1224, 126 S.W.2d at 208. Similarly, in *Selser v. Bragmans Bluff Lumber Co.*, 146 So. 690 (La. Ct. App. 1933), a Louisiana appellate court determined that a "change in [the employee's] position and the increase of his salary" that occurred in another jurisdiction "in no way abrogated or set aside" the remaining terms of the original contract. *Id.* at 696. Furthermore, in *Benguet Consolidated Mining Co. v. Industrial Accident Commission*, 36 Cal. App. 2d 158, 97 P.2d 267 (1939), a California appellate court concluded that a three-year contract of hire originally made in California "was still in effect in spite of the changes in duties and salary agreed upon in the Philippines" and remained binding even after subsequent mutual agreements made in the Philippines extended the worker's

employment beyond the time specified in the original contract. *Id.* at 167, 97 P.2d at 272. Consistent with these decisions, *Larson's Workers' Compensation Law* states that "[o]nce the contract has achieved an identifiable situs, that situs is not changed merely because the contract is modified in another state, as when there is a change in salary or other benefits made in the second state." 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 143.03[4], at 143-22 (2012) (citing *United Airlines, Inc. v. Indus. Comm'n*, 96 Ill. 2d 126, 449 N.E.2d 119 (1983); *Crawford v. Trans World Airline*, 27 N.J. Super. 567, 99 A.2d 673 (1953); *Tobin v. Rouse*, 118 Vt. 40, 99 A.2d 617 (1953)). We find this authority persuasive.

Kuzel v. Aetna Insurance Co., 650 S.W.2d 193 (Tx. App. 1983), which plaintiff references and which the Court of Appeals cited, does not contradict this result. The court in *Kuzel* concluded that, based upon the specific facts before it, the initial agreement regarding the plaintiff's employment in that case "was no more than preliminary negotiations," while "[a] contract [was] established [in another state] when agreement [was] reached on all terms, and the preliminary agreements [were] . . . incorporated into the final offer and acceptance." *Id.* at 195. As a result, *Kuzel* did not involve a modification of an existing contract, but rather concerned preliminary negotiations culminating in a subsequent final written employment agreement. Accordingly, the court's analysis in *Kuzel* is not persuasive in the case *sub judice*.

Although the Fifth Circuit in *Kilburn v. Grande Corp.*, 287 F.2d 371 (5th Cir. 1961), concluded that a modification *may* create a new contract, that decision was based in part upon the premise that, because the employee's "salary was to be paid on an hourly basis," thus indicating a less than " 'permanent' type of employment," whatever employment contract existed "had life on a pay-period-to-pay-period basis, and . . . a new contract was impliedly made each time that [the employee] reported to work and was given work following a pay period." *Id.* at 373. Because North Carolina law looks to "the final act necessary to make [the contract] a binding obligation," *Thomas*, 101 N.C. App. at 96, 398 S.E.2d at 925, and does not imply the creation of a new contract after each pay period, we find *Kilburn* unpersuasive.[1] *See also, e.g.*, *Murray*

1. Moreover, we note that the original agreement in *Kilburn* was never reduced to writing by the parties, which further distinguishes *Kilburn* from the instant case. The lack of a written agreement led the Fifth Circuit to find the absence of "an enforceable contract of employment for any period of time in existence when [the employee] moved to [the other state]." *Kilburn*, 287 F.2d at 373.

v. Ahlstrom Indus. Holdings, Inc., 131 N.C. App. 294, 296-97, 506 S.E.2d 724, 726 (1998) (citing *Thomas* and concluding that a contract for employment was complete when the plaintiff accepted the employer's offer in North Carolina, even though the plaintiff completed the necessary paperwork in another state, where he was assigned to perform his work).

Ultimately, section 97-36 authorizes compensation pursuant to North Carolina law if an individual's employment contract was "made" in North Carolina—the statute does not include the word "modified." After interpreting this statute in light of its plain language and upon consideration of decisions from other jurisdictions, we conclude that section 97-36 does not apply to a contract initially made in another state and subsequently modified in North Carolina.

Here the evidence in the record establishes that when plaintiff began working for U.S. Foods, his employment contract was not made in North Carolina. After being hired in South Carolina in 2000, plaintiff worked continuously for U.S. Foods and never left the job until he was terminated following his injury. Plaintiff's 2002 transfer involved administrative changes, new customers, and increased pay, but his job title and responsibilities did not change. Plaintiff's supervisor stated that plaintiff had the "[s]ame job" following the transfer. In addition, although plaintiff's pay eventually increased by a substantial amount, much of the increase occurred between 2004 and 2005, long after the 2002 transfer at issue here. Plaintiff testified that he was not informed about this change in salary before its implementation, suggesting that it was not part of how he understood the transfer process at the time it was taking place. We decline to hold that this internal transfer of supervision, which essentially allowed plaintiff to continue working for U.S. Foods in the same capacity throughout the merger, established a new employment contract. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

Justice HUDSON dissenting.

The majority holds that an employment contract modified in North Carolina does not qualify as one "made" in North Carolina for purposes of conferring subject matter jurisdiction on the North Carolina Industrial Commission, even when the modifications to the employment relationship are substantial and where it is undisputed that it was impossible for the employment relationship to continue on the original terms. In my

view, this holding contradicts the long-standing rule that North Carolina courts must liberally construe the Workers' Compensation Act in favor of providing relief to workers injured in the scope of their employment. Accordingly, I respectfully dissent.

The statute at issue here, N.C.G.S. § 97-36, governs when an employee may be entitled to compensation for a work-related accident that occurs outside North Carolina. Section 97-36 provides in relevant part:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation . . . if the contract of employment was made in this State . . . .

N.C.G.S. § 97-36 (2013). In interpreting this provision, it is well settled that the Workers' Compensation Act, including section 97-36, "must necessarily be viewed with liberality in order to accomplish its purpose[ ]" of providing compensation to employees injured during the course and within the scope of their employment. *Essick v. City of Lexington*, 232 N.C. 200, 208, 60 S.E.2d 106, 112 (1950); *see also Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930) ("It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation."). The question presented here is whether a contract of employment qualifies as a contract "made" in North Carolina when an employee is given a choice between termination and continuing the relationship under terms so significantly different that the arrangement amounts, in effect, to a new contract. I conclude that, on the facts presented here and against that liberal interpretive backdrop, it does.

Here, plaintiff first accepted an offer of employment with defendant U.S. Foods in May 2000. For two years, he worked as a delivery truck driver with an assigned drop yard in Columbia, South Carolina and a planned route in the Augusta, Georgia area. The customers to whom plaintiff made deliveries included health care facilities, convenience stores, and restaurants. While there was some variation among these customers, most of them remained the same during the time plaintiff had that route.

In 2002, U.S. Foods merged with another company, PYA Monarch, and defendant elected to close the Columbia drop yard. Plaintiff, like

many other employees based out of the Columbia location, was given a choice: He could either accept termination and a severance package, or he could transfer to a division based in Lexington, South Carolina, or one located in Charlotte, North Carolina. Because the Columbia drop yard was closing, the parties did not have the option of continuing the employment relationship as it had existed up to that point. Faced with this decision, plaintiff chose transfer to the Charlotte-based division of the company. Plaintiff also negotiated for and received an additional benefit; specifically, plaintiff and defendant agreed that while plaintiff worked out of the Charlotte-based division, U.S. Foods would deliver plaintiff's loaded trailer to him in Augusta, Georgia. The company's Human Resources Department, which was also located in Charlotte, approved the transfer in October 2002, thereby finalizing the new agreement.

Once he came under the supervision of the Charlotte-based division of the company, plaintiff's employment changed in several other ways as well. As plaintiff described in his testimony before the Industrial Commission, he drove a new route and his "customers changed completely." While he had previously made deliveries to health care facilities, convenience stores, and restaurants, the "bulk" of plaintiff's deliveries when he was based in Charlotte were to chain restaurants such as Sonic, KFC, Subway, and IHOP. In addition, the method by which plaintiff's pay was calculated was changed. When he was based in South Carolina, plaintiff was paid based on an hourly weight-based commission system, under which he earned approximately $400 to $500 per week. In North Carolina, however, he was first paid an hourly rate, then under a component-based system.[1] Under the component-based system, plaintiff eventually earned more than twice as much as under the commission-based system, up to $1400 per week.

In sum: When U.S. Foods merged with PYA Monarch, plaintiff was faced with either termination or transfer to a division based in another State. Plaintiff chose transfer to North Carolina and bargained for the inclusion of specific contractual terms under the new arrangement. Upon approval by defendant's Charlotte-based Human Resources Department, plaintiff had a new supervisor stationed in a new state. Plaintiff then drove a new route, served new customers, and earned significantly more

1. Under the commission system, delivery drivers' wages were based primarily on the weight of the cargo they delivered. In contrast, under the component system, in addition to receiving a base pay, drivers are paid based on a number of factors including a safety bonus, the hours worked, and the number of stops and items of cargo.

money through the use of a new method of calculating his pay. On the whole, it appears that the only characteristics of the employment relationship that remained the same were plaintiff's general duties and title as a delivery driver, and the name of his employer.

In my view, then, this was no mere modification, as when an employee accepts a modest pay increase in exchange for taking on modest new responsibilities. Rather, I conclude that the required break from the old employment arrangement, paired with significant changes in how plaintiff's employment would proceed moving forward, warrants treating this arrangement as a new contract—one finalized when defendant's Human Resources Department in Charlotte approved the arrangement. Based on these facts, and in light of the requirement that we liberally construe the Workers' Compensation Act in favor of awarding benefits, *see*, *e.g.*, *Essick*, 232 N.C. at 208, 60 S.E.2d at 112, I would hold that the contract in place when plaintiff suffered his work-related injury on 23 September 2009 was a contract "made" in North Carolina for purposes of N.C.G.S. § 97-36, and that the North Carolina Industrial Commission has jurisdiction over plaintiff's claim. On this basis, I would affirm the decision of the Court of Appeals. Therefore, I respectfully dissent.

Justices BEASLEY and ERVIN join in this dissenting opinion.

STATE v. GRAY

[368 N.C. 324 (2015)]

STATE OF NORTH CAROLINA
v.
ANTONIO NEAL GRAY

No. 237PA14

Filed 25 September 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 758 S.E.2d 699 (2014), finding no error after appeal from judgments entered on 5 April 2013 by Judge G. Wayne Abernathy in Superior Court, Wake County. Heard in the Supreme Court on 31 August 2015.

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

Rudolph A. Ashton, III and Charles J. Cushman for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

WILLIAM T. USSERY AND WIFE, CAROLYN B. USSERY
v.
BRANCH BANKING AND TRUST COMPANY

No. 277A13

Filed 25 September 2015

Loans—refinancing—no misrepresentation by lender—small business loan not available

BB&T was entitled to summary judgment in its favor as to all of plaintiff's claims and as to all but the interest claim stated in BB&T's counterclaim in a contract and tort action arising from a commercial loan from BB&T to plaintiff. The small business, government-backed loan that plaintiff expected was not available and BB&T made a new commercial loan to plaintiff, with subsequent modifications, thereby consolidating plaintiff's debts and giving him additional cash. It was undisputed that this occurred several months after plaintiff became aware that the desired government-backed loan was not available and thus learned of his potential claims against BB&T. The record reveals no misrepresentation inducing plaintiff to obtain this second loan, and plaintiff then executed a series of six modifications, all of which unambiguously reaffirmed the obligation and expressly waived any offsets and defenses against the indebtedness or the bank.

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. ___, 743 S.E.2d 650 (2013), reversing and remanding an order granting summary judgment for defendant entered on 16 April 2012 by Judge W. David Lee in Superior Court, Richmond County. Heard in the Supreme Court on 7 January 2014.

Anderson, Johnson, Lawrence & Butler, L.L.P., by Stacey E. Tally and Steven C. Lawrence, for plaintiff-appellees.

Bell, Davis & Pitt, P.A., by Michael D. Phillips and Kevin G. Williams, for defendant-appellant.

NEWBY, Justice.

In this case we consider whether a plaintiff may recover against his bank for its failure to provide a government-backed business loan when,

after learning no such loan was available, plaintiff sought and obtained a new commercial loan with the same bank and subsequently expressly waived all offsets and defenses. Plaintiff's claims arise in contract and in tort, and all of them rely upon one key date: the date on which plaintiff was made aware no government-backed loan was available. In his complaint plaintiff alleges that he incurred his indebtedness in anticipation of receiving a government-backed loan as promised by his bank. The undisputed facts, however, show that plaintiff chose to obtain a new commercial loan after learning no government-backed loan was available, and he repeatedly reaffirmed his obligations under the commercial loan and expressly waived any offsets and defenses to the loan and against the bank. Therefore, the trial court properly granted summary judgment for defendant, and the decision of the Court of Appeals is reversed.

Viewing the facts in the light most favorable to plaintiff, the nonmoving party, the record reveals the following: In 1998 plaintiff William "Pete" Ussery[1] and his business partner, D. Wayne Barker, launched a venture to establish a furniture assembling business. Barker had years of managerial experience at CAFCO Industries, Inc. (CAFCO), a local chair manufacturer, and plaintiff had greater financial resources, was a seasoned real estate developer and businessman, and sat on the board of a bank. In response to a decrease in sales, CAFCO was in the process of closure and liquidation, and the owners had approached plaintiff to discuss the sale of the company's old manufacturing building (the CAFCO building).

Plaintiff and Barker formed their business, Chair Specialists, Inc.,[2] with plaintiff holding sixty percent of the equity and Barker holding the remaining forty percent. According to their business plan, Barker would run the day-to-day operations and plaintiff would provide the startup capital to fund the enterprise. Plaintiff planned to individually purchase the CAFCO building and develop it into residential condominiums, and the operations of Chair Specialists would be housed in a different location. The long-range plan was for Barker to obtain a government-backed business loan with which to purchase plaintiff's interest in Chair Specialists and repay plaintiff for the startup expenses.

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1. Plaintiffs are William Ussery and his wife, Carolyn Ussery. The record reflects that William Ussery was the primary actor in the following events, and we refer to him in the singular as "plaintiff" for clarity.

2. The business is referred to as "Chair Specialists" and "Chair Specialties" interchangeably throughout the record.

In November 1999, plaintiff bought equipment from CAFCO to use at Chair Specialists. For $150,000 plaintiff also purchased the "Cheraw Road Building,"[3] a commercial facility in Hamlet, North Carolina, to house Chair Specialists' operations. The Cheraw Road Building had been contaminated with lead and required clean up and abatement; moreover, following remediation of the property, the building would serve as collateral for any future business loan. Plaintiff transferred ownership of the Cheraw Road Building to Chair Specialists and retained a deed of trust on the property. Plaintiff then purchased, individually, the CAFCO Building for approximately $100,000.

Plaintiff alleges that sometime in 1999, Barker and he first met with Wiley Mabe, a commercial lending officer for Branch Banking and Trust Company (BB&T), to discuss their business plan and learn about available government-backed loans. Mabe allegedly reviewed the business plan and assured plaintiff and Barker that Barker and Chair Specialists would qualify for and receive a $450,000 small business, government-backed loan.

Between 1999 and 2001, plaintiff obtained three commercial loans from BB&T for the startup of Chair Specialists and to reimburse himself for his purchases. The loans were in the amounts of (1) $100,000 on 6 December 1999, with plaintiff and Barker as debtors; (2) $50,000 on 25 February 2000, with Chair Specialists as debtor and plaintiff and Barker as guarantors; and (3) $125,000 on 21 February 2001, with plaintiff and his spouse as debtors.

By January 2002, Mabe notified all parties that no government-backed loan was available, nor would BB&T extend a long-term loan to them. According to plaintiff, Barker and he had inquired into the status of the application frequently and were repeatedly assured that they would receive the loan. Upon further inquiry, Barker discovered that neither he nor the business could qualify for a government-backed loan elsewhere because of the additional debt incurred between 1999 and 2001. The Small Business Administration (SBA) advised Barker that Mabe had not submitted the application documents to the SBA because Mabe did not believe Barker would qualify for a loan.

Knowing that no government-backed loan was available, plaintiff and Barker closed Chair Specialists in early 2002 and set about selling the accompanying real and personal property. According to Barker, plaintiff

3. The Cheraw Road Building is also referred to as the "Tartan Building" throughout the record.

then approached BB&T to inquire about a single loan to consolidate his debts associated with the business and reduce his monthly expenditures while he attempted to sell the company's assets. On 18 April 2002, fully aware that no government-backed loan was available and that he had various potential causes of action against BB&T, plaintiff nonetheless obtained a commercial loan of $425,000 from BB&T (the $425,000 Note). The $425,000 Note provided in part: "For value received, the undersigned . . . promises to pay to Branch Banking and Trust Company . . . the sum of . . . $425,000.00 . . . ." The $425,000 Note secured a one-year, interest-only loan, with accrued interest payments due quarterly, and was payable in full on 18 April 2003. As a condition of the loan, BB&T required Barker to issue a $122,000 promissory note to plaintiff. After paying off the antecedent debts, plaintiff personally received $99,187.75 in cash proceeds from the $425,000 loan.

On 15 April 2003, fifteen months after learning that no government-backed loan was available and one year after executing the $425,000 Note, plaintiff entered into the first of a total of six promissory note modification agreements. In the first modification BB&T agreed to extend the maturity date of the $425,000 Note by an additional year and allowed plaintiff to continue making quarterly, interest-only payments. In exchange, plaintiff reaffirmed his payment obligation and waived any offsets and defenses against the Note or the bank.

All six note modification agreements contained express and unambiguous language to this effect:

> [A]ll other terms, conditions, and covenants of [the $425,000 Note] remain in full force and effect, and . . . all other obligations and covenants of Borrower(s), except as herein modified, shall remain in full force and effect, and binding between Borrower(s) and [the] Bank . . . .
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> . . . .
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> . . . The original obligation of the Borrower(s) as evidenced by the [$425,000 Note] above described is not extinguished hereby. It is also understood and agreed that except for the modification(s) contained herein said [$425,000 Note] . . . shall be and remain in full force and effect. . . . Borrower and Debtor(s)/Grantor(s), if any, jointly and severally consent to the terms of this Agreement, *waive any objection thereto, affirm any and all obligations to Bank and certify that there are no*

> *defenses or offsets against said obligations or the Bank*, including without limitation the [$425,000 Note].

(Emphasis added.) Plaintiff was current on the interest-only payments required under the $425,000 Note at the time of his first loan modification, and he continued to make quarterly interest payments through 27 April 2006.

In May 2003, just over a month after the execution of plaintiff's first note modification, Barker filed suit against BB&T (the Barker litigation) for its alleged misrepresentations and failure to use reasonable efforts to obtain a government-backed loan for Chair Specialists. Barker's complaint stated claims of negligence, breach of contract, and breach of fiduciary duty. According to plaintiff, after the Barker litigation commenced, plaintiff discussed with BB&T that he was contemplating filing a separate suit against the bank or joining the Barker litigation as an additional party. Plaintiff alleges that BB&T, through its agent Charles Smith, told him "everything would be worked out in the Barker litigation" and there was no need to join the Barker litigation or bring a separate action. Plaintiff contends that BB&T further promised that "the [$425,000 Note] would be canceled upon resolution of the [Barker litigation]. . . . [T]he loan would be forgiven, and [plaintiff] would be reimbursed any expenses incurred related to BB&T's failure to obtain the [government-backed loan]." Plaintiff admits, however, that "no agents or employees of BB&T ever proposed a specific plan for resolving the issues."

Thereafter, on 25 May 2004, plaintiff executed his second modification of the $425,000 Note, which contained provisions identical to the first, but extended the maturity date to 25 February 2005. It allowed plaintiff to continue interest-only payments, affirmed plaintiff's continuing obligation to repay the debt, and waived any offsets and defenses. Plaintiff was current on his interest payments at that time.

On 21 March 2005, plaintiff executed his third modification of the $425,000 Note, which, except for extending the loan maturity date to 20 March 2006, contained provisions identical to the first two modifications, allowing plaintiff to continue quarterly interest-only payments, affirming plaintiff's obligation to repay the debt, and waiving any offsets and defenses. Plaintiff was current on his interest payments at that time.

Around 20 April 2006, the Barker litigation settled confidentially.

On 26 April 2006, plaintiff executed his fourth modification of the $425,000 Note, which extended the loan maturity date several months

to 25 June 2006 and now allowed plaintiff to accrue all interest due until maturity. The modification contained provisions identical to its three predecessors affirming plaintiff's obligation to repay the debt and waiving any offsets and defenses. Plaintiff remained current on his interest payments at that time.

In the summer of 2006, plaintiff consulted legal counsel, apparently for the first time. BB&T had not cancelled the $425,000 Note, and plaintiff was denied access to the terms of the Barker litigation settlement. On 5 July 2006, plaintiff and his counsel first met with BB&T representatives and agreed to discuss resolution of the matter.

On 24 July 2006, plaintiff executed his fifth modification of the $425,000 Note, which extended the loan maturity date several more months to 22 October 2006, allowed plaintiff to continue to accrue interest, and contained provisions identical to the former modifications affirming plaintiff's obligation to repay the debt and waiving any offsets and defenses. Plaintiff was current on his interest payments at that time.

According to plaintiff, on 17 October 2006, "having not received a settlement proposal from BB&T," his counsel wrote BB&T and demanded cancellation of the $425,000 Note, plus compensation for interest, costs, and expenses incurred in acquisition of the Cheraw Road Building and for startup and financing costs related to Chair Specialists. BB&T responded by e-mail on 20 October 2006. BB&T held a deed of trust on the Cheraw Road Building as collateral for the $425,000 Note, and the bank sought to conduct an environmental inspection and assess the value of the property. BB&T requested confirmation that the parties understood that they would "let the environmental inspections, appraisals, etc. run their course to see where we are," and, as related to the $425,000 Note, reiterated that "[a]nything of substance would have to come through the regional offices here first."

Plaintiff's counsel agreed to that understanding on 23 October 2006 and noted in his e-mail to BB&T's representative that he would await "completion of the environmental assessment and BB&T's decision relative to the subject transaction and [plaintiff's] position on the matter before acting further." Around this time and continuing into 2007, plaintiff allowed contractors retained by BB&T to have access to the Cheraw Road Building to conduct their environmental inspections and assessments.

On 21 November 2006, plaintiff executed his sixth and final modification of the $425,000 Note, which extended the loan maturity date several additional months to 19 February 2007, allowed plaintiff to continue

to accrue interest, and contained provisions identical to the former modifications affirming plaintiff's obligation to repay the debt and waiving any offsets and defenses.

In April 2007, in an unrelated, separate loan transaction, BB&T denied plaintiff's request to extend a loan on a different commercial property because, according to plaintiff, BB&T was "looking at writing off approximately '$160,000.00 on the [$425,000 Note].' "[4]

On 14 August 2007, over five and a half years after plaintiff's evidence shows he first became aware that no government-backed loan was available, plaintiff's counsel wrote BB&T and demanded that the bank "cancel the $425,000.00 Note as satisfied" and "reimburse [plaintiff] the sum of $192,812.00," for a total of $617,812.00, in exchange for which plaintiff would convey the Cheraw Road Building to BB&T; otherwise, plaintiff would initiate a lawsuit. Plaintiff's counsel noted that "this is a very reasonable settlement proposal." BB&T's counsel rejected plaintiff's demand outright, noting in a letter dated 14 January 2008 that plaintiff's claims are "without merit and clearly time-barred," but he expressed a willingness to work towards a resolution of BB&T's potential claims against plaintiff. Counsel's letter included a counterproposal giving plaintiff six months to sell the Cheraw Road Building and, after applying the proceeds from that sale to the $425,000 Note, allowing plaintiff to pay eighty-five percent of any deficiency balance remaining in twenty-four equal monthly installments, without interest.

On 25 June 2008, six years and five months after plaintiff first became aware that no government-backed loan was available, plaintiff filed his complaint asserting seven causes of action, each of which incorporates by reference and is based in part upon the following allegations:

> 9. On or about April 18, 2002, based upon the assurances that Barker and Chair Specialties would quality [sic] for a business loan, Plaintiffs obtained a $425,000 loan from BB&T, signing a promissory note in said amount payable to BB&T in full upon its maturity on April 18, 2003, with accrued interest payable on a quarterly basis through maturity. As collateral for the loan, the Plaintiffs granted a

4. For internal accounting purposes BB&T did write down the indebtedness by $180,000, but the internal entries did not alter plaintiff's $425,000 Note or his repayment obligations, and plaintiff has not alleged otherwise. As plaintiff has asserted in his complaint, any harm remains founded on BB&T's alleged failure to obtain the government-backed loan.

Deed of Trust to BB&T in the amount of $425,000.00, with the Cheraw Road building as collateral, and also entered into a Security Agreement with BB&T.

. . . .

11. Plaintiffs allege under information and belief that with the start up of Chair Specialties and the securing of a $450,000.00 [government-backed loan] by Barker and Chair Specialties, that Barker and Chair Specialties would be able to pay in full the Promissory Note issued by the Plaintiffs to Barker and his wife, and also pay off the $425,000.00 business loan obtained by the Plaintiffs for the start up of Chair Specialties.

12. On April 18, 2002 notes and closing documents were all executed with the knowledge of Mabe and BB&T, and under the full assurance to the Plaintiffs that the business loan for Chair Specialties would be approved.

13. Plaintiffs allege upon information and belief that within the weeks that followed the April 18, 2002 closing on the $425,000.00 loan from BB&T to the Plaintiffs, Barker contacted Mabe to obtain a status on the paperwork for the Chair Specialties business loan, and upon his inquiry, Mabe within the course and scope of his authority with BB&T, assured Barker that the loan paperwork was "on track" and that the loan would be approved.

14. Plaintiffs allege upon information and belief that in January of 2003, Mabe called Barker and informed him that he had bad news, and that much to Mabe's surprise, the [government-backed] loan had been denied.

. . . .

33. Defendants have failed and refused to cancel the [$425,000 Note] and reimburse the Plaintiffs for expenses incurred based upon the Defendant's breach and failure to procure original financing for Chair Specialties and Barker.

In essence, plaintiff argues in his complaint that he sought the $425,000 loan as a "bridge loan" to be repaid with the proceeds of the anticipated $450,000 government-backed loan. Unable to repay the $425,000 Note with funds from the expected $450,000 government-backed loan,

plaintiff asserts the following claims: (1) negligence, (2) negligent misrepresentation, (3) breach of contract, (4) unfair and deceptive trade practices, (5) breach of fiduciary relationship, (6) breach of BB&T's duty of good faith dealing, and (7) fraud. In addition to compensatory damages, plaintiff requested punitive damages and a declaratory judgment voiding the $425,000 Note and cancelling the bank's deed of trust on the Cheraw Road Property.

Despite the foundational allegation in the complaint that plaintiff obtained the $425,000 loan in reliance upon a representation that the government-backed loan was forthcoming, the actual facts established by plaintiff's own affidavit and discovery, and by the affidavit of his business partner Barker, are that BB&T had already notified plaintiff that no such government-backed loan was available by January 2002, several months before plaintiff obtained the $425,000 loan in April 2002. Plaintiff has not filed a motion to amend his pleading.

In its answer BB&T raised the statutes of limitation[5] as an affirmative defense and filed a compulsory counterclaim to collect the outstanding principal and interest owed on the $425,000 Note. In plaintiff's reply to BB&T's counterclaim, he pled, as one of his affirmative defenses, the claims from his complaint, stating that "Plaintiffs plead and rely upon the original claims set forth in their Complaint as a bar to the Counterclaim."[6]

On 15 December 2011, BB&T moved for summary judgment on the grounds that, *inter alia*, there is no genuine dispute of material fact regarding plaintiff's indebtedness under the $425,000 Note or that plaintiff's claims are time-barred. On 16 April 2012, the trial court granted summary judgment in favor of BB&T, concluding that BB&T is entitled to damages of $645,382.79, plus costs and interest, and attorney fees. On

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5. Plaintiff's claims for negligence, negligent misrepresentation, breach of contract, breach of fiduciary relationship, breach of duty of good faith and fair dealing, and fraud are subject to a three-year statute of limitations. N.C.G.S. § 1-52(1), (5), (9) (2013). Plaintiff's unfair and deceptive trade practices claim is subject to a four-year statute of limitations. *Id.* § 75-16.2 (2013). Based on the purported claims having arisen in January 2002, the three-year statute of limitations would have run in January 2005, and the four-year statute of limitations would have run in January 2006.

6. Plaintiff raises seven defenses in his reply to BB&T's counterclaim. First, plaintiff does not dispute execution of the $425,000 Note or the accompanying six modification agreements or the benefits therein, but denies he is in default. He then asserts six affirmative defenses: (1) "unclean hands," (2) "modification and novation," (3) "laches," (4) "waiver and estoppel," (5) "Defendant's failure to mitigate," and (6) "the original claims set forth in [plaintiff's] Complaint."

appeal, plaintiff argued, *inter alia*, that the record establishes a genuine issue of material fact whether BB&T should be equitably estopped from asserting the statutes of limitation defense and whether the promissory note and deed of trust are enforceable. BB&T reiterated its argument that plaintiff's claims are in fact time-barred and that it is entitled to summary judgment on the $425,000 Note.

In a divided opinion, the Court of Appeals held that the events alleged by plaintiff raised an inference that BB&T was equitably estopped from asserting the statutes of limitation as a defense when its assurances to plaintiff may have induced his delay in filing suit and reversed the trial court's grant of defendant's motion for summary judgment. *Ussery v. Branch Banking & Trust Co.*, ___ N.C. App. ___, ___, 743 S.E.2d 650, 658 (2013). The dissent rejected the majority's equitable estoppel analysis, concluding that no genuine issue of material fact existed regarding plaintiff's claims and that BB&T's alleged "assurances" were "nothing more than mere 'promises' that Defendant would work to resolve Plaintiff's claims in the future." *Id.* at ___, 743 S.E.2d at 659 (Dillon, J., concurring in part and dissenting in part). The dissent noted that, in any event, "the alleged oral 'assurance' [by BB&T] that the [$425,000 Note] would not have to be paid back under any circumstance is in *direct contradiction* to the terms of the six written [modification] agreements executed by Plaintiff." *Id.* at ___, 743 S.E.2d at 661. Nonetheless, the dissent agreed with the majority that a genuine issue of material fact remained regarding the amount of interest accrued on the $425,000 Note, for which defendant sought recovery in its counterclaim.[7] *Id.* at ___, ___, 743 S.E.2d at 658-59, 662.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2013). The movant is entitled to summary judgment: (1) "where a claim or defense is utterly baseless in fact," or (2) when only a question of law arises based on undisputed facts. *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (citations omitted). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). This Court

7. This final issue was not appealed by either party and is not before this Court. *See, e.g.*, *Town of Midland v. Wayne*, ___ N.C. ___, ___, 773 S.E.2d 301, 305-06 (2015) (recognizing that when a party has not sought further review of an issue, the decision of the Court of Appeals on that matter is final).

reviews appeals from summary judgment de novo. *Dallaire v. Bank of Am.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (citations omitted).

A genuine issue of material fact "is one that can be maintained by substantial evidence." *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835 (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (quoting *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)), and means "more than a scintilla or a permissible inference," *id.* at 414, 233 S.E.2d at 544 (quoting *State ex. rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 287 N.C. 192, 205, 214 S.E.2d 98, 106 (1975)). When the proof offered by either party establishes that no cause of action or defense exists, summary judgment may be granted. *Kessing*, 278 N.C. at 535, 180 S.E.2d at 830 (citation omitted).

It is undisputed that, several months after plaintiff became aware that the desired government-backed loan was unavailable and thus learned of his potential claims against BB&T, he nonetheless sought and obtained a new $425,000 loan from BB&T, thereby consolidating his existing debts and giving him $99,187.75 in additional cash. The record reveals no misrepresentation inducing plaintiff to obtain this loan. Plaintiff then executed a series of six modifications, all of which unambiguously reaffirmed the $425,000 Note obligation and expressly waived any offsets and defenses against the indebtedness or the bank.

BB&T is entitled to summary judgment on its counterclaim seeking repayment of the $425,000 Note because, relying on the contractual terms of the loan documents, plaintiff repeatedly reaffirmed his indebtedness and expressly waived his defenses and offsets. Likewise, because plaintiff's own claims incorporate and rely upon his indebtedness, comprised of both the $425,000 Note and subsequent modifications, plaintiff's waiver necessarily included his claims, and summary judgment for BB&T on that basis is proper. Moreover, plaintiff's claims as pled in his complaint rely upon the premise that the $425,000 Note was a "bridge loan" obtained before he knew the government-backed loan was not available, but his own evidence directly contradicts this assertion.

In interpreting contracts, we construe them as a whole. *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) ("The various terms of the [contract] are to be harmoniously construed . . . ." (alteration in original) (quoting *Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563

(2000))). Each clause and word is considered with reference to each other and is given effect by reasonable construction. *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 93, 143 S.E.2d 270, 275 (1965) ("[A] paragraph or excerpt must be interpreted in context with the rest of the agreement." (quoting 1 Strong's North Carolina Index: *Contracts* § 12, at 585 (1957))). We determine the intent of the parties by using "the plain meaning of the written terms." *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citing *Powers v. Travelers Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923)). Contracting parties understand that "liability to the burden is a necessary incident to the right to the benefit." *Id.* at 428-29, 762 S.E.2d at 190 (quoting *Norfleet v. Cromwell*, 70 N.C. 510, 516, 70 N.C. 633, 641 (1874) (citations omitted)). "It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners . . . ." *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 693-94, 51 S.E.2d 191, 199 (1949) (Stacy, C.J., dissenting) (citations omitted). One who executes a written instrument is ordinarily charged with knowledge of its contents, *see, e.g.*, *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963), 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, *Pierce v. Bierman*, 202 N.C. 275, 279, 162 S.E. 566, 568 (1932).

"Parties are [generally] free to waive various rights, including those arising under statutes." *RL REGI*, 367 N.C. at 428, 762 S.E.2d at 190 (citations omitted). "Waiver is the intentional relinquishment of a known right," and as such, "knowledge of the right and an intent to waive it must be made plainly to appear." *Brady v. Funeral Benefit Ass'n*, 205 N.C. 5, 7, 169 S.E. 823, 824 (1933) (citation omitted). A debtor who, on the one hand, acknowledges his debt obligations and waives any defenses against that obligation cannot, at the same time, claim he reasonably relied on contemporaneous assurances that the very same debt would be canceled. *See Int'l Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 220, 316 S.E.2d 619, 621, *disc. rev. denied*, 312 N.C. 493, 322 S.E.2d 556 (1984) (holding the defendants' reliance unreasonable as a matter of law when the defendants signed a guaranty that expressly contradicted the creditor's assurance).

Recently, in *RL REGI North Carolina, LLC v. Lighthouse Cove, LLC*, we held that a spousal guarantor's execution of a forbearance agreement that "waiv[ed] all defenses" precluded her assertion of a statutory affirmative defense after she was sued for defaulting on the underlying loan. 367 N.C. at 428-30, 762 S.E.2d at 190-91. In reaching this

conclusion, we relied on traditional contract interpretation principles. *Id.* at 428-30, 762 S.E.2d at 190-91. The defendant in *RL REGI* executed a guaranty agreement with her bank to support financing for a real estate development project. *Id.* at 426, 762 S.E.2d at 189. The loan went into default, after which the parties entered into a restructuring arrangement; in conjunction with that transaction, the defendant executed an accompanying forbearance agreement. *Id.* at 426, 762 S.E.2d at 189. According to that arrangement, the bank agreed not to exercise its collection remedies under the loan documents and to forego payments on the principal debt during the forbearance period. *Id.* at 426, 762 S.E.2d at 189. In exchange, the defendant "waived 'any and all claims, defenses and causes of action.' " *Id.* at 426, 762 S.E.2d at 189. The plaintiff lender later sued the defendant seeking recovery of the indebtedness. *Id.* at 427, 762 S.E.2d at 189. In response, the defendant asserted an affirmative defense, arguing that the bank had obtained her guaranty in violation of the federal Equal Credit Opportunity Act. *Id.* at 427, 762 S.E.2d at 189.

Reading the plain language of the forbearance agreement, we held that, regardless of whether the bank had violated the Act, the defendant had waived that defense. *Id.* at 428, 762 S.E.2d at 190 ("We must decide the case, therefore, . . . by what is written in the contract actually made by them." (alteration in original) (quoting *Powers*, 186 N.C. at 338, 119 S.E. at 482)). The defendant acknowledged that she had freely and voluntarily signed the forbearance agreement after having adequate time to review, analyze, and discuss its provisions. *Id.* at 426-27, 762 S.E.2d at 189. Despite the defendant's later assertion to the contrary, we found "nothing facially illegal about this loan relationship," in which the lender agreed to modify a loan upon certain conditions. *Id.* at 429, 762 S.E.2d at 191 ("[P]arties routinely forego claims in settlement agreements."). The defendant's waiver "was not a precondition . . . to receive the . . . loan, but rather it was a negotiated settlement." *Id.* at 430, 762 S.E.2d at 191. The defendant guarantor chose to accept the benefits of the forbearance agreement, which provided leniency in repayment of her debt, and she thus "acknowledged the enforceability of her guaranty and waived a wide array of potential claims [or defenses]." *Id.* at 429, 762 S.E.2d at 190.

Here the language in both the $425,000 Note and accompanying modifications clearly and unambiguously establishes plaintiff's indebtedness. In exchange for incurring the $425,000 Note, plaintiff received benefits, including capital, an additional $99,187.75 in cash proceeds, consolidation of his debts, and reduction of his monthly expenses through interest-only payments. Likewise, plaintiff benefitted from the

six loan modification agreements, each of which extended the maturity date of the $425,000 Note and allowed him to make interest-only payments, or via the later modifications, accrue the interest until maturity. The language in the promissory note executed by plaintiff in conjunction with his receipt of the $425,000 states that "[*f*]*or value received*, *the undersigned . . . promises to pay*." Plaintiff later reaffirmed that his obligation to repay the debt "*shall remain in full force and effec*t" on six different occasions. We accept the Note and modifications as accurate statements of the parties' contractual agreement.

Given that parties are generally free to waive various rights, *RL REGI*, 367 N.C. at 428-29, 762 S.E.2d at 190, plaintiff accepted the terms of the modification agreements, which benefitted him, in exchange for plaintiff's reaffirmation of his loan obligation and waiver of his offsets and defenses against BB&T. With each loan modification plaintiff again consented to the agreement, "waiv[ed] any objection thereto," and "certif[ied] that there are no defenses or offsets against" either the "obligations or the Bank." The text is clear and unambiguous. Plaintiff offers no contrary interpretation of his waiver. If plaintiff relied on verbal assurances contrary to the documents he signed, such reliance cannot be reasonable, and he was "misled through his own want of reasonable care and circumspection." *Hawkins v. M & J Fin. Corp.*, 238 N.C. 174, 179, 77 S.E.2d 669, 673 (1953); *see RL REGI*, 367 N.C. at 429, 762 S.E.2d at 190. Plaintiff's waiver acknowledging his obligation and waiving any offsets or defenses against the $425,000 Note makes summary judgment proper for BB&T on its counterclaim seeking repayment of the indebtedness.

Each of plaintiff's claims as pled seeks to defeat the $425,000 Note based on plaintiff's bridge loan theory: that he would not have incurred the obligation but for BB&T's assurance that a government-backed loan would be available. By tying each of his claims to the $425,000 Note or to BB&T's refusal to cancel it, plaintiff acknowledges that his claims are efforts to defeat that indebtedness and, therefore, constitute defenses or offsets against that obligation.[8] Construing plaintiff's indebtedness

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8. Plaintiff's stated claims each incorporate by reference his bridge loan theory as outlined in his complaint, and each claim reveals, *inter alia*, the following reliance upon cancellation of the $425,000 Note and accompanying loan agreements:

(1) Plaintiff's negligence claim relies on BB&T's refusal to "cancel the Deed of Trust and Security Agreement" accompanying the $425,000 Note.

(2) Plaintiff's negligent misrepresentation claim provides that BB&T misrepresented that the "[$425,000 Note] would be canceled" and that, "based upon [BB&T's] refusal to

as a whole, and in light of established principles of reasonable construction and interpretation, we find the $425,000 indebtedness valid and conclude that plaintiff waived his claims and defenses as they are offsets or defenses to that indebtedness; therefore, summary judgment is proper for BB&T on plaintiff's claims.

Furthermore, plaintiff's claims as pled are logically flawed, and plaintiff fails to establish a genuine issue of material fact regarding his claims. Plaintiff cannot prove, even under his own asserted timeline, that he obtained the $425,000 Note in anticipation of the government-backed loan. In his complaint, plaintiff alleges that on 18 April 2002, he executed the $425,000 Note with BB&T in anticipation of securing a government-backed loan in the future. Plaintiff further alleges that in the weeks that followed, BB&T assured plaintiff that his government-backed loan was "on track" and that it would be approved. Nevertheless, by his own affidavit and interrogatories, plaintiff admits that by January 2002, BB&T had already notified him that no such government-backed loan would be available. Plaintiff further admits he had transitioned to closing Chair Specialists and was in the process of selling the associated equipment and other property "by the beginning of 2002." Plaintiff's business partner Barker, by his affidavit, acknowledged the same: "Mr. Mabe contacted me in January of 2002 and stated that . . . the [government-backed loan] had been denied. . . . In early 2002 . . . we were

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cancel the [accompanying] Deed of Trust," plaintiff has been "precluded from selling the property" serving as collateral for the loan.

(3) Plaintiff's breach of contract claim asserts that plaintiff "enter[ed] into the $425,000.00 Promissory Note . . . as the bridge loan for Chair Specialties," and requests that plaintiff "be indemnified on the $425,000.00 note and bridge loan."

(4) Plaintiff's unfair and deceptive trade practices claim relies in part on "representations to induce [plaintiff] to enter into the alleged [$425,000 Note]" and representations that "BB&T would cancel the [$425,000 Note]."

(5) Plaintiff's breach of fiduciary relationship claim relies on "[BB&T's] assurance to the Plaintiff[ ] that all matters involving the Plaintiff's $425,000.00 note, and any expenses incurred would be resolved," and BB&T's failure to "resolve the issue related to the $425,000.00 loan and damages" and its "refus[al] to cancel the [accompanying] Deed of Trust."

(6) Plaintiff's breach of duty of good faith dealing claim relies on BB&T's actions in "the various respects alleged above," referring to the allegations in the aforementioned claims, all of which rely in large part upon the $425,000 Note.

(7) Plaintiff's fraud claim relies on BB&T's "representations that the [$425,000 Note] and the associated business expenses would be resolved."

forced to close Chair Specialists." Barker characterized the transaction at issue as a "consolidation loan," stating that "[i]n early 2002, being unable to obtain [the government-backed] loan . . . [plaintiff] thereafter approached BB&T about a single loan of $425,000.00 to consolidate the debt on the building and reduce his monthly expenditures." Even taking the evidence in the light most favorable to plaintiff, BB&T could not have issued the $425,000 Note in anticipation of a future government-backed loan that the bank had already advised plaintiff would not be forthcoming. Plaintiff's blanket assertions cannot overcome his own evidence to the contrary. *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 886 (2004) ("[A] party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." (quoting *Roberts v. Grogan*, 222 N.C. 30, 33, 21 S.E.2d 829, 830-31 (1942))); *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835 (providing that summary judgment is proper when "the opposing party cannot produce evidence to support an *essential element* of her claim" (emphasis added) (citations omitted)). Though a plaintiff may amend his complaint, and leave to do so "shall be freely given when justice so requires," N.C.G.S. § 1A-1, Rule 15(a) (2013), plaintiff failed to do so despite such fundamental, logical defects.

In conclusion, the $425,000 Note and modifications clearly establish plaintiff's indebtedness and his waiver of offsets and defenses against BB&T. Plaintiff's waiver necessarily included, and extended to, his claims against the $425,000 Note or the bank. Taking the evidence in the light most favorable to plaintiff, BB&T is entitled to summary judgment in its favor as to all claims set forth in plaintiff's complaint and all but the interest claim stated in BB&T's counterclaim; accordingly, the decision of the Court of Appeals which is before us is reversed. Regarding the interest claim, the Court of Appeals unanimously held that the trial court erred in calculating the amount of interest due on the $425,000 Note and remanded that issue for determination at trial. That matter was not before this Court on appeal, and therefore, the decision of the Court of Appeals as to that issue remains undisturbed. Accordingly, this case is remanded to the Court of Appeals for further remand to the Superior Court, Richmond County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA
v.
GREGORY ALDON PERKINS

No. 332PA14

Filed 25 September 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 928 (2014), finding no error after appeal from judgments entered on 4 December 2012 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 31 August 2015.

Roy Cooper, *Attorney General*, *by Amy Kunstling Irene*, *Assistant Attorney General*, *for the State.*

Glenn Gerding for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
DWAYNE ANTHONY ELLIS

No. 405PA14

Filed 25 September 2015

Indictment and Information—injury to personal property—owned by multiple entities

The Court of Appeals erred by holding that the indictment charging defendant with injury to personal property was fatally flawed for failure to allege that each owner of the property was an entity capable of owning property. When an indictment alleges that injury to personal property was committed against multiple entities, at least one of which was capable of owning property, the indictment is not facially invalid.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 574 (2014), finding no error in part and vacating in part a judgment entered on 2 August 2013 by Judge W. Osmond Smith, III, in Superior Court, Wake County, and remanding this case to the trial court. Heard in the Supreme Court on 22 April 2015.

Roy Cooper, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by James R. Grant*, *Assistant Appellate Defender*, *for defendant-appellee.*

ERVIN, Justice.

Defendant Dwayne Anthony Ellis was convicted of felonious larceny, injury to personal property causing damage in excess of $200.00, first degree trespass, and misdemeanor possession of stolen property. A unanimous panel of the Court of Appeals vacated defendant's injury to personal property conviction and remanded this case to the trial court for resentencing. We now reverse the decision of the Court of Appeals.

At around 4:30 a.m. on 23 April 2011, Sergeant Ian Kendrick of the North Carolina State University Police Department witnessed a vehicle with an attached trailer leaving a parking lot near an electrical substation located on the University's campus. After noting that the vehicle

had no visible tail lights and that the trailer was dragging the ground, Sergeant Kendrick stopped the vehicle, which was being driven by defendant. During the course of a pre-impoundment inventory search of the vehicle, investigating officers discovered, among other things, four large rolls of copper wire and a collection of wet, muddy clothing. Subsequently, investigating officers determined that the copper wire had been taken from a fenced-in area associated with the electrical substation. The remaining wire on the spool at the substation had been damaged to such an extent that it was no longer useable.

On 12 July 2011, the Wake County grand jury returned a bill of indictment in File No. 11 CrS 210130 that purported to charge defendant with felonious larceny, injury to personal property causing damage in excess of $200.00, and first degree trespass stemming from the 23 April 2011 incident and a separate bill of indictment in File No. 11 CrS 211154 that purported to charge defendant with felonious possession of stolen property stemming from his possession of a trailer that had allegedly been taken from Shaw University. On 25 July 2013, defendant consented to the filing of a pair of superseding informations that purported to allege the same offenses charged in the original bills of indictment, with the principal difference between the original indictment and the information in File No. 11 CrS 210130 being the manner in which the ownership of the property that defendant allegedly stole, damaged, and trespassed upon was stated. More specifically, the indictment returned against defendant in File No. 11 CrS 210130 alleged that the property in question was owned by "NC State University High Voltage Distribution," while the information filed against defendant in File No. 11 CrS 210130 alleged that the property was owned by "North Carolina State University (NCSU) and NCSU High Voltage Distribution."

On 2 August 2013, the jury returned a verdict convicting defendant of felonious larceny, misdemeanor injury to personal property, first degree trespass, and misdemeanor possession of stolen property. After accepting the jury's verdict and consolidating defendant's convictions in File No. 11 CrS 210130 for judgment, the trial court sentenced defendant to a term of six to eight months imprisonment in File No. 11 CrS 210130 and to a consecutive term of forty-five days imprisonment in File No. 11 CrS 211154. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

In his sole challenge to the trial court's judgments before the Court of Appeals, defendant argued that "the trial court lacked subject matter jurisdiction over the injury to personal property charge because the information filed" in File No. 11 CrS 210130 "failed to allege that 'North

Carolina State University (NCSU) and NCSU High Voltage Distribution' were legal entities capable of owning property." *State v. Ellis*, ___ N.C. App. ___, ___, 763 S.E.2d 574, 575 (2014). After holding that the information did, in fact, adequately allege that North Carolina State University was an entity capable of owning property, a unanimous panel of the Court of Appeals held that the same could not be said for the ownership allegation relating to "NCSU High Voltage Distribution" given the absence of any indication that "NCSU High Voltage Distribution" was a legal entity capable of owning property. *Id.* at ___, 763 S.E.2d at 576-77. Acting in reliance upon its recent decision in *State v. Campbell*, ___ N.C. App. ___, 759 S.E.2d 380 (2014), *rev'd*, ___ N.C. ___, 772 S.E.2d 440 (2015), the Court of Appeals stated that, "when an indictment alleges that the property at issue has multiple owners, the indictment must also show that each owner is capable of owning property." *Ellis*, ___ N.C. App. at ___, 763 S.E.2d at 574. In view of the fact that the second count of the information filed in File No. 11 CrS 210130 failed to allege that "NCSU High Voltage Distribution" was capable of owning property, the Court of Appeals concluded that the trial court lacked jurisdiction over the injury to personal property charge, vacated defendant's conviction for committing that offense, and remanded this case to the trial court for resentencing. *Id.* at ___, 763 S.E.2d at 577.

"[A]n [information or] indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (citation omitted), *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003); *see also* N.C.G.S. § 15A-924(a)(5) (2013) (requiring that a criminal pleading contain a "plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation"). A criminal pleading, such as an information, is fatally defective if it "fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943) (citations omitted).

An individual is guilty of injury to personal property in the event that: (1) personal property was injured; (2) the personal property was that "of another"; (3) the injury was inflicted "wantonly and willfully"; and (4) the injury was inflicted by the person or persons accused. N.C.G.S. § 14-160 (2013). The identity of the owner of the property that the defendant allegedly injured is a material element of the offense of injury to

personal property. *See State v. Eppley*, 282 N.C. 249, 259, 192 S.E.2d 441, 448 (1972). For that reason, a criminal pleading seeking to charge the commission of crimes involving theft of or damage to personal property, including injury to personal property, must "allege ownership of the property in a person, corporation, or other legal entity capable of owning property." *State v. Thornton*, 251 N.C. 658, 661-62, 111 S.E.2d 901, 903 (1960) (citation and quotation marks omitted).

As he candidly concedes, defendant did not challenge the sufficiency of the second count of the information filed against him in File No. 11 CrS 210130 in the trial court. However, since "a valid bill of indictment [or information] is essential to the jurisdiction of the trial court to try an accused," *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted), the facial validity of a criminal pleading may be challenged for the first time on appeal if the appellate court has jurisdiction over the underlying case. *State v. Pennell*, 367 N.C. 466, 469, 758 S.E.2d 383, 385 (2014) (citation omitted).

As we have already noted, the only issue before the Court in this case is the extent to which the second count in the information filed in File No. 11 CrS 210130 adequately alleged that the property that defendant was alleged to have injured was that "of another." Defendant does not appear to dispute that North Carolina State University is expressly authorized to own property by statute, N.C.G.S. § 116-3 (2013), and is, for that reason, an entity inherently capable of owning property. *See Campbell*, ___ N.C. at ___, 772 S.E.2d at 444 (holding that, because "our statutes recogniz[e] that churches are entities capable of owning property in North Carolina," "alleging ownership of property in an entity identified as a church or other place of religious worship . . . signifies an entity capable of owning property"). Thus, because North Carolina State University is, as the Court of Appeals correctly recognized, an entity capable of owning property, a criminal pleading that charges the defendant with injuring personal property owned by North Carolina State University adequately alleges "all the essential elements of the offense endeavored to be charged." *Hunt*, 357 N.C. at 267, 582 S.E.2d at 600 (citation and quotation marks omitted). Defendant contends, however, that the relevant count of the information is fatally defective because "NCSU High Voltage Distribution" was not alleged to be an entity capable of owning property. Assuming, without deciding, that the relevant count of the information did not adequately allege that "NCSU High Voltage Distribution" was an entity capable of owning property, that fact does not render the relevant count facially defective.

According to defendant, this Court's decisions establish that, where a criminal pleading purporting to charge the commission of an injury to personal property lists two entities as property owners, both entities must be adequately alleged to be capable of owning property for the pleading to properly charge the commission of the crime. Although defendant cites numerous cases in support of this position, each decision on which he relies involves a claim that a fatal variance existed between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial, rather than a challenge to the facial sufficiency of the underlying criminal pleading. For example, in *State v. Greene*, 289 N.C. 578, 585-86, 223 S.E.2d 365, 370 (1976), this Court held that there was no fatal variance between the indictment and the evidence in a case in which both men listed as property owners in the indictment were shown to have an ownership interest in the property. Similarly, we concluded in *State v. Hill*, 79 N.C. 656, 658-59 (1878), that a fatal variance did exist in a case in which the indictment alleged that the property was owned by "Lee Samuel and others" while the evidence showed that Lee Samuel was the sole owner of the property in question. Finally, in *State v. Burgess*, 74 N.C. 272, 272-73 (1876), we determined that a fatal variance existed in a case in which the indictment alleged that the property was owned by Joshua Brooks while the evidence tended to show that the property in question was owned by both Mr. Brooks and an individual named Hagler. As a result, none of the decisions upon which defendant relies stand for the proposition that all of the alleged victims named in a criminal pleading that purports to charge a defendant with the commission of certain property-related crimes must be alleged to have been capable of owning the property in order to preclude a finding of facial invalidity.

Although neither party has identified any prior decision of this Court that is directly on point with respect to this issue, our jurisprudence suggests, as the State argues, that a criminal pleading purporting to charge the commission of a property-related crime like injury to personal property is not facially invalid as long as that criminal pleading adequately alleges the existence of at least one victim that was capable of owning property, even if the same criminal pleading lists additional victims who were not alleged to have been capable of owning property as well. In *State v. Jessup*, 279 N.C. 108, 109, 181 S.E.2d 594, 595 (1971), an indictment alleged that the property taken in a larceny was owned by "the estate of W.M. Jessup." After concluding that the indictment was fatally defective because a decedent's estate is not a legal entity capable of owning property, *id.* at 111, 181 S.E.2d at 597, this Court favorably referenced a Texas decision upholding the validity of an indictment that

alleged that the property in question was owned by "the estate of Mary E. Rose" and possessed by an heir named "W.C. Shandley," *id.* at 114, 181 S.E.2d at 598. The implied distinction drawn in *Jessup* between the validity of an indictment alleging that property had been stolen from an entity that was not capable of owning property and an indictment alleging that property had been stolen from both an entity that was not capable of owning property and a person who was capable of owning property, with the former being invalid and the latter being valid, suggests that a criminal pleading like the second count of the information at issue here is not facially invalid as long as at least one person capable of owning property is named as the victim of the crime in question. *See also Greene*, 289 N.C. at 584-85, 223 S.E.2d at 369-70 (stating that, "[s]ince [*State v.*] *Jenkins*[, 78 N.C. 478 (1878),] was decided, the general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen"). Such a determination is fully consistent with the entire concept of facial invalidity, which should be judged based solely upon the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading. As a result, given that injuring personal property owned by North Carolina State University would constitute a criminal offense, the second count of the information in File No. 11 CrS 210130 is not facially invalid.

Thus, we hold that, in the event that a criminal pleading alleges that injury to personal property was committed against multiple entities, at least one of which is capable of owning property, that pleading is not facially invalid. As a result, for the reasons set forth above, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA
v.
CHARLES STEVENS BLOW, JR.

No. 446A14

Filed 25 September 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 764 S.E.2d 230 (2014), finding no error in part and vacating in part judgments entered on 31 July 2013 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Supreme Court on 1 September 2015.

Roy Cooper, Attorney General, by Anne M. Middleton and Christina E. Simpson, Assistant Attorneys General, for the State-appellant.

Paul F. Herzog for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed as to the appealable issue of right, and judgment entered upon defendant's conviction for first-degree rape of a child in case number 11 CRS 55728 is reinstated. The remaining issues addressed by the Court of Appeals are not before this Court and that court's decision as to these matters remains undisturbed.

REVERSED.

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

CARPENTER v. McKINNEY

[368 N.C. 349 (2015)]

ROBERT CARPENTER AND TAMMY CARPENTER, INDIVIDUALLY AND TAMMY CARPENTER AS ADMINISTRATOR OF THE ESTATE OF MONIQUE L. CARPENTER	)	
v.	)	From Guilford County
WILLIE McKINNEY, INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH WINDHAM HEATING AND AIR CONDITIONING, INC., INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH OLD REPUBLIC HOME PROTECTION COMPANY, INC., INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH PAUL EDWARD WINDHAM, INDIVIDUALLY AND D/B/A WINDHAM HEATING & AIR	)	

No. 266PA14

ORDER

After carefully reviewing all filings in this matter, the Court determines that the petition for writ of certiorari was improvidently allowed. Accordingly, it is ordered that the appeal is dismissed.

By Order of this Court, this 24th day of September, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of September, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Lee County
	)	
JUAN CARLOS BENITEZ	)	

No. 24PA15

ORDER

This case has come before the Court by way of the State's Petition for Discretionary Review pursuant to N.C.G.S. § 7A-31.

Pursuant to N.C.G.S. § 15A-1418, the decision of the Court of Appeals is vacated and this Court now ORDERS this case remanded to the Court of Appeals for remand to the Superior Court, Lee County, for an evidentiary hearing to make findings of fact necessary to determine whether the trial counsel's actions fell below an objective standard of reasonableness, *see State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998) (remanding a motion for appropriate relief to the trial court with instructions to conduct an evidentiary hearing), and, if so, whether defendant was prejudiced by any deficient performance by his trial counsel.

The time periods for perfecting or proceeding with the appeal are tolled. The Superior Court, Lee County, is ordered to transmit its order on the motion for appropriate relief within 120 days so that the Court of Appeals may proceed with the appeal or enter an order terminating the appeal, as appropriate.

By order of the Court in Conference, this 24th day of September, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of September, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. WALSTON

[368 N.C. 351 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Dare County
	)	
ROBERT TIMOTHY WALSTON SR.	)	

No. 392PA13-2

ORDER

The defendant's petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals to (1) determine, in light of our holding and analysis in *State v. King*, 366 N.C. 68, ___ S.E. 2d ___ (2012) (applying North Carolina Rules of Evidence 403 and 702), and other relevant authority, if the trial court's decision to exclude the expert testimony was an abuse of discretion and, if so, (2) determine if the erroneous decision to exclude the testimony prejudiced defendant. The petition is denied as to any remaining issues.

By Order of this Court, this 24th day of September, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

24 SEPTEMBER 2015

003P10-2	State v. Steven L. Peoples	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31	Dismissed
005PA15	Commscope Credit Union v. Butler and Burke, LLP, et al.	1. Plt's Motion to Remove James L. Wright, Third Party Defendant 2. Plt's Motion to Withdraw Motion to Remove	1. — **09/02/2015** 2. Allowed **09/02/2015** **Beasley, J., recused**
008PA14	High Point Bank and Trust Company v. Highmark Properties, LLC, Mitchell Blevins, Cynthia Blevins, Charles Williams, and Janice Williams	Plt's Motion for the Court to Take Judicial Notice	Dismissed as moot **Ervin, J., recused**
008PA14	High Point Bank and Trust Company v. Highmark Properties, LLC, Mitchell Blevins, Cynthia Blevins, Charles Williams, and Janice Williams	Defs' Motion to Strike	Dismissed as moot **Ervin, J., recused**
019PA14	State v. Randy Benjamin Bartlett	Def's Motion to Take Judicial Notice	Allowed
024PA15	State v. Juan Carlos Benitez	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Lee County 2. State's Motion to Strike Petition for *Writ of Certiorari*	1. Dismissed 2. Dismissed as moot
032PA15	Eastern Carolina Regional Housing Authority v. Sherbreda Lofton	Motion to Admit Erik R. Zimmerman *Pro Hac Vice*	Allowed **09/01/2015** **Ervin, J., recused**
050P12-3	Ovarias Verdad Criego-El v. State	1. Plt's *Pro Se* Motion for Judicial Notice 2. Plt's *Pro Se* Motion for Judicial Notice	1. Dismissed 2. Dismissed
071P15	State v. Christopher Allen Reese	Def's PDR Under N.C.G.S. § 7A-31 (COA14-593)	Denied
091P14-3	State v. Salim Abdu Gould	1. Def's *Pro Se* Motion of Leave to File Individual *Writ of Certiorari* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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

24 SEPTEMBER 2015

107P15	Branch Banking and Trust Company v. Hui S. Smith, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-554)	Denied
108P15	Michael C. Piro v. Karen Shapiro Piro (Now Karen Shapiro)	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-962) 2. Def's *Pro Se* Motion for Temporary Stay 3. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **05/11/2015** Dissolved **09/24/2015** 3. Denied
109P15	State v. Thomas Clay Friday	Def's PDR Under N.C.G.S. § 7A-31 (COA14-529)	Denied
144P15	State v. Calvin Lewis Moore, Jr.	1. State's Motion for Temporary Stay (COA14-1033) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/27/2015** Dissolved **09/24/2015** 2. Denied 3. Denied
164P15	State v. Charles Gilbert Gillespie	Def's PDR Under N.C.G.S. § 7A-31 (COA14-953)	Denied
171P15-2	Arthur Donald Darby, Jr. v. Jamie Christina Campbell, Jason Murphy, Attorney, Matthew Rothbeind, Attorney, and Fairmont Police Department, Hamlet Police Department, Robeson County Court, "John Doe"	1. Plt's *Pro Se* Motion for *Error Coram Vobis* 2. Plt's *Pro Se* Motion for *Error Coram Nobis*	1. Dismissed 2. Dismissed
172P15-2	State v. Mohammed Nasser Jilani	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
178P15	State v. Charles Shannon Harrison	Def's PDR Under N.C.G.S. § 7A-31 (COA14-859)	Denied
182A15-2	State v. Adam Jarmal Hodge	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed

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

24 SEPTEMBER 2015

188A15	Jeffrey Huggins, Employee v. Marlatex Corporation, Employer, and New Hampshire Insurance, Carrier	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1232) 2. Defs' Motion to Dismiss Appeal	1. --- 2. Allowed
192P15	Erin Isenberg v. North Carolina Department of Commerce, Division of Employment Security	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA14-808)	Denied
199P15	State v. Brent Tyler Miller	State's PDR Under N.C.G.S. § 7A-31 (COA14-1310)	Allowed
213P15	In the Matter of the Foreclosure of Deed of Trust Executed by Daryl O. Sutton and Shonda J. Sutton in the Original Amount of $136,000.00 Dated April 14, 2005, Recorded in Book 6297, Page 1933, Guilford County Registry, Substitute Trustee Services, Inc., Substitute Trustee	Respondents' PDR Under N.C.G.S. § 7A-31 (COA14-761)	Denied
224P15	In the Matter of Foreclosure of the Deeds of Trust Executed by Grover C. Brown and Wife, Margaret C. Brown Dated April 1, 1980, Recorded in Book 949, Page 109, and Book 949, Page 111 of the Buncombe County Registry	1. Petitioners' (Grover & Margaret Brown) PDR Under N.C.G.S. § 7A-31 (COA14-937) 2. First Choice Title, LLC's Conditional Motion for Leave to File Amicus Brief 3. Petitioners' (Grover & Margaret Brown) Motion to Amend PDR 4. Petitioners' (Grover & Margaret Brown) Second Motion to Amend PDR	1. Allowed 2. Allowed 3. Allowed 4. Allowed
225P15	State v. Connie Prentice Reaves	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1055)	Denied
230A15	Branch Banking & Trust Company v. Peacock Farm, Inc., et al.	Plt's Motion to Supplement the Record	Allowed **09/16/2015**

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

24 SEPTEMBER 2015

234P15	Jonathan Wilner, et al., and All Others Similarly Situated v. The Cedars of Chapel Hill, LLC, et al.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA14-380) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 3. North Carolina Association of Realtors' Conditional Motion for Leave to File *Amicus* Brief 4. Defs' Motion to Strike Motion for Leave to File *Amicus Curiae* Brief on Behalf of the North Carolina Association of Realtors	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed as moot
235P15	Jimmy L. and Angela M. Allen v. Travelers Insurance Company	Plts' *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA15-427)	Denied
236P15	Jimmy L. and Angela M. Allen v. Travelers Insurance Company and The Charter Oak Fire Insurance Company	Plts' *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA15-428)	Denied
240P15-2	In the Matter of Appeal of Celeste G. Broughton, Trustee, from the Decision of the Wake County Board of Equalization and Review Regarding the Valuation and Taxation of Certain Property for Tax Year 2013	Taxpayer's *Pro Se* Motion for Notice of Appeal (COA15-519)	Dismissed *ex mero motu*
243P15	State v. Steven L. Lowery	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1306)	Denied
244A15	State v. Tanisha Decole Belcher	Def's Notice of Appeal Based Upon a Constitutional Question (COA15-31)	Dismissed *ex mero motu*
253P15	State v. Artie Stevenson Smith, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1314)	Denied
254P15	Donna Simmons v. Kathleen M. Waddell	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1214)	Denied

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

24 SEPTEMBER 2015

257A15	Joseph Michael Griffith v. Chaplain Hovis, et al.	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1411) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Defs' Motion to Dismiss the Appeal	1. --- 2. Allowed 3. Allowed **Jackson, J., recused**
258P15	State v. Rahul Rumar Mack	1. Def's *Pro Se* Motion for Notice of Appeal (COA13-1173) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Petition for *Writ of Certiorari*	1. Dismissed *ex mero motu* 2. Dismissed 3. Denied **Ervin, J., recused**
265P15	State v. Walter Timothy Gause	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA14-1085)	Denied
266PA14	Carpenter, et al. v. McKinney, et al.	Plts' Motion to Amend Record on Appeal (COA13-516)	Denied; Special Order
269P15	State v. Danny Lamont Avery	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-460)	Dismissed
270P15	State v. Terence D. Smith	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-441)	Dismissed
271P15	State v. Felix Ricardo Saldierna	1. State's Motion for Temporary Stay (COA14-1345) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/03/2015** 2. Allowed 3. Allowed
272P04-2	State v. James Allen Cook	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-290) 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

24 SEPTEMBER 2015

275P15	State v. Reco Kamson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
279P15	State v. Frederick D. Gibbs	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-1052) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. 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' 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. 3. Denied **08/25/2015** 4. 5. 6.
282P15	Harvey D. Kohn, M.D. v. FirstHealth of the Carolinas, Inc. d/b/a Moore Regional Hospital	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1210)	Denied
283P15	State v. Robert Earl Wilkerson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-95)	Denied
290P15	State v. Jeffrey Tryon Collington	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1244)	Denied
293P15	State v. Steven Faison-El	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-543)	Dismissed
297P15	State v. Terrance Javarr Ross	1. State's Motion for Temporary Stay (COA15-87) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/21/2015** 2. 3.

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

24 SEPTEMBER 2015

299P15	State v, Jessica Rasheeda Jordan	1. State's Motion for Temporary Stay (COA114-1070) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/24/2015** 2. 3.
301P15	House of Raeford Farms, Inc. v. North Carolina Department of Environmental and Natural Resources	1. Respondent's Motion for Temporary Stay (COA15-47) 2. Respondent's Petition for *Writ of Supersedeas* 3. Respondent's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/26/2015** 2. 3.
307P14-2	State v. Donald G. Barnette, Jr.	1. Def's *Pro Se* Motion for Notice of Appeal (COA13-1076) 2. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
307P15	The Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue	Plt's PDR Prior to a Decision of the COA (COA15-896)	Denied
311P15	State v. Thedford Roy Rorie, Jr.	1. State's Motion for Temporary Stay (COA14-886) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/08/2015** 2.
318P15	State v. Edward Williams, III	1. Def's *Pro Se* Motion for Belated Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Denied 3. Dismissed as moot
319P15	State v. Carlton Washington Tomlinson	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 (COA14-1016)	1. Allowed **09/10/2015** 2. 3.
322P15	State v. Raymond Alan Griffin	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied 0**9/18/2015**

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

24 SEPTEMBER 2015

323A92-10	Charles Alonzo Tunstall-Bey v. Frank W. Ballance, et al.	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
325P15	State v. Mohammed N. Jilani	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed 0**9/22/2015**
375P09-4	State v. Avenger Ridgeway	Def's *Pro Se* Motion for Petition to Toss Out Violent Habitual Law	Dismissed
392PA13-2	State v. Robert Timothy Walston, Sr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1377-2) 2. Def's Petition for *Writ of Certiorari* to Review Order of COA	1. Special Order 2. Denied
409P05-3	State v. Sebastian X. Moore	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP14-690)	Dismissed
510P04-2	State v. Jose Luis Macias	1. Def's *Pro Se* Motion for Petition for Writ of Error 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **09/02/2015** 2. Allowed **09/02/2015** 3. Dismissed as moot **09/02/2015**

MORNINGSTAR MARINAS/EATON FERRY, LLC, PETITIONER
v.
WARREN COUNTY, NORTH CAROLINA AND KEN KRULIK, WARREN COUNTY PLANNING AND ZONING ADMINISTRATOR, IN HIS OFFICIAL CAPACITY, RESPONDENTS

No. 131A14

Filed 6 November 2015

Zoning—appeal from zoning officer—duty to transmit to board

The Court of Appeals correctly concluded that a zoning officer (Krulik) was bound by statute to transmit petitioner's appeal to the Board and that the legal determination of whether petitioner had standing fell within the province of the Board. N.C.G.S. § 153A-345(b) specifically states that "[t]he officer from whom the appeal is taken *shall forthwith transmit to the board* all the papers constituting the record upon which action appealed from was taken." It does not establish any exception or other circumstances in which the officer may decline to transmit the appropriate materials.

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. ___, 755 S.E.2d 75 (2014), affirming an order entered on 13 September 2012 by Judge Robert H. Hobgood in Superior Court, Warren County. Heard in the Supreme Court on 16 February 2015.

Robinson Bradshaw & Hinson, P.A., by John H. Carmichael, for petitioner-appellee.

Turrentine Law Firm, PLLC, by Karlene S. Turrentine, for respondent-appellants.

JACKSON, Justice.

In this case we consider whether a zoning officer may refuse to transmit an appeal from his own zoning determination to the county board of adjustment for its review. We conclude that a zoning officer does not have this authority and therefore that the Superior Court, Warren County, properly entered an order compelling respondents to place petitioner's appeal on the agenda of the Warren County Board of Adjustment (the Board).

Morningstar Marinas (petitioner) owns land abutting Lake Gaston in Warren County, where it operates a commercial marina known as Eaton

Ferry. Petitioner's property is zoned for business development pursuant to the Warren County Zoning Ordinance (the Ordinance). East Oaks, LLC (East Oaks) owns land approximately 145 feet away, across a small cove. Pursuant to the Ordinance, 8.5 acres of that property are zoned as residential and 1.91 acres are zoned for commercial use. The commercial portion of the property is improved with a boat storage building and a parking lot.

In April 2011, East Oaks filed a petition seeking a conditional use permit to develop a townhouse community (the Townhouse Project) on the residential portion of the property. The site plan for the Townhouse Project showed a proposed access easement for a driveway (the Drive) connecting the boat storage building on the commercial portion of the property to a boat launch area on Lake Gaston located on the residential portion of the property. The Drive was to be utilized to transport boats from the boat storage facility to the boat slips and launching area on the residential property.

On 21 April 2011, before the Board had an opportunity to rule on the petition, Warren County Planning and Zoning Administrator Ken Krulik issued a formal determination concluding that townhouses were a permitted use in the subject residential district and therefore, a conditional use permit was not required. As a result, East Oaks withdrew its application for a conditional use permit and obtained a zoning permit to develop the townhouses.

Petitioner appealed Krulik's 21 April formal determination to the Board and argued that the Townhouse Project did not constitute a permitted use in the East Oaks residential property pursuant to the Ordinance. As Krulik's formal determination did not specifically address the Drive portion of the site plan, petitioner wrote Krulik a letter requesting that he issue a formal determination pursuant to the Ordinance regarding whether the Drive constituted a commercial use of the East Oaks residential property in violation of the Ordinance. Krulik responded by e-mail that he would not make a determination on the Drive, explaining that it was "not a relevant issue to [his] determination on townhouses as a permitted use or issuing the zoning permit."

When the Board heard petitioner's appeal in August 2011, it overturned Krulik's interpretation of the Ordinance and revoked the zoning permit previously issued to East Oaks. On 12 September, East Oaks successfully petitioned the superior court for a writ of certiorari to review the Board's order. On 14 October 2011, East Oaks and Warren County entered into a consent order, approved by the court, in which East Oaks

and Warren County agreed that the zoning permit issued based upon Krulik's interpretation of the Ordinance would be reinstated, thereby allowing East Oaks to continue the Townhouse Project. The consent order, to which petitioner was not a party, also stated the trial court's conclusions of law that "Morningstar is not a 'person aggrieved' pursuant to N.C. Gen. Stat. §153A-345(b)" and that the Board "had no jurisdiction or authority to hear the appeal of Morningstar."

Meanwhile, on 7 October 2011, petitioner filed its first petition for writ of mandamus with the Superior Court, Warren County, in which it requested that the court compel Krulik to issue a formal determination regarding the Drive. Warren County and Krulik (respondents) filed an answer in which they contended that petitioner lacked standing to appeal and to petition for the writ of mandamus. Respondents also attached a determination letter from Krulik dated 16 November 2011, which stated in pertinent part:

> While I did not make a specific determination as to whether the use of the concrete drive/easement constitutes a commercial use of the East Oaks Property in violation of the Ordinance, my issuance of the East Oaks' zoning permit . . . necessarily required that I determine the submitted use of the entire property covered by the permit is not restricted by the Warren County Zoning Ordinance.
>
> The drive is shown as a "'20 [foot] wide private access easement" on East Oaks' development plans. Warren County's Ordinance does not specifically regulate easements—whether or not they cross varying zoning jurisdictions . . . [T]o my knowledge, there has been no attempt by Warren County to regulate such easements through its zoning regulations.

In light of Krulik's determination regarding the Drive, petitioner voluntarily dismissed its mandamus action without prejudice and on 14 December 2011, noticed its appeal to the Board from Krulik's 16 November determination. Petitioner again asserted that "the Drive constitutes a commercial use of the East Oaks Property, which is zoned Residential District, in violation of the Ordinance."

In January 2012, the county attorney informed petitioner that she had advised Krulik not to place the December appeal from Krulik's November 2011 determination on the Board's agenda because, *inter alia*, the Board "has no authority or jurisdiction to hear an appeal by

[petitioner] because East Oaks' permit issue has been settled by" the 14 October 2011 consent order between East Oaks and Warren County.

Petitioner filed another petition for writ of mandamus in Superior Court, Warren County, requesting that the court compel respondents to place the 14 December 2011 appeal on the Board's next available agenda for a hearing. Petitioner asserted that the consent order, to which it was not a party and which dealt with a separate issue, did not concern the subject of the instant appeal, which involved the Drive. Respondents again argued in their response to the petition that "Petitioner-Morningstar was neither an aggrieved party to the 'Prior Action' nor an aggrieved party to this action . . . . As such Petitioner-Morningstar has no standing to appeal the actions of the Planning and Zoning Administrator, nor to bring this action for mandamus."

On 13 September 2012, the court granted the petition and issued a writ of mandamus ordering respondents to place the appeal on the Board's agenda for a hearing on the merits. The court added that its order "only direct[ed] that a hearing be conducted by the [Board] but [did] not direct that Board concerning the merits of the case." Respondents appealed the order to the Court of Appeals, which affirmed the trial court's order in a divided opinion. *Morningstar Marinas/Eaton Ferry, LLC v. Warren County*, ___ N.C. App. ___, 755 S.E.2d 75 (2014).

Notwithstanding respondents' contention that petitioner lacked standing, the majority determined that Krulik had a mandatory statutory duty to transmit petitioner's appeal to the Board pursuant to section 153A-345, and that "the existence—or nonexistence—of standing is a legal determination that must be made by the [Board]." *Id.* at ___, 755 S.E.2d at 78. The majority further concluded that petitioner had complied with the requirements for taking an appeal as set forth in the Ordinance and that petitioner thus had a right to have its appeal placed on the Board's agenda. *Id.* at ___, 755 S.E.2d at 79. In addition, the majority determined that "mandamus was [petitioner's] only available remedy." *Id.* at ___, 755 S.E.2d at 80. Accordingly, the majority held that the trial court did not err by granting the petition for writ of mandamus. *Id.* at ___, 755 S.E.2d at 81.

The dissent disagreed with the majority that section 153A-345 required Krulik to transmit the appeal to the Board and for that reason would have reversed the trial court's order. Relying upon *Smith v. Forsyth County Board of Adjustment*, 186 N.C. App. 651, 652 S.E.2d 355 (2007), the dissent asserted that a party must first demonstrate that it has standing to appeal pursuant to section 153A-345 in order for the

statute to compel a zoning officer to transmit an appeal to the Board. *Id.* at ___, 755 S.E.2d at 82. (Elmore, J., dissenting). According to the dissent, *Smith* suggests that a zoning officer "is vested with authority to refuse to transmit an appeal to the [Board] if the appealing party's application [does not allege any] special damages" demonstrating that it is "aggrieved" pursuant to section 153A-354. *Id.* at ___, 755 S.E.2d at 82. Therefore, the dissenting judge believed that a zoning officer "may unilaterally dismiss the appeal for want of standing." *Id.* at ___, 755 S.E.2d at 82. The dissent concluded that because petitioner neglected to allege special damages in its appeal from the 16 November determination, petitioner failed to show that it was "aggrieved" and thus had no standing to appeal to the Board. *Id.* at ___, 755 S.E.2d at 82. For that reason the dissent would have held that petitioner had not met the first requirement for issuance of a writ of mandamus that the party seeking relief "demonstrate a clear legal right to the act requested." *In re T.H.T.*, 362 N.C. 446, 453, 665 S.E.2d 54, 59 (2008) (citation omitted). Nonetheless, the dissenting judge "concur[red] in all other aspects of the majority opinion."[1] *Id.* at ___ N.C. App. at ___, 755 S.E.2d at 81. Respondents filed their appeal of right based on the dissenting opinion.

"The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971) (citations omitted). A writ of mandamus is an appropriate remedy when the following circumstances are present: (1) the party seeking relief has "a clear legal right to the act requested"; (2) the respondent has "a legal duty to perform the act requested"; (3) performance of the act at issue is "ministerial in nature and [does] not involve the exercise of discretion"; (4) the respondent did not perform the act requested and the time for performance of the act has expired; and (5) no "alternative, legally adequate remedy" is available. *In re T.H.T.*, 362 N.C. at 453-54, 665 S.E.2d at 59 (citations omitted).

Respondents argue based upon the dissent that the trial court erred by granting petitioner's request for writ of mandamus because petitioner lacks standing as a party "aggrieved" to appeal Krulik's 16 November determination; therefore petitioner does not have "a clear legal right" to have its appeal placed on the Board's agenda. We agree with the Court of

1. Accordingly, the other holding by the Court of Appeals dealing with attorney's fees is not before this Court on appeal. The Court denied respondents' petition for discretionary review of that and other issues.

Appeals' conclusion that Krulik is bound by statute to transmit petitioner's appeal to the Board and that the legal determination whether petitioner has standing falls within the province of the Board. As a result, we hold that petitioner has a clear legal right to have its appeal transmitted to the Board and placed on the agenda, and we affirm the Court of Appeals' determination that mandamus was proper. In reaching this conclusion, we do not decide whether petitioner, in fact, has standing because that decision first must be made by the Board of Adjustment.

Subsection 153A-345(b)[2] of the North Carolina General Statutes, which governed county board of adjustment appeals at all times relevant to this matter, states that

> the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. Any person aggrieved or any officer, department, board, or bureau of the county may take an appeal. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken.

N.C.G.S. § 153A-345(b) (2012). "It is well established 'that the word "shall" is generally imperative or mandatory' " when used in our statutes. *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*,

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2. This statute was repealed by the General Assembly, effective 1 October 2013, but was in effect during the relevant time period of the present case. N.C.G.S. § 160A-388 now governs appeals to county boards of adjustment. *See* N.C.G.S. § 153A-345.1 (2013) (making the provisions of section 160A-388 applicable to counties). Significantly, the revised statute requires that

> [t]he official who made the decision shall transmit to the board all documents and exhibits constituting the record upon which the action appealed from is taken. The official shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the appellant is not the owner.

Id. § 160A-388(b1)(5) (2013). In addition, the revisions now mandate that the appeal itself be filed "with the [county] clerk," *id.* § 160A-388(b1)(1), a procedure that is more analogous to notices of appeal filed pursuant to both Chapter 150B and in the General Court of Justice. *See* N.C. R. App. P. 3(a).

361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). Our reading of subsection 153A-345(b) does not deviate from this precedent. The statute specifically states that "[t]he officer from whom the appeal is taken *shall forthwith transmit to the board* all the papers constituting the record upon which action appealed from was taken." N.C.G.S. § 153A-345(b) (emphasis added). The statute does not establish any exception or other circumstances in which the officer may decline to transmit the appropriate materials. Accordingly, when Morningstar appealed Krulik's 16 November determination in its 14 December letter to Krulik, it was mandatory that Krulik immediately transmit the appeal to the Board.

Although subsection 153A-345(b) clearly includes the standing requirement that only a "person aggrieved . . . may take an appeal," neither the statute nor the Ordinance includes any language suggesting that this determination is to be made by a zoning officer. We have stated that, "[i]n general, the zoning administrator is a purely administrative or ministerial agent following the literal provisions of the ordinance." *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993) (citation omitted). Consistent with subsection 153A-345(b), the Ordinance states that "[a]ppeals from the enforcement and interpretation of this ordinance . . . shall be filed with the Zoning Administrator, who shall transmit all such records to the Board of Adjustment." Warren County, N.C., Zoning Ordinance § IX-4 (2010). The Ordinance further indicates that "[t]he Board of Adjustment shall fix a reasonable time, not to exceed 30 days, for the hearing of the appeal." *Id.* The plain language in both the statute and the Ordinance mandates that the zoning officer forward the documents constituting the record to the Board—an act that is ministerial in nature, involving no discretion. Conversely, "[w]hether a party has standing is a question of law." *McCrann v. Pinehurst LLC*, 225 N.C. App. 368, 372, 737 S.E.2d 771, 775, *disc. rev. denied*, 366 N.C. 593, 743 S.E.2d 221 (2013). In light of the ministerial role of the zoning officer in the appeal process, as designated and required by subsection 153A-345(b), we conclude that these officers are not vested with authority to dismiss or foreclose an appeal based upon their legal determination that the appealing party lacks standing. Moreover, we do not believe the statute was intended to permit zoning officers to single-handedly block appeals from their own zoning determinations. The county board of adjustment, not the zoning officer, determines the fate of such an appeal.

Our decision does not address the issue of whether petitioner in fact has standing, nor does it allow petitioner to evade the standing

requirement. Although subsection 153A-345(b) requires petitioner to demonstrate to the Board that it is an aggrieved party before its challenge can be heard on the merits, in any event, petitioner has a clear legal right to have its appeal transmitted to the Board. Respondents do not dispute that petitioner complied with the requirements for taking an appeal pursuant to both subsection 153A-345(b) and the Ordinance. Subsection 153A-345(b) requires a zoning officer to transmit an appeal to the applicable board of adjustment, without consideration of that zoning officer's judgment regarding whether or not the petitioner possesses standing to appeal. By refusing to place petitioner's appeal on the Board's agenda, Krulik failed to comply with this statutory mandate.

Accordingly, as to the issue on direct appeal based upon the dissenting opinion, we affirm the Court of Appeals' determination that the trial court did not err by granting mandamus and by ordering respondents to place petitioner's appeal on the Board's agenda. This case is remanded to the Court of Appeals for further remand to the trial court for any additional proceedings necessitated by and consistent with this opinion.

AFFIRMED AND REMANDED.

KEEN LASSITER, AS GUARDIAN AD LITEM FOR JAKARI BAIZE, A MINOR
v.
NORTH CAROLINA BAPTIST HOSPITALS, INCORPORATED A/K/A NORTH CAROLINA BAPTIST HOSPITAL, WAKE FOREST UNIVERSITY HEALTH SCIENCES, TERRY DANIEL, M.D., AND DAYSPRING FAMILY MEDICINE ASSOCIATES, PLLC

No. 330PA14

Filed 6 November 2015

Costs—expert witness fees—for actual time spent—not under subpoena

In a medical malpractice action, the trial court did not err by awarding expert witness fees as costs to defendants for the actual time the expert witnesses spent providing deposition testimony even though the expert witnesses were not under subpoena. N.C.G.S. § 7A-305(d)(11) allows the trial court to tax "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" whether or not the expert witnesses were subpoenaed.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 761 S.E.2d 720 (2014), reversing and remanding orders entered on 9 September 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Supreme Court on 1 September 2015.

Crabtree, Carpenter & Connolly, PLLC, by Charles F. Carpenter; and Edwards & Edwards, L.L.P., by Joseph T. Edwards and Sharron R. Edwards, for plaintiff-appellee.

Carruthers & Roth, P.A., by Norman F. Klick, Jr., Richard L. Vanore, and Robert N. Young, for defendant-appellants Terry Daniel, M.D. and Dayspring Family Medicine Associates, PLLC; and Wilson Helms & Cartledge, LLP, by G. Gray Wilson and Linda L. Helms, for defendant-appellants North Carolina Baptist Hospitals, Incorporated a/k/a North Carolina Baptist Hospital and Wake Forest University Health Sciences.

ERVIN, Justice.

In this case we are required to determine whether defendants North Carolina Baptist Hospitals, Incorporated a/k/a North Carolina Baptist Hospital and Wake Forest University Health Sciences (collectively, "defendants NCBH and WFUHS"), and defendants Terry Daniel, M.D. and Dayspring Family Medicine Associates, PLLC (collectively, "defendants Daniel and Dayspring") were required to obtain the issuance of subpoenas directed to certain individuals who had been identified as planning to provide expert testimony on behalf of plaintiff Keen Lassiter, as guardian *ad litem* for Jakari Baize, as a prerequisite for being awarded the fees that defendants paid for the "actual time [that the expert witnesses] spent providing [deposition] testimony" as costs. N.C.G.S. § 7A-305(d)(11) (2013). On 5 August 2014, a unanimous panel of the Court of Appeals filed an opinion concluding that the trial court had erred by awarding the relevant expert witness fees as costs because defendants were statutorily required to subpoena the expert witnesses in question as a prerequisite for obtaining such relief. *Lassiter ex rel. Baize v. N.C. Baptist Hosps., Inc.*, ___ N.C. App. ___, ___, 761 S.E.2d 720, 724 (2014) (citing *Stark v. Ford Motor Co.*, 226 N.C. App. 80, 84, 739 S.E.2d 172, 176 (citing *Jarrell v. Charlotte–Mecklenburg Hosp. Auth.*, 206 N.C. App. 559, 563, 698 S.E.2d 190, 193 (2010) (concluding that N.C.G.S § 7A-314 "limits the trial court's broader discretionary power under [N.C.G.S.] § 7A-305(d)(11) to award expert fees as costs only when the expert is under subpoena")), *disc. rev. denied*, 367 N.C. 240, 748 S.E.2d 321

(2013)). After reviewing the relevant statutory provisions, we conclude that the General Assembly eliminated the traditional subpoena requirement associated with the taxing of certain expert witness fees as costs in civil actions by adding subdivision (11) to N.C.G.S. § 7A-305(d) (stating that "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" are "assessable or recoverable" as costs) in 2007, *see* Act of July 3, 2007, ch. 212, sec. 3, 2007 N.C. Sess. Laws (Reg. Sess. 2007) 339, 339-40, and that the Court of Appeals' decision should be reversed.

On 8 December 2010, Chinatha Clark, as guardian *ad litem* for her son, Jakari Baize,[1] filed a complaint in Superior Court, Pitt County,[2] against defendants based on their alleged individual and collective failure to properly treat Jakari for a severe case of jaundice that resulted in serious complications and left Jakari permanently disabled. In February 2011, defendants NCBH and WFUHS and defendants Daniel and Dayspring, respectively, filed separate answers in which they denied that Jakari's injuries had resulted from any negligence on their part. Subsequently, defendants NCBH and WFUHS and defendants Daniel and Dayspring filed separate motions asking the trial court to schedule a discovery conference and enter a discovery scheduling order as required by N.C.G.S. § 1A-1, Rule 26(f1).

On 13 February 2012, a hearing was held before Judge Marvin K. Blount, III to address a number of issues, including the entry of a discovery scheduling order. Two days later, counsel for defendants Daniel and Dayspring sent a draft discovery scheduling order to the trial court coordinator for the Superior Court, Johnston County, for consideration by Judge Blount. On 25 April 2012, the trial court coordinator contacted counsel for the parties to inform them that, while Judge Blount had not yet entered a discovery scheduling order, he would do so as soon as possible.

According to the draft discovery scheduling order transmitted to Judge Blount by counsel for defendants Daniel and Dayspring, plaintiff was required to designate all expert witnesses whom he intended to call at trial on or before 1 May 2012 and to "make [his] expert witnesses available for deposition upon request by any party on or before August 15, 2012." Although Judge Blount had not, by that point, entered

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1. At some unspecified point before entry of the 28 November 2011 order, Keen Lassiter was substituted for Ms. Clark as Jakari's guardian *ad litem*.

2. On 28 November 2011, "upon motion of defendants," venue in this case was transferred to the Superior Court, Johnston County.

a discovery scheduling order, plaintiff identified ten expert witnesses whom he expected to call at trial during May 2012 before plaintiff withdrew one of those expert witnesses on 6 July 2012.

On 15 October 2012, Judge Blount entered a discovery scheduling order that, among other things, extended the date by which plaintiff's designated expert witnesses must be made available for deposition from 15 August 2012 to 15 November 2012. In addition, the discovery scheduling order provided that (1) "[e]xperts not designated and made available for deposition in accordance with this [o]rder shall not be permitted to testify at trial"; (2) "[a]ll designated expert witnesses shall reasonably be made available for a discovery deposition upon request by any party"; (3) "[a] party desiring to depose another party's expert witness shall pay the expert a reasonable hourly rate for the expert's actual time testifying at the deposition"; and (4), if a dispute concerning the amount of compensation to be paid to an expert witness for deposition-related testimony arises, "the deposition shall be taken, and thereafter the [c]ourt, upon motion filed by any party, shall establish a reasonable hourly rate for the expert's actual time testifying at the deposition." Moreover, the discovery scheduling order required that all discovery be completed by 3 October 2013, that the mandatory mediation conference be held by 17 October 2013, and that the case be set for trial on or after 20 January 2014. Finally, the discovery scheduling order permitted modification of the "schedule and deadline dates set forth [t]herein . . . only by the written consent of counsel for all parties with the [c]ourt's consent or by order of the [c]ourt for good cause shown."

Prior to the 15 November 2012 deadline, defendants deposed (1) Kitty Carter-Wicker, M.D. on 27 July 2012;[3] (2) Thomas Hegyi, M.D. on 3 August 2012; (3) Richard Inwood, M.D. on 22 August and 13 September 2012; and (4) Marcus Hermansen, M.D. on 25 September 2012. On 20 December 2012, plaintiff filed a Motion to Amend Discovery Scheduling Order in which he sought the entry of an order extending the deadline by which he could make his remaining experts available for deposition from 15 November 2012 to 31 January 2013. On 27 December 2012, all defendants filed a Motion to Strike and Exclude Certain Expert[ ] Witnesses Designated by Plaintiff in which they argued that plaintiff had violated the discovery scheduling order by failing to provide dates upon which defendants could depose Richard C. Lussky, M.D.; J.C. Poindexter, Jr., Ph.D.; Lois Johnson, M.D.; Ann T. Neulicht, M.D.; and Steven Shapiro, M.D. prior to 15 November 2012, and that these witnesses should be

3. Defendants also deposed Dr. Carter-Wicker on 4 December 2012.

precluded from testifying at trial "as expressly ordered in the Discovery Scheduling Order." In January 2013, plaintiff responded to defendants' motion by offering an explanation for the delays that had occurred during the discovery process and asserting that defendants had failed to make two important treating physicians available for deposition in a timely manner.

A hearing concerning the issues raised by these competing motions was held before Judge William R. Pittman at the 14 January 2013 term of the Superior Court, Johnston County. On the same date, Judge Pittman entered an order denying plaintiff's motion to amend and allowing defendants' motion to preclude certain of plaintiff's expert witnesses from testifying at trial. More specifically, Judge Pittman ordered that Drs. Lussky, Poindexter, and Neulicht be precluded from testifying at trial, allowed Dr. Shapiro to testify as a treating physician while precluding him from testifying as an expert witness, and stated that, if Dr. Johnson had not been made available for deposition by 1 March 2013, her trial testimony would be precluded as well.

On 4 February 2013, the trial court entered an amended discovery scheduling order, under which the 15 November 2012 deadline by which plaintiff was required to make his expert witnesses available for deposition remained in effect. On 21 February 2013, plaintiff filed a motion seeking to have the deadline by which Dr. Johnson had to be made available for deposition extended or, in the alternative, to have Dr. Johnson replaced with another expert witness. On 4 March 2013, defendants filed a motion to preclude Dr. Johnson from testifying at trial on grounds that plaintiff "has not offered any dates for Dr. Johnson's deposition and has not made her available for deposition by March 1, 2013." On 11 April 2013, Judge Pittman entered an order allowing defendants' motion.

On 22 July 2013, plaintiff voluntarily dismissed all claims against all defendants without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a). On 2 August 2013, defendants Daniel and Dayspring filed a motion seeking the entry of an order taxing costs against plaintiff in the dismissed case pursuant to N.C.G.S. § 1A-1, Rule 41(d)[4] including "reasonable and necessary expenses for stenographic and videographic services [related

4. Although costs in civil actions are ordinarily taxed to one party or the other pursuant to N.C.G.S. § 6-20, which provides that such an award is discretionary with the trial judge subject to the limitations set out in N.C.G.S. § 7A-305(d), the costs at issue here were subject to being taxed against plaintiff pursuant to N.C.G.S. § 1A-1, Rule 41(d), which makes the taxing of costs mandatory when a plaintiff has voluntarily dismissed an action pursuant to Rule 41(a). *See* N.C.G.S. §§ 1A-1, Rule 41, 6-20 (2013).

to the taking of depositions], the cost of deposition transcripts, travel expenses of defense counsel for depositions and expert witness fees for the depositions of plaintiff['s] expert witnesses in the total amount of $39,749.60." On the same date, defendants NCBH and WFUHS filed a motion seeking to have "reasonable and necessary costs in the amount of $29,609.80" incurred in "the preparation and defense of [plaintiff's] action" taxed against plaintiff pursuant to Rule 41(d).

After conducting a hearing to consider the issues raised by defendants' motions on 26 August 2013, the trial court entered orders on 9 September 2013[5] determining that (1) the "expenses [defendants had] incurred for video conferencing, stenographic preparation of a deposition summary and room rent" should not be taxed against plaintiff because those expenses "were not reasonable and necessary"; (2) defendants had "incurred expenses recoverable under [section] 7A-305 for stenographic and videographic services and expert witness fees for depositions of expert witnesses [that defendants had] taken"; and (3) "in light of the language of the Discovery Scheduling Orders," the expert witnesses "did not need to be subpoenaed" for these expert witness fee costs to be taxed against plaintiffs.[6] Based upon these determinations, the trial court taxed $23,799.61 in costs in favor of defendants NCBH and WFUHS, and $24,738.76 in costs in favor of defendants Daniel and Dayspring. Plaintiff appealed from the trial court's 9 September 2013 orders to the Court of Appeals.[7]

"The sole issue on appeal [before the Court of Appeals was] whether the trial court erred by granting expert witness fees" for the actual time that the experts plaintiff had designated spent testifying during their respective depositions "as costs to defendants pursuant to section 7A-305 of the North Carolina General Statutes." *Lassiter*, ___ N.C. App. at ___, 761 S.E.2d at 722. In resolving this issue, the Court of Appeals began by discussing the interplay between N.C.G.S. §§ 6-20, 7A-305(d)(11), and 7A-314, and concluded that under existing law "before a trial

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5. The language quoted in the text of this opinion is taken from the order that the trial court entered in response to the motion filed by defendants NCBH and WFUHS. The order entered in response to the motion filed by defendants Daniel and Dayspring, while substantively identical, is worded somewhat differently.

6. According to the 9 September 2013 orders, all defendants withdrew their requests "for taxation of . . . travel expenses."

7. More specifically, plaintiff appealed "from that portion of" the trial court's orders that "grant[ed] expert witness fees to" defendants for the time the experts actually spent testifying during the depositions and not from that portion of the trial court's orders that taxed the costs of the stenographic and videographic services to plaintiff.

court may assess expert witness testimony fees as costs, the testimony must be (1) reasonable, (2) necessary, and (3) given while under subpoena." *Id.* at ___, 761 S.E.2d at 723 (quoting *Peters v. Pennington*, 210 N.C. App. 1, 26, 707 S.E.2d 724, 741 (2011)).

After making this determination, the court addressed defendants' contention that the discovery scheduling orders "eliminated the need to subpoena [the] expert witnesses for deposition" as a precondition for taxing the expert witness fees incurred in the course of taking these depositions as costs. *Id.* at ___, 761 S.E.2d at 723. In plaintiff's view, since the discovery scheduling orders "did not modify or waive the [subpoena] requirement" and since "the parties [had] not [otherwise] waive[d] the subpoena requirement, the trial court erred by granting expert witness fees" at issue here given defendants' failure to subpoena these witnesses. *Id.* at ___, 761 S.E.2d at 723. Defendants, on the other hand, argued that the trial court had correctly concluded that the discovery scheduling orders had the effect of altering the traditional rule that a party is not entitled to recover costs associated with testimony given by a witness who had not been placed under subpoena.

In their briefs before the Court of Appeals, plaintiff and defendants relied upon *Jarrell v. Charlotte–Mecklenburg Hospital Authority*, in which the plaintiffs challenged an order awarding costs "associated with out-of-state expert witnesses" on the ground that the subpoenas sent to the expert witnesses in question were ineffective to compel their attendance. *Jarrell*, 206 N.C. App. 559, 560-61, 698 S.E.2d 190, 191 (2010). In response, the defendants in *Jarrell* asserted that the effectiveness of the subpoenas that had been served on these expert witnesses was irrelevant given that the discovery scheduling order governing the case provided that " '[a]ll parties agree that experts need not be issued a subpoena either for deposition or for trial and waive that requirement of the statute as it may affect the recovery of costs.' " *Id.* at 561, 698 S.E.2d at 192 (alteration in original). Although the Court in *Jarrell* agreed "that the express terms of the [discovery scheduling order] would render inapplicable the statutory provisions detailing recovery of expert witness costs," the Court of Appeals declined to decide the case on that basis because that argument had not been raised before the trial court. *Id.* at 561-62, 698 S.E.2d at 192. In addition, the Court of Appeals concluded that "[N.C.G.S.] § 7A-314 limits the trial court's broader discretionary power under [N.C.G.S.] § 7A-305(d)(11) to award expert fees as costs only when the expert is under subpoena." *Id.* at 563, 698 S.E.2d at 193. (citing *Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997)). Instead, after finding that the plaintiffs

lacked standing to challenge the validity of the subpoenas served on the nonparty expert witnesses, the Court of Appeals upheld the taxing of the challenged expert witness fees to the plaintiffs as costs. *Id.* at 564-65, 698 S.E.2d at 194.

The Court of Appeals distinguished this case from *Jarrell* on the grounds that (1) subpoenas had been issued for the expert witnesses in *Jarrell* and (2) the discovery scheduling order in *Jarrell* explicitly waived the otherwise-applicable subpoena requirement. *Lassiter*, ___ N.C. App. at ___, 761 S.E.2d at 723-24. On the other hand, the expert witnesses at issue in this case were not placed under subpoena and the discovery scheduling orders merely required plaintiff to " 'make [his] expert witnesses available for deposition upon request by any party on or before November 15, 2012.' " *Id.* at ___, 761 S.E.2d at 724 (alteration in original). Given the absence of any indication "that the expert witnesses at issue did not need to be issued subpoenas for deposition or for trial," the Court of Appeals declined to treat the discovery scheduling orders "as a waiver of the statutory requirements detailing recovery of expert witness costs." *Id.* at ___, 761 S.E.2d at 724. Thus, the court held that the trial court erroneously awarded costs associated with fees paid to expert witnesses who had not been placed under subpoena and remanded this case to the trial court for a proper determination of the amount of costs that should be taxed in favor of defendants. *Id.* at ___, 761 S.E.2d at 724.

On 9 September 2014, defendants petitioned for discretionary review of the Court of Appeals' decision. On 9 April 2015, we allowed the petition. As was the case before the Court of Appeals, the sole issue before this Court is whether defendants' failure to subpoena the expert witnesses identified by plaintiff pursuant to the discovery scheduling orders precluded the trial court from taxing plaintiff with the costs of "[r]easonable and necessary fees of expert witnesses" incurred "solely for actual time spent providing testimony at . . . deposition" pursuant to N.C.G.S. § 7A-305(d)(11).

In their briefs before this Court, defendants argue that their failure to subpoena the relevant expert witnesses did not preclude an award of costs in their favor because (1) the discovery scheduling orders waived or eliminated the subpoena requirement that the Court of Appeals has deemed applicable in civil actions by virtue of N.C.G.S. §§ 7A-314(a) and 7A-314(d) and (2) N.C.G.S. § 7A-305(d)(11) obviates the necessity for the issuance of a subpoena as a prerequisite for an award of expert witness fees as costs pursuant to that statute. On the other hand, plaintiff contends that the discovery scheduling orders in this case did not

obviate the need for defendants to subpoena the expert witnesses at issue here because: (1) no language similar to that contained in the discovery scheduling orders before the Court of Appeals in *Jarrell* is present here and N.C.G.S. § 1A-1, Rule 26(f1) contains no indication that the General Assembly intended for the enactment of that provision to have the effect of eliminating the traditional subpoena requirement and (2) the enactment of N.C.G.S. § 7A-305(d)(11) did not, as *Jarrell* and its progeny indicate, have the effect of eliminating the traditional subpoena requirement either.[8]

> At common law neither party recovered costs in a civil action and each party paid his own witnesses. Today in this State, "all costs are given in a court of law [by] virtue of some statute." The simple but definitive statement of the rule is: "[C]osts in this State, are entirely creatures of legislation, and without this they do not exist."

City of Charlotte v. McNeely, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (second alteration in original) (citations omitted). As a result of the fact that "[a]n award of costs is an exercise of [the] statutory authority[,] if the statute is misinterpreted, the judgment is erroneous." *Id.* at 691, 190 S.E.2d at 185 (quoting *State ex rel. Morris v. Shinn*, 262 N.C. 88, 89, 136 S.E.2d 244, 245 (1964)). In other words, when the validity of an award of costs hinges upon the extent to which the trial court properly interpreted the applicable statutory provisions, the issue before the appellate court is one of statutory construction, which is subject to de novo review. *See In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (stating that "[q]uestions of statutory interpretation are questions of law and are reviewed de novo" (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998))).

According to N.C.G.S. § 7A-305, which governs the recovery of costs in civil actions:

> (d) The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to [N.C.]G.S. [§] 6-20:

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8. Plaintiff does not appear to contend that the costs awarded by the trial court exceeded an amount that was "[r]easonable and necessary" under N.C.G.S. § 7A-305(d)(11) in the event that no subpoena was required as a prerequisite for the taxing of the relevant expert witness fees as costs.

> 1) Witness fees, as provided by law.
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> . . . .
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> (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

N.C.G.S. § 7A-305(d)(1), (11) (2013). Similarly, N.C.G.S. § 7A-314, which applies to all types of actions, provides, in pertinent part, that:

> (a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance . . . .
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> (b) A witness entitled to the fee set forth in subsection (a) of this section . . . shall be entitled to receive reimbursement for travel expenses as [set forth in subsection (b)] . . . .
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> . . . .
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> (d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize.

Id. § 7A-314(a), (b), (d) (2013). In defendants' view, the General Assembly's decision to add subdivision (11) to N.C.G.S. § 7A-305(d), effective 1 August 2007, without including the reference to "as provided by law" contained in N.C.G.S. § 7A-305(d)(1), decoupled N.C.G.S. § 7A-305(d)(11) from N.C.G.S. § 7A-314 so as to explicitly allow trial judges to tax "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" as costs regardless of whether the expert witness in question had been placed under subpoena. Plaintiff, on the other hand, contends that defendants' argument is contrary to decisions by the Court of Appeals, such as *Jarrell*, and that interpreting the relevant statutory provisions so as to eliminate any link between N.C.G.S. § 7A-305(d)(11) and N.C.G.S. § 7A-314 would "effectively nullif[y]" the provisions of

N.C.G.S. § 7A-314 relating to expert witness fees discussed by this Court in *State v. Johnson*, 282 N.C. 1, 26-28, 191 S.E.2d 641, 658-59 (1972). We find defendants' argument to be the more persuasive of the two.

In *Johnson*, which arose from a condemnation proceeding initiated by the State and which was decided several decades before enactment of N.C.G.S. § 7A-305(d)(11), this Court considered, among other things, whether the trial court erred by taxing fees for four expert witnesses who had testified at trial without having been placed under subpoena as costs against the State. 282 N.C. at 26-28, 191 S.E.2d at 658-59. In reversing the trial court's award, we stated that N.C.G.S. § 7A-314(a) "makes a witness fee for any witness, except those specifically exempted therein, dependent upon his having been subpoenaed to testify in the case" and "fixes his fee at $5.00 per day"; that, with respect "to expert witnesses," N.C.G.S. § 7A-314(d) "modifies [N.C.G.S. § 7A-314(a)] by permitting the court, in its discretion, to increase . . . compensation and allowances" for expert witnesses; and that this "modification relates only to the amount of an expert witness's fee" and accordingly, "does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation" pursuant to N.C.G.S. § 7A-314. *Id.* at 27-28, 191 S.E.2d at 659 (citing N.C.G.S. § 7A-314 (Supp. 1971)).[9]

As noted in *Jarrell*, the Court of Appeals has consistently stated, in the aftermath of *Johnson*,[10] that even though such "fees were not specifically provided for under N.C.[G.S.] § 7A-305(d), . . . 'expert witness fees could be taxed as costs when a witness has been subpoenaed.' " *Jarrell*, 206 N.C. App. at 562, 698 S.E.2d at 192 (quoting *Bennett v. Equity Residential*, 192 N.C. App. 512, 516, 665 S.E.2d 514, 517 (2008)

9. In view of our determination that the expert witnesses whose fees were at issue in *Johnson* were not "entitled to compensation" for their testimony pursuant to N.C.G.S. § 7A-314 because their attendance had not been compelled by subpoena, we did not specify the statutory authority under which expert witness fees payable to subpoenaed witnesses could have been taxed as costs against the State. 282 N.C. at 28, 191 S.E.2d at 659.

10. Although *Johnson* marked the first occasion on which this Court analyzed the subpoena requirement in the context of N.C.G.S. § 7A-314, *Johnson* was only the latest in a long line of cases holding that witness fees were only recoverable as costs when the testimony in question was compelled by a subpoena. *E.g.*, *McNeely*, 281 N.C. at 692, 190 S.E.2d at 186 (stating that "[t]he losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered" (citing N.C.G.S. § 6-53 (1969)); *Chadwick v. Life Ins. Co. of Va.*, 158 N.C. 318, 320, 158 N.C. 380, 381, 74 S.E. 115, 116 (1912) (stating that, "[b]y statute, the losing party is taxed with the costs of the witnesses of the winning party, but to prevent oppression only two witnesses of the winning side to each material fact can be taxed against the losing side, and then only if subpoenaed and examined or tendered" (citations omitted)).

(emphasis omitted) (quoting *Vaden v. Dombrowski*, 187 N.C. App. 433, 440, 653 S.E.2d 543, 547 (2007))). More specifically, the Court in *Jarrell* noted that prior panels of the Court of Appeals had concluded that expert witness fees constituted recoverable costs pursuant to N.C.G.S. § 7A-305(d)(1), which allows taxing "witness fees . . . as costs as provided by law" and reasoned that the reference to "as provided by law" contained in N.C.G.S. § 7A-305(d)(1) referred to N.C.G.S. § 7A-314. *Id.* at 562, 698 S.E.2d at 192 (citing *Vaden*, 187 N.C. App. at 440, 653 S.E.2d at 547). The court further noted that the Court of Appeals had previously held that N.C.G.S. § 7A-305(d)(1) should "be read in conjunction with [N.C.G.S.] § 7A-314, which governs fees for witnesses" so as to limit awardable expert witness fees to amounts paid to witnesses who have testified subject to a subpoena. *Id.* at 562, 698 S.E.2d at 192 (quoting *Morgan v. Steiner*, 173 N.C. App. 577, 583, 619 S.E.2d 516, 520 (2005), *disc. rev. denied*, 360 N.C. 648, 636 S.E.2d 808 (2006)). In reliance on this line of authority, the Court in *Jarrell* determined that the 2007 General Assembly had amended N.C.G.S. § 7A-305(d) in response to " 'inconsistencies within [Court of Appeals'] case law' " regarding "the propriety of taxing certain costs" and had "supplement[ed] the witness fees allowed under" N.C.G.S. § 7A-305(d)(1) "by adding a specific provision for expert fees" in N.C.G.S. § 7A-305(d)(11). *Id.* at 562, 698 S.E.2d at 192 (quoting *Vaden*, 187 N.C. App. at 438 n.3, 653 S.E.2d at 546 n.3). As a result, the Court in *Jarrell* concluded that, like N.C.G.S. § 7A-305(d)(1), "[N.C.G.S.] § 7A-305(d)(11) must be understood in light of [N.C.G.S.] § 7A-314" so that, in order to recover amounts paid to expert witnesses for actual time spent testifying as authorized by N.C.G.S. § 7A-305(d)(11) as costs, the expert witness whose testimony generated the relevant fees had to have testified while subject to subpoena. *Id.* at 562-63, 698 S.E.2d at 192-93.

Although the General Assembly certainly intended for the 2007 amendments to N.C.G.S. § 7A-305(d) to clarify the identity and amounts of taxable costs in civil actions, we believe that the enactment of N.C.G.S. § 7A-305(d)(11) served an additional purpose, which was to establish that "[r]easonable and necessary [expert witness] fees . . . solely for actual time spent providing testimony at trial, deposition, or other proceedings" are taxable as costs in civil actions and that, given the omission of "as provided by law," such expert witness fees are taxable as costs even though the expert testimony is not compelled by a subpoena. *See* ch. 212, sec. 3, 2007 N.C. Sess. Laws (Reg. Sess. 2007) at 339-40 (captioned "An Act to Clarify the Court's Discretion to Allow Court Costs."). We do not believe, as plaintiff argues, that giving determinative effect to the omission from N.C.G.S. § 7A-305(d)(11) of any reference to "as provided by law" as contained in N.C.G.S. § 7A-305(d)(1) "effectively

nullifie[s]" the expert witness provisions of N.C.G.S. § 7A-314.[11] Unlike N.C.G.S. § 7A-305(d), which governs the taxing of costs in civil actions, N.C.G.S. § 7A-314 applies to other types of legal proceedings, including special proceedings and criminal actions, as well. As a result, the enactment of N.C.G.S. § 7A-305(d)(11) has no effect on the awarding of expert witness fees as costs or the taxing of costs in any proceeding other than in a civil action. In view of the fact that the General Assembly did not repeal or otherwise alter N.C.G.S. § 7A-305(d)(1) or N.C.G.S. § 7A-314, a trial court also has the authority in a civil action to award additional expert witness-related costs, such as amounts related to travel pursuant to N.C.G.S. § 7A-314(b) or incurred for time spent in attendance at trial or some other proceeding pursuant to N.C.G.S. § 7A-314(d), provided that the expert witness testified pursuant to subpoena.[12] As a result, adopting the construction of N.C.G.S. § 7A-305(d)(11) that we deem appropriate does not render N.C.G.S. § 7A-314 without any effect.

Thus, we conclude that the enactment of N.C.G.S. § 7A-305(d)(11) in 2007 allows for the taxing of "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" without requiring the party seeking to obtain the taxing of such costs to demonstrate that the expert witnesses in question testified subject to a subpoena.[13] To the extent that *Jarrell* and its progeny suggest that the subpoena requirement established in N.C.G.S. § 7A-314 applies to expert witness fees taxed as costs pursuant

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11. On the contrary, plaintiff's argument effectively adds the reference to "as provided by law" contained in N.C.G.S. § 7A-305(d)(1) into N.C.G.S. § 7A-305(d)(11) even though no such language appears in N.C.G.S. § 7A-305(d)(11).

12. The existence of multiple options for awarding costs associated with expert testimony discussed in the text was short-lived. With respect to "motions or applications for costs filed on or after" 1 October 2015, the General Assembly has amended N.C.G.S. § 7A-314(d) to provide that, "[s]ubject to the specific limitations set forth in [N.C.]G.S. [§] 7A-305(d)(11), an expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion may authorize." Act of July 15, 2015, ch. 153, sec. 2, 3, 2015 3 Adv. Legis. Serv. 12, 14 (LexisNexis) (captioned "An Act Amending the Rules of Civil Procedure to Modernize Discovery of Expert Witness and Clarifying Expert Witness Costs in Civil Actions.").

13. In light of our determination that the enactment of N.C.G.S. § 7A-305(d)(11) eliminated the requirement that expert witnesses be subpoenaed as a precondition for an award of expert witness fees as costs, we need not address the validity of defendants' contention that the trial court correctly determined that the discovery scheduling order and the provisions of N.C.G.S. § 1A-1, Rule 26(f1) obviated the necessity for the issuance of subpoenas to compel the deposition testimony of plaintiff's designated expert witnesses.

to N.C.G.S. § 7A-305(d)(11), those decisions are overruled. As a result, given that the trial court correctly taxed expert witness fees in accordance with N.C.G.S. § 7A-305(d)(11) against plaintiff, albeit for reasons other than those we have deemed persuasive in this opinion, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA
v.
LESTER GERARD PACKINGHAM

No. 366PA13

Filed 6 November 2015

Sex Offenders—unauthorized accessing of social networking website—Facebook—constitutionality of statute

The Court of Appeals erred by vacating defendant's conviction for accessing a social networking website as a registered sex offender based on its determination that N.C.G.S. § 14-202.5 was unconstitutional on its face and as applied to defendant. N.C.G.S. § 14-202.5 is constitutional on its face because it satisfies *O'Brien*'s four factors, *U.S. v. O'Brien*, 391 U.S. 367 (1968). N.C.G.S. § 14-202.5 is narrowly tailored to serve a substantial governmental interest, and leaves available ample alternative channels of communication. Further, the incidental burden imposed upon this defendant, who was barred from Facebook but not from many other sites, was not greater than necessary to further the governmental interest of protecting children from registered sex offenders. Finally, defendant's conduct defeated his vagueness claim.

Justice HUDSON dissenting.

Justice BEASLEY joining in dissent.

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. ___, 748 S.E.2d 146

(2013), vacating a judgment entered on 30 May 2012 by Judge William Osmond Smith in Superior Court, Durham County. Heard in the Supreme Court on 8 September 2014.

Roy Cooper, Attorney General, by Anne M. Middleton and David L. Elliott, Assistant Attorneys General, for the State-appellant.

Glenn Gerding, Appellate Defender,[1] *for defendant-appellee.*

EDMUNDS, Justice.

The Court of Appeals vacated defendant's conviction for accessing a social networking Web site as a registered sex offender, finding that the applicable statute, N.C.G.S. § 14-202.5, is unconstitutional both on its face and as applied to defendant. We conclude that the statute is constitutional in all respects. Accordingly, we reverse the holding to the contrary of the Court of Appeals.

In 2008, the General Assembly enacted N.C.G.S. § 14-202.5, which bans the use of commercial social networking Web sites by registered sex offenders. In April 2010, Officer Brian Schnee of the Durham Police Department began an investigation to detect such sex offenders living in Durham who were illegally accessing commercial social networking Web sites. Officer Schnee identified defendant Lester Gerard Packingham (defendant), who had been convicted in 2002 of a sexual offense in Cabarrus County, North Carolina, as a registered sex offender subject to N.C.G.S. § 14-202.5. Officer Schnee located defendant's name and photograph on the North Carolina Department of Justice Sex Offender Registry. While investigating the Web site Facebook.com, Officer Schnee found a user profile page that, based upon the profile photo, he believed belonged to defendant. Although the name on the Facebook account was "J.R. Gerrard," Officer Schnee was able to confirm that the Facebook page in fact was defendant's. During a subsequent search of defendant's residence, officers recovered a notice of "Changes to North Carolina Sex Offender Registration Laws" signed by defendant describing commercial social networking Web sites that he was prohibited from accessing. This document was admitted into evidence at trial.

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1. Glenn Gerding was appointed to the position of Appellate Defender on 1 November 2015. His motion to withdraw as private assigned counsel was allowed by this Court on 5 November 2015. His motion to represent defendant through this Court's appointment of the Appellate Defender was also allowed on 5 November 2015.

On 20 September 2010, defendant was indicted by a Durham County grand jury for violating N.C.G.S. § 14-202.5. On 9 December 2010, defendant filed a motion to dismiss the charge in Superior Court, Durham County, contending that section 14-202.5 is unconstitutional on its face or as applied to him. On 19 April 2011, the trial court entered an order denying defendant's motion. The trial court's order included a finding of fact that both the State and defendant agreed that Facebook.com is a social networking Web site as contemplated by N.C.G.S. § 14-202.5. The trial court declined to address defendant's facial challenge but found that N.C.G.S. § 14-202.5 was constitutional as applied to defendant. On 22 June 2011, the Court of Appeals denied defendant's petition for certiorari.

The case went to trial and, after considering evidence that defendant maintained a Facebook page, a jury on 30 May 2012 found defendant guilty of one count of accessing a commercial social networking Web site by a registered sex offender. The trial court sentenced defendant to a term of six to eight months of imprisonment, suspended for twelve months, and defendant was placed on supervised probation.

Defendant appealed to the Court of Appeals, challenging the constitutionality of N.C.G.S. § 14-202.5. That court determined that N.C.G.S. § 14-202.5 "plainly involves defendant's First Amendment rights . . . because it bans the freedom of speech and association via social media" and concluded that intermediate scrutiny was appropriate. *State v. Packingham*, ___ N.C. App. ___, ___, 748 S.E.2d 146, 150 (2013). While acknowledging the legitimate state interest in protecting children from sex offenders, the Court of Appeals found that the statute "is not narrowly tailored, is vague, and fails to target the 'evil' it is intended to rectify" because it "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." *Id.* at ___, 748 S.E.2d at 154. The court further concluded that the language of N.C.G.S. § 14-202.5 "lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited." *Id.* at ___, 748 S.E.2d at 153. Accordingly, finding that the statute violates the First Amendment, the Court of Appeals held the statute unconstitutional on its face and as applied, and vacated defendant's conviction. *Id.* at ___, 748 S.E.2d at 154. On 7 November 2013, this Court allowed the State's Petition for Discretionary Review.

Statutes are presumed constitutional, *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991), and the interpretation of a statute is

controlled by the intent of the legislature, *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294-95 (1975). We review challenges to the constitutionality of a statute de novo. *In re Adoption of S.D.W.*, 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citing *Libertarian Party of N.C. v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-03 (2011)).

Defendant argues that N.C.G.S. § 14-202.5 is unconstitutional both on its face and as applied to him, contending that the statute violates his right to free speech as guaranteed by the United States and North Carolina Constitutions. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); N.C. Const. art. I, § 14 ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . . ."). As we begin our analysis, we note that while these constitutional provisions appear absolute, "[h]istory, necessity, and judicial precedent have proven otherwise: 'Freedom of speech is not an unlimited, unqualified right.' " *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012) (quoting *State v. Leigh*, 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971)), *cert. denied*, ___ U.S. ___, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013). In addition, when analyzing alleged violations of our State Constitution's Free Speech Clause, this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court. *See State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (adopting that Court's First Amendment jurisprudence "[i]n this case").

The issue before us is whether the proscription of access to some social networking Web sites violates the First Amendment. An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable. *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999). A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context. *Id.* The constitutional standards used to decide either challenge are the same. *Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014).

We begin by considering defendant's facial challenge, cognizant that a facial attack on a statute imposes a demanding burden on the challenger. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987). This Court rarely upholds facial challenges because "[t]he fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100, 95 L. Ed. 2d at 707).

The First Amendment is triggered by regulations that burden speech, so we must make an initial determination whether N.C.G.S. § 14-202.5 is a regulation of speech or a regulation of conduct. The distinction is critical because a statute that regulates speech is "subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Burson v. Freeman*, 504 U.S. 191, 198, 112 S. Ct. 1846, 1851, 119 L. Ed. 2d 5, 14 (1992) (plurality) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794, 804 (1983)). First Amendment protection of speech is extended to conduct only when the conduct in question "is inherently expressive." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 1310, 164 L. Ed. 2d 156, 175 (2006). In contrast, a regulation that governs conduct while imposing only an incidental burden upon speech "must be evaluated in terms of [its] general effect." *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906, 86 L. Ed. 2d 536, 548 (1985). An incidental burden on speech is permissible "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*

The statute at issue provides in pertinent part:

> (a) **Offense.** — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.
>
> (b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:
>
> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
>
> (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

N.C.G.S. § 14-202.5 (2013).

This statute addresses the ability of registered sex offenders to access some social networking Web sites. We concluded in *Hest* that legislation banning the operation of sweepstake systems primarily regulated "noncommunicative conduct rather than protected speech." 366 N.C. at 296, 749 S.E.2d at 435. The plaintiff in *Hest* argued that video games which were used to announce the results of the sweepstakes should be protected by the First Amendment. We disagreed, finding that the statute at issue in that case prohibited not the video games but the underlying conduct of a sweepstakes whose outcome was announced through the video game. *Id.* at 297, 749 S.E.2d at 435. Unlike the statute in *Hest*, however, the statute here defines a "commercial social networking Web site" as one that facilitates social introduction between people, N.C.G.S. § 14-202.5(b)(2), and provides users with a means of communicating with each other, *id.* § 14-202.5(b)(4). As is apparent to any

who access them, social networking Web sites provide both a forum for gathering information and a means of communication. Even so, like the statute in *Hest*, the essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex offenders to engage in speech after accessing those Web sites that fall within the statute's reach. Thus we conclude that section 14-202.5 is a regulation of conduct.

Our next inquiry is whether N.C.G.S. § 14-202.5 governs conduct on the basis of the content of speech or is instead a content-neutral regulation. *See Brown v. Town of Cary*, 706 F.3d 294, 300 (4th Cir. 2013) ("Our first task is to determine whether the [statute] 'is content based or content neutral . . . .' ") (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 59, 114 S. Ct. 2038, 2047, 129 L. Ed. 2d 36, 50 (1994) (O'Connor, J., concurring)). The level of scrutiny we apply is based on this determination. Restrictions based upon the content of the speech trigger strict scrutiny, *see United States v. Playboy Entm't Grp.*, 529 U.S. 803, 814, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865, 880 (2000), and are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542, 120 L. Ed. 2d 305, 317 (1992) (citations omitted). To survive under strict scrutiny, the regulation "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, ___ U.S. ___, ___, 134 S. Ct. 2518, 2530, 189 L. Ed. 2d 502, 515 (2014) (citation omitted). In contrast, content-neutral regulations of conduct that impose an incidental burden on speech are subject to intermediate scrutiny because they "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497, 517 (1994).

The United States Supreme Court recently discussed the distinction between content-based and content-neutral regulations in *Reed v. Town of Gilbert*, ___ U.S. ___, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Under *Reed*, a court initially must consider "whether the law is content neutral on its face." *Id.* at ___, 135 S. Ct. at 2228, 192 L. Ed. 2d at 246. Although *Reed* focused on the interpretation of content-based regulations of *speech*, while we concluded above that section 14-202.5 is a regulation of *conduct*, even under a *Reed* analysis we see that section 14-202.5 is a content-neutral regulation. On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a

particular Web site are available for use by minors. Thus, we conclude, as the Court did in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661, 675 (1989), that section 14-202.5 "involve[s] a facially content-*neutral* ban on the use [of commercial social networking Web sites]." *Reed*, ___ U.S. at ___, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247 (citing *Ward*, 491 U.S. at 792, 109 S. Ct. at 2754, 105 L. Ed. 2d at 676).

As to the intent of the General Assembly in passing section 14-202.5, the trial court found as a matter of law that the purpose of the statute is to "facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes." The parties have not challenged this conclusion of law. *Reed* states that a law, though content neutral on its face, is "considered [a] content-based regulation[] of speech" if the law "cannot be 'justified without reference to the content of the regulated speech' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* at ___, 135 S. Ct. at 2227, 192 L. Ed. 2d at 245 (fourth alteration in original) (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675). A court must address both prongs before concluding that a lower level of scrutiny applies to the law. *Id.* at ___, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247. Assuming that these tests also apply to a regulation of conduct, we see that section 14-202.5 satisfies both. The justification of the statute—protecting minors from registered sex offenders—is unrelated to any speech on a regulated site. Nor does the statute have anything to say regarding the content of any speech on a regulated site. As a result, we conclude that, to the extent *Reed* applies to our analysis of section 14-202.5, the statute satisfies that case's requirements and strict scrutiny is not required. Although the statute may impose an incidental burden on the ability of registered sex offenders to engage in speech on the Internet, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675 (citation omitted). Accordingly, we conclude that N.C.G.S. § 14-202.5 is a content-neutral regulation requiring intermediate scrutiny.

"Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (citation omitted). The Supreme Court

has provided guidance in applying intermediate scrutiny. In *United States v. O'Brien*, the defendant claimed that the statute forbidding destruction of his Selective Service registration card was unconstitutional as applied to him because such a ban on burning the card violated his right to free speech. 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The Supreme Court found that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," *id.* at 376, 88 S. Ct. at 1678, 20 L. Ed. 2d at 679, the regulation

> is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,

id. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d at 680. Because the statute at issue here is a content-neutral regulation that imposes only an incidental burden on speech, we believe the four-factor test from *O'Brien* is instructive in evaluating defendant's facial attack on N.C.G.S. § 14-202.5.

Looking to the first two *O'Brien* factors, the parties agree that promulgating restrictions such as those contained in N.C.G.S. § 14-202.5 on registered sex offenders is within the constitutional power of the General Assembly and that protecting children from sexual abuse is a substantial governmental interest. We then consider *O'Brien*'s third factor, whether this governmental interest is related to the suppression of free expression. The State asserts that the statute was enacted to prevent registered sex offenders from prowling on social media and gathering information about potential child targets. Viewing this statute as a preventive measure apparently intended to forestall illicit lurking and contact, we see that it is distinguishable from other North Carolina statutes that criminalize communications which have already occurred. The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression of free speech. Accordingly, the statute satisfies *O'Brien*'s third factor.

Although the fourth *O'Brien* factor appears to reflect the strict scrutiny requirement that the regulation be the "least restrictive means" of carrying out a compelling state interest, *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2530, 189 L. Ed. 2d at 515, the United States Supreme Court has since explained that for content-neutral regulations, the statute should

be "narrowly tailored to serve a significant governmental interest," *Ward*, 491 U.S. at 796, 109 S. Ct. at 2756, 105 L. Ed. 2d at 678 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221, 227 (1984)) (finding that a narrowly tailored regulation controlling noise does not restrict free speech). Narrow tailoring requires the government to demonstrate that "alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2540, 189 L. Ed. 2d at 526.

Defendant argues that the statute is not narrowly tailored. Specifically, defendant contends that the statute's definition of a "commercial social networking Web site" is overbroad, that the statute does not take into account the underlying offense of conviction or the likelihood of recidivism, that the statute does not require criminal intent, that the statute is underinclusive because, *inter alia*, it applies only to commercial Web sites, that less burdensome laws already exist to protect children from baleful Internet contacts, and that sufficient alternatives allowing communication do not exist. Defendant's arguments are premised on the assumption that a statute regulating the manner of speech must be drawn as narrowly as possible, or at least more narrowly than this statute. However, the Supreme Court has stated explicitly that "[l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798, 109 S. Ct. at 2757-58, 105 L. Ed. 2d at 680. The Court went on to explain that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S. Ct. at 2758, 105 L. Ed. 2d at 681.

Instead of imposing a blanket prohibition against Internet use, the statute establishes four specific criteria that must be met in order for a commercial social networking Web site to be prohibited. N.C.G.S. § 14-202.5(b). In addition, the statute entirely exempts Web sites that are exclusively devoted to speech, such as instant messaging services and chat rooms. *Id.* § 14-202.5(c). Thus we see that the General Assembly has carefully tailored the statute in such a way as to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors, thereby addressing

the evil that the statute seeks to prevent. While we acknowledge that defendant has identified some areas in which the statute could have been drafted even more narrowly, we conclude that the statute is sufficiently narrowly drawn to satisfy the requirements of *Ward*.

Our inquiry does not end here, however. A content-neutral statute not only must be narrowly tailored but must also "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S. Ct. at 2753, 105 L. Ed. 2d at 675 (quoting *Cmty. for Creative Non-Violenc*e, 468 U.S. at 293, 104 S. Ct. at 3069, 82 L. Ed. 2d at 227). Subsection 14-202.5(c) allows such alternatives through specific exceptions for Web sites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. A Web site that requires one seeking access to provide no more than a username and an email address to reach the page does not necessarily violate the statute. Only a site that generates or creates a Web page or a personal profile for the user and otherwise meets the requirements of the statute is prohibited. In addition, even if a site falls within the definition of a "commercial social networking Web site" found in subsection 14-202.5(b), in order to convict a registered sex offender of accessing the site, the State must prove that "the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site." N.C.G.S. § 14-202.5(a).

In his brief and argument to this Court, defendant lists numerous well-known Web sites that he contends he could not access legally. In considering those and other similar sites, we find that even where defendant is correct, the Web offers numerous alternatives that provide the same or similar services that defendant could access without violating N.C.G.S. § 14-202.5. For example, defendant would not violate N.C.G.S. § 14-202.5 by accessing the Paula Deen Network, a commercial social networking Web site that allows registered users to swap recipes and discuss cooking techniques, because its Terms of Service require users to be at least eighteen years old to maintain a profile. *Paula Deen Network Terms of Service*, http://www.pauladeen.com/terms-of-service/ (last visited 5 November 2015) ("This website is designed for and targeted to Adults. It is intended solely and exclusively for those at least 18 years of age or older."). Similarly, users may follow current events on WRAL.com, which requires users to be at least eighteen years old to register with the site and, as a result, is not prohibited. *Capitol Broadcasting Company Terms of Use*, http://www.capitolbroadcasting.com/terms-of-use/ (last visited 5 November 2015) ("[Y]ou must be at least 18 years old to register and to use the Services."). A sex offender engaging in an

on-line job search is free to use the commercial social networking Web site Glassdoor.com, which prohibits use by individuals under the age of eighteen. *Glassdoor Terms of Use*, http://www.glassdoor.com/about/terms.htm (last visited 5 November 2015) ("To access or use Glassdoor, you must be 18 years of age or older . . . ."). Finally, sex offenders permissibly may access Shutterfly to share photos, because that site limits its users to those eighteen and older. *Shutterfly Terms of Use*, http://shutterfly-inc.com/terms.html (last visited 5 November 2015) ("In order to create a member account with any of our Sites and Apps, you must be at least 18 years of age.").

While we leave for another day the question whether a site's terms of use alone are sufficient as a matter of law to impute knowledge of the site's limitations on access to a registrant, such terms of use provide specific and pertinent information to a registered sex offender seeking lawful access to the Internet. These examples demonstrate that the Web offers registered sex offenders myriad sites that do not run afoul of the statute. In addition, such methods of communication as text messages, FaceTime, electronic mail, traditional mail, and phone calls, which are not based on use of a Web site, are unrestricted. Accordingly, the regulation leaves open ample channels of communication that registered sex offenders may freely access.

Defendant cites cases from other jurisdictions faulting similar statutes. However, those cases are not binding on this Court, and the statutes under consideration in those cases are readily distinguishable from our own. For instance, a federal circuit court found unconstitutional an Indiana statute that sought to prevent most sex offenders from communicating with minors by prohibiting their use of commercial social networking Web sites, including instant messaging services and chat rooms. *See Doe v. Prosecutor, Marion Cty.*, 705 F.3d 694, 695-96 (7th Cir. 2013). The circuit court found that the law was not narrowly tailored to prevent illicit communications between sex offenders and minors. *Id.* at 695. Not only did the Indiana statute prohibit use of instant messaging and chat room services, both of which are exempted under N.C.G.S. § 14-202.5, Indiana's statute focused on preventing communications, while North Carolina's statute focuses on preventing registered sex offenders from gathering information about minors on the Internet. Similarly, while a federal court concluded that Louisiana's statute, which was analogous to Indiana's, was facially unconstitutional because it was vague and overbroad, *Doe v. Jindal*, 853 F. Supp. 2d 596, 607 (M.D. La. 2012), Louisiana thereafter amended that statute to a version more in

line with N.C.G.S. § 14-202.5, *see* La. Rev. Stat. Ann. 14:91.5 (2012), *available at* http://legis.la.gov/Legis/Law.aspx?d=78714.

Thus, we conclude that N.C.G.S. § 14-202.5 satisfies *O'Brien*'s four factors, is narrowly tailored to serve a substantial governmental interest, and leaves available ample alternative channels of communication. Defendant has failed to meet the high bar necessary to mount a successful facial challenge. *See*, *e.g.*, *Thompson*, 349 N.C. at 496, 508 S.E.2d at 285 (holding defendant's facial challenge to a statute regulating pretrial release failed when defendant did not establish that no set of circumstances existed under which the act would not be valid). Accordingly, we conclude the statute is constitutional on its face.

We next consider defendant's as-applied challenge. A statute that is constitutional on its face nevertheless may be unconstitutional as applied to a particular defendant. Because Facebook does not limit users to those over the age of eighteen and otherwise fits the definition of a commercial social networking Web site set out in N.C.G.S. § 14-202.5, defendant is forbidden to access that site unless the statute is unconstitutional as applied to him. Earlier in this opinion we observed that the trial court made the uncontested finding that the government's interest here is protecting minors by preventing registered sex offenders from gathering information about them on social media. Although we also found that the statute is content-neutral, we observed that it imposes an incidental burden on speech on the Internet. We now consider whether this incidental restriction on defendant is no greater than is essential to further the government's interest. *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d at 680.

Beginning with consideration of the nature and severity of the incidental restriction, we have stated that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595, 104 L. Ed. 2d 18, 25 (1989)). The United States Fourth Circuit Court of Appeals has held that, in the context of responding to a posting on a political campaign page maintained on Facebook.com, simply "liking" the post is speech protected by the First Amendment, an analysis with which we agree. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) ("[C]licking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement."). Here, defendant posted the following on Facebook: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? . . . Praise be to GOD, WOW! Thanks JESUS!" If merely "liking" a post on

Facebook.com is speech protected by the First Amendment, we have no doubt that posting a message on that site falls within this category as well. Thus, the statutory restrictions on defendant's right to speech on Facebook, while incidental, are not trivial.

Considering next the governmental interest in protecting minors, when "a direct relationship between the regulation and the interest" exists, *Hest*, 366 N.C. at 298, 749 S.E.2d at 436, an incidental burden on speech can be justified if the governmental interest is being furthered, *see Turner Broad. Sys.*, 512 U.S. at 662, 114 S. Ct. at 2469, 129 L. Ed. 2d at 530. Nevertheless, "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' " *Id.* at 664, 114 S. Ct. at 2470, 129 L. Ed. 2d at 531 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1995)). Instead, the State must demonstrate "that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (citations omitted). The State argues that protection of minors from known sexual predators is a vital duty, one this Court has recognized in another context. *See Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (discussing the risk of recidivism among sex offenders).

In considering this balance between the governmental interest and the incidental burden on this defendant's speech, we are mindful of our opinion in *Britt v. State*, in which we were confronted with a challenge to the constitutionality of N.C.G.S. § 14-415.1, which banned all convicted felons from possessing firearms. 363 N.C. 546, 681 S.E.2d 320 (2009). We held that the statute violated the North Carolina Constitution when applied to the plaintiff because his underlying offense (a nonviolent drug crime), his subsequent lawful behavior and demonstrated respect for the law, and his history of peaceable conduct following his conviction, all gave no indication that he posed any substantial threat to society. *Id.* at 550, 681 S.E.2d at 323. As a result, we concluded that the statute barring the plaintiff from possessing a firearm was "not fairly related" to the governmental purpose for which the statute was enacted, which was "the preservation of public peace and safety." *Id.* The statute was unconstitutional as applied to the plaintiff when prosecution would not further that governmental interest.

As indicated by our analysis in *Britt*, the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case. In ascertaining whether the government's interest in protecting children from registered sex offenders who are lurking on social networking Web sites and gleaning information on potential

targets is furthered by prosecution of this defendant, we observe that defendant has the status of a registered sex offender because he was convicted of indecent liberties with a minor, a sex crime against a child falling directly within the purview of section 14-202.5. Officers who searched his home found a signed written notice advising defendant of sites he could not legally access. Defendant set up his Facebook page under an alias, further indicating his awareness that he was indulging in forbidden behavior while simultaneously hiding his identity from investigators and parents. Thus defendant's case is readily distinguishable from *Britt*, in which the plaintiff's underlying conviction for drugs was considerably less directly related to the possession of "sporting rifles and shotguns" than is defendant's indecent liberties conviction to his use of Internet sites frequented by minors. Moreover, the plaintiff in *Britt* discussed the law's application to him with his local sheriff and thereafter voluntarily divested himself of all firearms before instituting his constitutional challenge to the statute, while defendant here deliberately disguised his identity. *Id.* at 547-48, 681 S.E.2d at 321-22. Unlike the plaintiff in *Britt*, defendant neither demonstrated respect for the law nor made good faith efforts to comply with the statute. These facts satisfy us that the incidental burden imposed upon this defendant, who is barred from Facebook.com but not from many other sites, is not greater than necessary to further the governmental interest of protecting children from registered sex offenders. Thus, N.C.G.S. § 14-202.5 is not an unreasonable regulation and is constitutional as applied to defendant. *Cf. id.* at 550, 681 S.E.2d at 323.

Defendant also argues that N.C.G.S. § 14-202.5 is unconstitutionally overbroad. "In the First Amendment context, . . . this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435, 447 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190 n.6, 170 L. Ed. 2d 151, 160 n.6 (2008)). In *Broadrick v. Oklahoma*, the Court clarified the limited scope of the overbreadth doctrine, explaining that

> the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if

> expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. 601, 615, 93 S. Ct. 2908, 2917-18, 37 L. Ed. 2d 830, 842 (1973). Because the notion of striking a statute at the request of one to whom it otherwise unquestionably applies goes against the grain of "prudential limitations on constitutional adjudication," *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113, 1130 (1982), the Supreme Court of the United States has recognized that the doctrine is "strong medicine" to be administered only with caution and as a "last resort," *id.* at 769, 102 S. Ct. at 3361, 73 L. Ed. 2d at 1130 (quoting *Broadrick*, 413 U.S. at 613, 93 S. Ct. at 2916, 37 L. Ed. 2d at 814). A party raising such a challenge "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198, 156 L. Ed. 2d 148, 159 (2003) (alteration in original) (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234, 101 L. Ed. 2d 1, 17 (1988)). When a statute's infringement on speech protected under the First Amendment is marginal, a finding of facial invalidity is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." *Ferber*, 458 U.S. at 770 n.25, 102 S. Ct. at 3362 n.25, 73 L. Ed. 2d at 1131 n.25 (alterations in original) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580-81, 93 S. Ct. 2880, 2898, 37 L. Ed. 2d 796, 817 (1973)).

In an overbreadth analysis, the reviewing court must "construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650, 662 (2008). As detailed above in our analysis of the facial constitutionality of the statute, we see that the statute is drafted carefully to limit its reach by establishing four specific criteria that must be met before access to a commercial social networking Web site is prohibited to a registered sex offender, N.C.G.S. § 14-202.5(b); that the statute exempts sites that are exclusively devoted to speech, *id.* § 14-202.5(c); and that the statute requires the State to

prove that a registered sex offender knew the site permitted minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site, *id.* § 14-202.5(a). These factors ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target. Outside these limits, registered sex offenders are free to use the Internet.

Although this statute "may deter protected speech to some unknown extent," *Broadrick*, 413 U.S. at 615, 93 S. Ct. at 2917, 37 L. Ed. 2d at 842, that effect can be characterized "at best [as] a prediction," *id.*, 93 S. Ct. at 2917-18, 37 L. Ed. 2d at 842, and we "cannot, with confidence, justify invalidating [this] statute on its face," *id.*, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842, and prohibit the State from continuing to enforce a statute protecting such an important government interest, *id.* Given the reluctance with which courts administer the strong medicine of overbreadth, we conclude section 14-202.5 does not sweep too broadly in preventing registered sex offenders from accessing carefully delineated Web sites where vulnerable youthful users may congregate. As in *Broadrick*, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615-16, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842.

Finally, the State challenges the Court of Appeals holding that the statute is unconstitutionally vague. Laws that are not "clearly defined" are void for vagueness under the Due Process Clause. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222, 227 (1972). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *id.* at 108, 92 S. Ct. at 2298-99, 33 L. Ed. 2d at 227, and must also provide sufficient clarity to prevent arbitrary and discriminatory enforcement, *see Petersilie*, 334 N.C. at 182, 432 S.E.2d at 839; *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Vague laws chill free speech because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' " *Grayned*, 408 U.S. at 109, 92 S. Ct. at 2299, 33 L. Ed. 2d at 228 (second alteration in original) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316, 1323, 12 L. Ed. 2d 377, 385 (1964)).

Vagueness cannot be raised by a defendant whose conduct falls squarely within the scope of the statute. *See Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L. Ed. 2d 439, 458 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for

vagueness."); *see also Hoffman Estates*, 455 U.S. at 495, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). The Court of Appeals "assume[d] that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream commercial social networking sites such as *Facebook.com*." *Packingham*, ___ N.C. App. at ___, 748 S.E.2d at 153. Whatever the status of other Web sites, no party disputes that Facebook.com, the site at issue here, falls under N.C.G.S. § 14-202.5's definition of "commercial social networking Web site." While an argument may be made that the statutory term "access" could be vague in other contexts, defendant's logging into his Facebook account and posting a message on his page is unquestionably "accessing" Facebook.com. Defendant's conduct defeats his vagueness claim.

Accordingly, we reverse the opinion of the Court of Appeals.

REVERSED.

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

Justice HUDSON dissenting.

The majority concludes that N.C.G.S. § 14-202.5 (2013), which bars any registered sex offender from accessing any commercial social networking site on which he knows a minor can create or maintain a profile, is constitutional on its face and as applied to defendant. Because I conclude that the statute is unconstitutional on its face, I disagree with the majority's reversal of the Court of Appeals. More specifically, I conclude that section 14-202.5 is not narrowly tailored enough to withstand even intermediate scrutiny and that it is facially overbroad under the First Amendment. Accordingly, I respectfully dissent.

As an initial matter, I agree with the majority opinion to the extent it concludes that N.C.G.S. § 14-202.5, by proscribing access to commercial social networking sites, targets sites which are used for "gathering information and [as] means of communication." However, I do not agree with the later assertion that the statute primarily regulates conduct and places only an "incidental" burden on speech. This statute completely bars registered sex offenders from communicating with others through many widely utilized commercial networking sites. Therefore, in my view, it primarily targets expressive activity usually protected by

the First Amendment. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997) (observing that previous cases from that Court "provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to online activities); *see also Brown v. Entm't Merchs. Ass'n*, ___ U.S. ___, ___, 131 S. Ct. 2729, 2733 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." (citation and internal quotation marks omitted)).

The majority finds the "four-factor test from [*United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968)] instructive" in applying intermediate scrutiny to what it sees as an "incidental" burden on speech. *O'Brien* involved a regulatory ban on burning of a draft card, which the Court saw as conduct having a "communicative element." *Id.* at 376, 88 S. Ct. at 1678. Because I read *O'Brien* to apply only where the restriction primarily targets expressive conduct, and because the statute at issue here necessarily burdens speech directly, I would not apply *O'Brien*'s four-factor test here. *See id.*, 88 S. Ct. at 1678-79 ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). Instead, I would analyze this statute as one that, by design and in effect, primarily and directly regulates First Amendment-protected activity, not conduct.

Because this statute primarily regulates speech (and other protected activity), I would apply the scrutiny applicable to restrictions on speech. *See, e.g.*, *McCullen v. Coakley*, ___ U.S. ___, ___, 134 S. Ct. 2518, 2530 (2014); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26-28, 130 S. Ct. 2705, 2723-24 (2010). According to these cases, the next step would be to determine whether the statute is content-based or content-neutral. Content-based restrictions are "presumptively unconstitutional" and can stand only if they survive strict scrutiny, the most difficult test in federal constitutional law. *McCullen*, ___ at ___, 134 S. Ct. 2530. In contrast, content-neutral measures that burden speech are subject to a form of intermediate scrutiny—a still difficult but less exacting analysis. *See id.* at ___, 134 S. Ct. 2530.

Here, applying the United States Supreme Court's recent decision in *Reed v. Town of Gilbert*, ___ U.S. ___, 135 S. Ct. 2218 (2015), the majority concludes that N.C.G.S. § 14-202.5 is a content-neutral burden on conduct only incidentally affecting speech. While I think there is a strong

argument in light of *Reed* that the statute is content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites, I do not think we need to resolve this question because I conclude that the law cannot withstand even intermediate scrutiny.

The intermediate scrutiny standard applicable to content-neutral regulations on speech requires the government to demonstrate, *inter alia*, that the restriction is "narrowly tailored to serve a significant governmental interest." *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2534 (quoting *Ward v. Rock Against Racism*, 491 U.S.781, 796, 109 S. Ct. 2756, 2746 (1989)). More specifically,

> [f]or a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate [and significant] interests. Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive or least intrusive means of serving the government's interests. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. at ___, 134 S. Ct. at 2535 (citations and internal quotation marks omitted). In short, when a statute "burden[s] substantially more speech than necessary to achieve the [government's] asserted interests," it will fail this form of intermediate scrutiny. *Id.* at ___, 134 S. Ct. at 2537. Here, there is no dispute that the State's purported concern—protecting minors from exploitation by registered sex offenders using the Internet—qualifies as a legitimate and significant government interest. The central question, then, is whether section 14-202.5 "burden[s] substantially more speech than necessary" in support of that interest. *Id.* at ___, 134 S. Ct. at 2537.

I conclude that it does. First, the statute as written sweeps too broadly regarding who is subject to its prohibitions. As noted, the State's interest here is in protecting minors from registered sex offenders using the Internet. However, this statute applies to *all* registered offenders. *See* § 14-202.5(a) ("It is unlawful for a [registered] sex offender . . . to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site."). The statute is not restricted in application only to those whose offenses harmed a minor or in some way involved a computer or the

Internet, nor to those who have been shown to be particularly violent, dangerous, or likely to reoffend. This statute therefore groups together, without distinction, offenders whose history and past conduct directly implicate the State's concerns with those who do not. To the extent the statute does so, it "burden[s] . . . more speech than necessary to achieve the [State's] interests." *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2537.

Second, as written, the statute also sweeps far too broadly regarding the activity it prohibits. The majority asserts that the statute prohibits "registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." But in fact, the statute contains no such limitation. Section 14-202.5 defines the term "commercial social networking Web site" as a website that (1) is operated by someone who derives revenue from the site; (2) facilitates "social introduction" or "information exchanges" between two or more people; (3) allows users "to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, [or] other personal information about the user . . . that may be accessed by other users or visitors" to the site; and (4) provides "users or visitors mechanisms to communicate with other users." N.C.G.S. § 14-202.5(b). I note in particular that the statute's description of a "personal profile[ ]," and the language "such as" when referring to the information that can appear in such profiles, could bring within the statute's scope many websites that allow users to register by going through the minimal process of creating a username and adding an email address or telephone number. As a result, this definition clearly includes sites that are normally thought of as "social networking" sites, like Facebook, Google+, LinkedIn, Instagram, Reddit, and MySpace. However, the statute also likely includes sites like Foodnetwork.com, and even news sites like the websites for *The New York Times* and North Carolina's own *News & Observer*. *See The News & Observer Terms of Service*, http://www.newsobserver.com/customer-service/terms-of-service/ (last visited Oct. 22, 2015) (stating that "[i]f you are under eighteen (18) then you may only use NewsObserver.com with the consent of a parent or legal guardian" but not limiting registration on the site to adults). Most strikingly, the statute may even bar all registered offenders from visiting the sites of Internet giants like Amazon[1] and Google.

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1. The statute does except from this definition any website that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services *between its members or visitors*." N.C.G.S. § 14-202.5(c)(2) (emphasis added). However, as defendant argues, "Amazon's primary purpose is to facilitate transactions *between Amazon*

In short, however legitimate—even compelling—the State's interest in protecting children might be, the plausible sweep of the statute as currently written "create[s] a criminal prohibition of alarming breadth," *United States v. Stevens*, 559 U.S. 460, 474, 130 S. Ct. 1577, 1588 (2010), and extends well beyond the evils the State seeks to combat. I therefore conclude that N.C.G.S. § 14-202.5 "burden[s] substantially more speech than necessary to achieve the [State's legitimate] interests," *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2537, and cannot survive even the intermediate scrutiny applied to content-neutral restrictions on speech.

In addition, for similar reasons, I conclude that this statute is also facially overbroad under the First Amendment. The overbreadth inquiry is very similar to the "narrow-tailoring" inquiry described above: First Amendment overbreadth doctrine requires a court to invalidate a statute that "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 1838 (2008). There is, however, one important nuance. Namely, while the Supreme Court of the United States has often invalidated specific applications of statutes under as-applied challenges, *see*, *e.g.*, *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2528, 2541, that Court has also made clear that First Amendment doctrine specifically permits litigants to make facial challenges based on overbreadth, *see*, *e.g.*, *Stevens*, 559 U.S. at 473, 130 S. Ct. at 1587 ("In the First Amendment context, however, this Court recognizes a second type of *facial* challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (emphasis added) (citation and internal quotation marks omitted)); *Williams*, 553 U.S. at 292, 128 S. Ct. at 1838 ("According to our First Amendment overbreadth doctrine, a statute is *facially invalid* if it prohibits a substantial amount of protected speech."(emphasis added)). The Court has even noted that such a challenge is permitted when the challenger's own conduct would clearly fall within the scope of the statute's prohibition and the claim is based only on how that statute might apply to the activity of others. *See*, *e.g.*, *Humanitarian Law Project*, 561 U.S. at 20, 130 S. Ct. at 2719 ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others. [But s]uch a plaintiff may have a valid overbreadth claim under the First Amendment . . . ."). In light of this precedent permitting such

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itself and its visitors, not between users of the Web site and other users." (Emphasis added.) Accordingly, it appears that this exception does not actually apply to websites like Amazon, but only covers websites like Craigslist or eBay.

challenges, and for the reasons noted above, I would hold that the statute at issue here, N.C.G.S. § 14-202.5, is facially overbroad and therefore unconstitutional, regardless of its application in this specific case.

For the foregoing reasons, I conclude that N.C.G.S. § 14-202.5 is both insufficiently narrowly tailored to satisfy intermediate scrutiny and facially overbroad under the First Amendment. Because I disagree with the majority's conclusions to the contrary, I respectfully dissent.

Justice BEASLEY joins in this opinion.

STATE OF NORTH CAROLINA
v.
STILLOAN DEVORAY ROBINSON

No. 398PA14

Filed 6 November 2015

Possession of stolen property—vehicle—jury instructions—lesser-included offense

The trial court did not err by denying defendant's request to instruct the jury on unauthorized use of a motor vehicle because that offense is not a lesser-included offense of possession of a stolen vehicle. The "use" offense contains an element—"taking or operating"—that is not included in the "possession" offense.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 178 (2014), finding no error after appeal from a judgment entered on 30 August 2013 by Judge Robert T. Sumner in Superior Court, Mecklenburg County. Heard in the Supreme Court on 22 April 2015.

Roy Cooper, *Attorney General*, *by Hugh Harris*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Jon H. Hunt*, *Assistant Appellate Defender*, *for defendant-appellant.*

BEASLEY, Justice.

This case asks this Court to consider whether unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen vehicle. We hold that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle because the former offense contains an essential element that is not an essential element of the latter offense. Accordingly, we affirm the decision of the Court of Appeals, though on different grounds. In so doing, we overrule *State v. Oliver* to the extent that it is inconsistent with this opinion.

On 1 December 2011, defendant moved into a halfway house in Charlotte, North Carolina, after serving five years and two months in federal prison for a firearms conviction. At the halfway house, defendant shared a room with William James Markham and two other individuals. The details of the events that transpired on 10 January 2012 are disputed.

According to defendant, on 10 January 2012, he told Markham about his plan to leave the halfway house without permission and "take [his] stuff home and get stuff situated at the house." In exchange for one and one-half grams of cocaine, Markham agreed to let defendant use his car, a Lexus ES that the halfway house permitted Markham to have to drive himself to work. When defendant was unable to obtain the cocaine, he gave Markham counterfeit crack cocaine. Markham accepted the counterfeit cocaine, removed his car keys from his shoe, and replaced the keys with the counterfeit substance. Markham then gave defendant the keys to his car. Defendant testified that the two men agreed that he would leave Markham's car in front of a nearby McDonald's restaurant the next day.

According to Markham, he never gave defendant permission to use his car. Markham testified that when he returned to the halfway house after work on 10 January 2012, Markham went to his room, where his roommates, including defendant, were present. Markham changed clothes and placed his car keys in his shoe. Markham then left the room to use the telephone and upon returning, found that his car keys were missing. Defendant was no longer in the room. Markham reported his missing keys to staff members at the halfway house. A staff member testified that she witnessed defendant leaving the halfway house in a car, after which she completed escaped inmate paperwork and called the police. Later that evening, Markham's car was reported stolen to police.

Three days later, on 13 January 2012, defendant returned from Atlanta and parked the car near his home in Charlotte to unload his clothes. Officer Bryan Overman was driving in the neighborhood after responding to a call and observed a gold Lexus parked on the street.

Officer Overman ran the license plate through a database that confirmed that the vehicle had been reported stolen. While Officer Overman and other officers canvassed the area, Officer William Dotson saw defendant and arrested him. Markham claimed that the vehicle was damaged and personal items were missing from the vehicle. Defendant testified that the car was returned in the condition in which he received it and that he had not taken any property from the car.

On 6 February 2012, a grand jury indicted defendant for possession of a stolen vehicle and larceny of a motor vehicle. Then on 2 April 2012, defendant was indicted for having attained habitual felon status. In three superseding indictments, one dated 2 April 2012 and two dated 20 May 2013,[1] the grand jury indicted defendant for possession of a stolen vehicle, breaking and entering a motor vehicle, and larceny of a motor vehicle.[2]

Defendant pleaded not guilty and was tried before Judge Robert T. Sumner in Superior Court, Mecklenburg County, beginning on 28 August 2013. During the charge conference, defendant requested a jury instruction on the misdemeanor offense of unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen vehicle. The trial court denied the request.

On 30 August 2013, the jury found defendant guilty of possession of a stolen motor vehicle, but not guilty of breaking or entering a motor vehicle or larceny of a motor vehicle. Pursuant to a plea agreement, defendant pleaded guilty to having attained habitual felon status. The trial court sentenced defendant to an active term of 84 to 113 months of imprisonment, and defendant appealed from the judgment to the Court of Appeals making two arguments on appeal.

Defendant first argued that he received ineffective assistance of counsel because the questions defense counsel asked on direct examination required defendant to admit guilt to possession of a stolen vehicle, the only crime for which he was found guilty. *State v. Robinson*, ___ N.C. App. ___, ___, 763 S.E.2d 178, 180 (2014). The Court of Appeals disagreed, concluding that defendant's ineffective assistance of counsel

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1. The typewritten portion of the superseding indictment charging defendant with possession of a stolen vehicle is dated 20 March 2013; however, the grand jury foreman signed and dated the indictment 20 May 2013.

2. Two superseding indictments charge defendant with "breaking and entering" a motor vehicle in violation of N.C.G.S. § 14-56. We note that section 14-56 references "breaking *or* entering." *See* N.C.G.S. § 14-56 (2013) (emphasis added). The trial court instructed the jury using the statutory language.

claim failed because his responses on direct examination only established that defendant kept the car longer than allegedly agreed; however, defendant never testified that he knew or had reason to know that the car was stolen, which is an essential element of possession of a stolen vehicle. *Id.* at ___, 763 S.E.2d at 180-81.

Second, defendant argued that the trial court erred in denying his request for a jury instruction on unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen vehicle. *Id.* at ___, 763 S.E.2d at 181. The Court of Appeals found no error on the grounds that it was bound by its decision in *State v. Oliver*, 217 N.C. App. 369, 718 S.E.2d 731 (2011), which held that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. *Id.* at ___, 763 S.E.2d at 181-82. The Court of Appeals noted that in *Oliver* the court relied on this Court's decision in *State v. Nickerson*, 365 N.C. 279, 715 S.E.2d 845 (2011). *Id.* at ___, 763 S.E.2d at 182. But the court explained that "in *Nickerson*, 'the principal question [wa]s whether the crime of unauthorized use of a motor vehicle is a lesser[-]included offense of *possession of stolen goods*.' " *Id.* at ___, 763 S.E.2d at 181 (brackets in original) (quoting *Nickerson*, 365 N.C. at 281, 715 S.E.2d at 846 (emphasis added)). The Court of Appeals concluded that "[t]hus, in *Oliver*, this Court mistakenly relied on *Nickerson* for a proposition not addressed, nor a holding reached, in that case." *Id.* at ___, 763 S.E.2d at 181 (italics added). The Court of Appeals further stated:

> However, we hope that by noting the clear discrepancy between *Oliver* and *Nickerson*, the Supreme Court may take this opportunity to clarify our case law and provide guidance on the issue of whether unauthorized use of a motor vehicle is in fact a lesser-included offense of possession of a stolen motor vehicle.

Id. at ___, 763 S.E.2d at 182 (citation omitted).

On 18 December 2014, this Court allowed defendant's petition for discretionary review on the issue of whether unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen vehicle.

Defendant maintains that *Oliver* was wrongly decided because that decision incorrectly interpreted *Nickerson*. The State contends that in *Oliver* the court properly applied the rule as stated in *Nickerson* when it concluded that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. The rule in *Nickerson* establishes that an offense is not the lesser-included offense of another if the lesser-included offense contains an essential element not present in

the greater offense. We conclude that the *Oliver* court misapprehended this Court's decision in *Nickerson*.

In *Oliver* the defendant argued that the trial court should have instructed the jury on unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen vehicle. 217 N.C. App. at 372, 718 S.E.2d at 733-34. The court in *Oliver* reasoned that

> [d]uring the pendency of defendant's appeal, our Supreme Court addressed this very issue of whether unauthorized use of a motor vehicle is a lesser included offense of possession of a stolen vehicle. *See State v. Nickerson*, 365 N.C. 279, 715 S.E.2d 845 (2011). Due to our Supreme Court's recent decision, we see no need to further discuss this issue. *Id.* Consequently, the trial court did not err in not instructing the jury on the crime of unauthorized use of a stolen vehicle as it is not a lesser included offense of possession of a stolen vehicle.

Id. at 372-73, 718 S.E.2d at 734. But contrary to the court's assessment in *Oliver*, *Nickerson* addressed whether unauthorized use of a motor vehicle is a lesser-included offense of possession of stolen goods. *Nickerson*, 365 N.C. at 282-83, 715 S.E.2d at 847 ("Because the offense of unauthorized use of a motor vehicle requires proof of at least one essential element not required to prove possession of stolen goods, unauthorized use of a motor vehicle cannot be a lesser included offense of possession of stolen goods under the definitional test in [*State v. Weaver*].").
Possession of stolen goods is an offense distinct from possession of a stolen vehicle, and these offenses are codified in different chapters of the General Statutes. *See* N.C.G.S. §§ 14-71.1, 20-106 (2013). The court's reliance on *Nickerson* to support its holding in *Oliver* was erroneous. Consequently, to the extent that *Oliver* holds that the offense of unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle for the reasons stated in *Nickerson*, *Oliver* is expressly overruled.

As to the issue before this Court, defendant contends that all the essential elements of unauthorized use of a motor vehicle are covered by the elements of possession of a stolen vehicle, and as a result, unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen vehicle. We disagree.

This Court has adopted a definitional test for determining whether one offense is the lesser-included offense of another. In *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), we stated:

> We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

Id. at 635, 295 S.E.2d at 378-79 (internal citation omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993).

The statute proscribing "unauthorized use of a motor-propelled conveyance" states that "[a] person is guilty of an offense under this section if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." N.C.G.S. § 14-72.2(a) (2013).

The statute proscribing unlawful possession of a stolen vehicle provides:

> Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, *or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken*, and who is not an officer of the law engaged at the time in the performance of his duty as such officer shall be punished as a Class H felon.

Id. § 20-106 (emphasis added).

In applying the definitional test as prescribed in *Weaver*, this Court considers the elements of possession of a stolen vehicle and unauthorized use of a motor vehicle. The elements of possession of a stolen vehicle are: (1) possession; (2) of a vehicle; (3) while having knowledge or reason to believe that the vehicle has been stolen or unlawfully taken. *See id.*; *State v. Bailey*, 157 N.C. App. 80, 86, 577 S.E.2d 683, 688 (2003) (citation omitted). The elements of unauthorized use of a motor

vehicle are: (1) taking or operating; (2) a motor-propelled conveyance; (3) "without the express or implied consent of the owner or person in lawful possession." N.C.G.S. § 14-72.2(a). It is clear that the crime of unauthorized use of a motor vehicle contains an essential element that is not an element of possession of a stolen vehicle, namely that the State must prove that the offender *took or operated* a motor-propelled conveyance. Possession of a stolen vehicle requires the State to prove that the offender *possessed* a vehicle. While "taking or operating" necessarily infers possession, it does not follow that possession encompasses "taking or operating." Therefore, unauthorized use of a motor vehicle contains an essential element—"taking or operating"—that is not included in possession of a stolen vehicle. Because we conclude that the lesser offense contains at least one essential element that is not an essential element of the greater offense, we need not analyze the remaining elements. *Nickerson*, 365 N.C. at 282, 715 S.E.2d at 847 (citing *Weaver*, 306 N.C. at 635, 295 S.E.2d at 378).

We hold, therefore, that the offense of unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. As such, the trial court did not err in denying defendant's request to instruct the jury on unauthorized use of a motor vehicle. For the reasons stated, we affirm the opinion of the Court of Appeals as modified herein.

MODIFIED AND AFFIRMED.

BYRD v. FRANKLIN CTY.

[368 N.C. 409 (2015)]

AARON BYRD and ERIC COOMBS, PETITIONERS
v.
FRANKLIN COUNTY, NORTH CAROLINA, RESPONDENT

No. 462A14

Filed 6 November 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 765 S.E.2d 805 (2014), affirming in part and reversing in part an order entered on 24 September 2013 by Judge Robert H. Hobgood in Superior Court, Franklin County. Heard in the Supreme Court on 5 October 2015.

George B. Currin for petitioner-appellants.

Davis, Sturges & Tomlinson, by Aubrey S. Tomlinson, Jr., for respondent-appellee.

Williams Mullen, by Camden R. Webb, for Second Amendment Foundation, Inc., amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

IN RE HILL

[368 N.C. 410 (2015)]

IN RE INQUIRY CONCERNING A JUDGE, NO. 14-169 & 14-192
JAMES T. HILL, RESPONDENT

No. 186A15

Filed 6 November 2015

Judges—discipline—improper courtroom conduct

In a judicial discipline case involving inappropriate conduct by a district court judge in the courtroom, the North Carolina Supreme Court concluded that the Judicial Standards Commission's findings of fact were supported by clear, cogent, and convincing evidence in the record and that its findings of fact supported its conclusions of law. The Supreme Court concluded and adjudged that the judge should be publicly reprimanded.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 6 May 2015 that Respondent James T. Hill, a Judge of the General Court of Justice, District Court Division, Judicial District 14, State of North Carolina, be publicly reprimanded for conduct in violation of Canons 1, 2A, 3A(1), 3A(3), and 3A(4) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 2 September 2015, but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or Respondent.

ORDER

By the recommendation of the North Carolina Judicial Standards Commission (Commission), the issue before this Court is whether James T. Hill (Respondent), a Judge of the General Court of Justice, District Court Division, Judicial District 14, should be publicly reprimanded for conduct in violation of Canons 1, 2A, 3A(1), 3A(3), and 3A(4) of the North Carolina Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. Respondent does not contest

the facts or oppose the Commission's recommendation that he be publicly reprimanded.

On 2 February 2015, the Commission's Counsel filed a statement of charges alleging that Respondent had engaged in inappropriate conduct while presiding over divorce proceedings in the matter of *Morrison v. Morrison*, Durham County File No. 14-CVD-0047, by

> exhibiting a failure to remain patient, dignified, and courteous to the parties appearing before him; making inappropriate comments to the parties before him; misstating the law when threatening future contempt proceedings; improperly exercising his contempt powers thereby denying multiple parties their fundamental rights of due process; and failing to maintain order and decorum in the proceedings before him.

Respondent filed a motion on 5 February 2015 to extend time to file an answer, which the Commission granted on the same day, thereby allowing Respondent until 30 March 2015 to file his response. Opposing counsel did not object to the motion. On 24 March 2015, the Commission notified Respondent that a hearing would take place on 10 April 2015. On 10 April 2015, Respondent and the Commission Counsel filed joint evidentiary and disciplinary stipulations under Commission Rule 22.

On 6 May 2015, the Commission made its recommendation, which contained the following stipulated findings of fact:

STIPULATED EVIDENTIARY FACTS

> 1. The investigative panel of the Commission alleged that, in the matter of Durham County File No. 14-CVD-47, Morrison v. Morrison, Respondent engaged in conduct inappropriate to his judicial office by:
>
> a. exhibiting a failure to remain patient, dignified, and courteous to the parties appearing before him;
>
> b. making inappropriate comments to the parties before him;
>
> c. misstating the law when threatening future contempt proceedings;
>
> d. improperly exercising his contempt powers thereby denying multiple parties their fundamental rights of due process.

2. Respondent presided over a contentious multi-day custody hearing in Morrison v. Morrison, which concluded on 7 August 2014[.] Durham County routinely records each of its domestic court sessions with audio and visual equipment. The recording in Durham County File No. 14-CVD-47 shows, after hearing all the evidence and before announcing a decision, Respondent[ ]was not patient, dignified, nor courteous with the parties before him. In a raised voice and sharp tone, Respondent proceeded to lecture both Mr. and Mrs. Morrison. During this soliloquy, Respondent made several inappropriate comments including repeatedly and loudly chastising the parties that they were acting like idiots. Respondent admitted during his 22 December 2014 interview with Commission staff, that he "said all of those things."

3. When Respondent addressed the parties on 7 August 2014, he threatened them with contempt if either party violated the Court's order. "And I better not hear either of you saying anything negative about the other party or y'all gonna get a little trip to the Durham County Bed and Breakfast for contempt of court. And there is no appeal, you stay until I say you get out."

4. Respondent's frequent references to the local jail facility as the "Durham County Bed and Breakfast" were inappropriate for court. Respondent's statement that there is no appeal and the parties would not be released until Respondent said so, is a misstatement of the law. A person found in criminal or civil contempt may appeal in the manner provided for appeals in other criminal or civil actions. See N.C.G.S. § 5A-17 and § 5A-24 (italics omitted). During his interview with Commission staff, Respondent admitted, "that was not accurate and I should not have said that." Respondent has acknowledged that he misstated the law when he threatened the parties with future contempt stating that there would be no appeal, but was attempting to warn the parties that future conduct could be punished by the contempt powers of the Court and Respondent wanted the parties to be aware of the consequences of future conduct.

5. Respondent, when addressing Ms. Morrison's contemptuous behavior following a heated verbal exchange

[between Ms. Morrison and Respondent][1], failed to respect and comply with Chapter 5A of the N.C. General Statutes. Respondent has indicated his intention was to hold Ms. Morrison in direct criminal contempt, though he used a civil commitment form that was available in the courtroom. However, Respondent failed to follow proper procedure for either civil or criminal contempt. In the mishandling of his contempt powers, Respondent did not afford Ms. [Morrison] the full right to be heard according to the law, which resulted in a substantial violation to Ms. Morrison's due process rights.

6. Respondent also failed to respect and comply with the applicable law when handling the disruptive behavior of Ms. Morrison's family members in court on August 7, 2014. Again, Respondent did not follow proper procedure for either civil or criminal contempt when he filed Commitment Orders for Civil Contempt for both Gloria Woods and Sherrod Smith.

7. The effects from Respondent's misconduct in this matter have been exacerbated by the video footage capturing the events of this hearing. Because Respondent's comments and Ms. Morrison's outburst were captured on video, this incident was highly publicized with media coverage both locally and nationwide. In addition to the facts as set forth in this Stipulation, Respondent agrees the Durham County court video recording of this matter will also be included in the evidentiary record for these Judicial Standards inquiries.

8. Respondent has a good reputation in his community. In the most recent Judicial Performance Evaluation, Respondent received an overall performance rating of 4.19. Of the 120 Judges evaluated, the average was 3.56. 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 underlying legal matter and fully and openly admitting error.

---

1. Here, the video recording of the hearing shows that Respondent and Ms. Morrison engaged in a verbal exchange.

9. Respondent, as a trial judge in a custody action, is to be guided by the principal [sic] of the "best interest of the child." Respondent acknowledges that during his "soliloquy" that he made several inappropriate comments including repeatedly telling the parties that they were acting like idiots. The comments by Respondent, though inappropriate, were an attempt by Respondent to make the parties aware the most important person involved in the hearing was the minor child. Respondent's comments, though inappropriate, were an attempt by Respondent to act in the best interest of the minor child.

10. Respondent agreed to stipulations of fact and disposition to bring closure to this matter and because of his concern for protecting the integrity of the court system. While Respondent believed he was acting within the scope of his discretion and that he was acting to preserve the integrity of the Court, with the benefit of hindsight, he now admits and understands his error and that in fact his actions, even if unintentional and not motivated by malice or ill-intent, did constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute although he did not intend for that to happen. Respondent believed he was punishing Ms. Morrison and her family for direct criminal contempt which may be summarily implemented pursuant to N.C.G.S. § 5A-13. Respondent now understands every person held in contempt under this statute is entitled to both notice and an opportunity to respond. In all future dealings, Respondent will make every effort to ensure that every person legally interested in a contempt proceeding receives their opportunity to be heard according to the law.

11. Respondent was represented by counsel in these proceedings and entitled to go forward with the hearing scheduled for 9:30 a.m. on 10 April 2015. However, after having discussed the matter with his counsel and reflected upon the circumstances that have brought us to this juncture, Respondent agreed to accept a recommendation of public reprimand from the Commission and to acknowledge that the conduct set out in the stipulation 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 [N.C.]G.S. § 7A-376[(b)].
>
> 12. Respondent acknowledges the ultimate jurisdiction for the discipline of judges is vested with the NC Supreme Court pursuant to Chapter 7A, Article 30 of the North Carolina General Statutes, which may either accept, reject, or modify any disciplinary recommendation from the Commission. (citations to Commission Exhibits omitted).

The Commission adopted stipulations that addressed certain procedural issues and established the Commission's jurisdiction over the hearing. In addition to findings of fact, the Commission made the following conclusions of law based on clear and convincing evidence:

> 1. In his adjudication of the matter of Durham County File No. 14-C VD-47, Morrison v. Morrison, Respondent exhibited a failure to remain patient, dignified, and courteous to the parties appearing before him; made inappropriate comments to the parties before him; misstated the law when threatening future contempt proceedings; and acted in violation of Chapter 5A of the North Carolina General Statutes, effectively denying those he held in contempt of their due process rights.
>
> 2. Respondent's actions, as described in stipulated Findings of Fact One (1) through Seven (7), constitute violations of Canon 1, Canon 2A, Canon 3A(1), Canon 3A(3), and Canon 3A(4) of the North Carolina Code of Judicial Conduct. Respondent's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. [§ 7A- 376].
>
> 3. Respondent's conduct, as described in stipulated Findings of Fact Eight (8) through Twelve (12), is recognized by the Commission as evidence of his cooperation with the Commission in its investigation, his recognition and acknowledgement that his actions were inappropriate and his promise to avoid similar inappropriate conduct in the future.

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 are supported by clear, cogent, and convincing evidence in the record. In addition, we conclude that the Commission's findings of fact support its conclusions of law. We therefore accept the Commission's findings and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that Respondent should be publicly reprimanded.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that Respondent James T. Hill 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, 3A(1), 3A(3), and 3A(4) of the North Carolina Code of Judicial Conduct.

By order of the Court in Conference, this the 5th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE V. DAVIS

[368 N.C. 417 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cleveland County
	)	
RANDY CARTER DAVIS	)	

No. 132P15

ORDER

The pending motions and petitions in this case are resolved as follows: N.C.R. App. P. 27(c) provides that "[c]ourts may not extend the time for taking an appeal or for filing a petition for discretionary review." For that reason, defendant's "Motion to Deem Petition [and Notice of Appeal] Timely Filed" is denied, the State's "Motion to Dismiss Defendant's Notice of Appeal (Constitutional Question)" is allowed, and defendant's "Petition for Discretionary Review" is dismissed. Defendant's "Petition for Writ of Certiorari" is allowed in part and denied in part. Defendant's "Petition for Writ of Certiorari" is allowed with respect to the issue of "whether the trial court erred in admitting the opinion testimony of witnesses Shukla and Chrysler." Except as otherwise allowed, defendant's "Petition for Writ of Certiorari" is denied.

By Order of the Court in Conference, this 5th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wayne County
	)	
ERIC GLENN LANE	)	

No. 606A05-3

ORDER

Defendant's motion for an extension of thirty days to prepare the transcript on appeal is allowed.

As to defendant's motion in the alternative to declare "that the one hundred twenty-five day deadline in N.C. R. App. P. 7(b)(1) for capitally tried cases applies in this procedural posture," the State is directed to file a response within ten days from the date of this order.

By Order of this Court, this 18th day of November, 2015.

Jackson, J., recused.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. TAYLOR

[368 N.C. 419 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
RODNEY NIGEE PLEDGER TAYLOR	)	

No. 317PA14

ORDER

This case comes before the Court by way of defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31. We also allowed the State's conditional petition for discretionary review as to additional issues.

We reverse the decision of the Court of Appeals in part and remand this case to the Court of Appeals to consider defendant's Fifth Amendment argument on the merits. As to all other issues in defendant's petition for discretionary review, and as to all issues in the State's conditional petition for discretionary review, we conclude that discretionary review was improvidently allowed.

By order of the Court in Conference, this 5th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

TOWN OF BOONE, PLAINTIFF	)	
v.	)	From Wake County
STATE OF NORTH CAROLINA, DEFENDANT	)	
COUNTY OF WATAUGA, INTERVENOR-DEFENDANT	)	

No. 93A15

Appeal and Error—constitutionality of an act of General Assembly—required holding—record on appeal

Appeals from orders by a three-judge panel in Wake County concerning the constitutionality of the Boone Act were dismissed where two orders entered on 29 December 2014 did not hold that an act of the General Assembly was facially unconstitutional, as required by the plain text of the statute under which appeal was sought, N.C.G.S. § 7A-27(a1) (2014). Appeal of a subsequent July order that was otherwise appealable by right under that statute was premature because the parties had not settled and filed an appropriate record on appeal.

ORDER

The State of North Carolina and the County of Watauga seek to appeal to this Court pursuant to N.C.G.S. § 7A-27(a1). First, the State seeks to appeal two orders entered on 29 December 2014 by a three-judge panel of the Superior Court in Wake County, the first of which denied the State's and the County's motions to dismiss a challenge to Chapter 33 of the 2014 Session Laws, Act of June 26, 2014, ch. 33, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 139 (the "Boone Act"), and the second of which issued a preliminary injunction enjoining any enforcement of the Boone Act. Next, the State and the County also seek to appeal the panel's 29 July 2015 order declaring that the Boone Act violates Article II, Section 24 of the North Carolina Constitution and entering summary judgment in favor of the Town of Boone.

On 31 March 2015, the Town filed a "Motion to Dismiss Appeal" of the December orders; the State filed a response on 10 April 2015. On 16 June 2015, the Town also filed a "Motion to Supplement the Record on Appeal" to include a Notice of Voluntary Dismissal Without Prejudice of Count 2 of the Town's complaint; the State filed a response to this motion

on 18 June 2015. In addition, on 19 August 2015, the Town of Boone filed a "Motion to Supplement the Record with Final Judgment of Three-Judge Panel and to Expedite Settlement of the Record on Appeal"[1] and a "Motion to Submit the Case for Oral Argument Under the Summary Judgment Standard." The State filed responses to these 19 August 2015 motions on 24 August 2015. Oral arguments were held before this Court on 6 October 2015.

According to the plain text of the statute under which appeal has been sought, N.C.G.S. § 7A-27(a1) (2014), appeal of right lies directly to this Court only "from [an] order or judgment of a court, either final or interlocutory, that *holds* that an act of the General Assembly is facially" unconstitutional. (Emphasis added.) Here, however, neither December order included such a holding: The order denying the State's and the County's motions to dismiss did not provide the panel's rationale for denying the motions, and the order issuing the preliminary injunction concluded that the Town "has shown a likelihood of success on the merits of its case." We therefore dismiss the State's appeal of the December 2014 orders with prejudice.

Because the State's appeal from the December orders of the panel was not statutorily authorized, that appeal did not divest the three-judge panel of jurisdiction to enter the July 2015 order granting summary judgment in favor of the Town of Boone. *See, e.g.*, *Veazey v. City of Durham*, 231 N.C. 357, 363-64, 57 S.E.2d 377, 382-83 (1950); *cf.* N.C.G.S. § 1-294 (2013) (stating that a "perfected" appeal "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein"). Unlike the December orders, the July order states that the Boone Act, which "revo[ked] . . . the Town of Boone's power of extraterritorial jurisdiction . . . is unconstitutional pursuant to the prohibition on local acts contained in Article II, Section 24 of the North Carolina Constitution." Therefore, the July order would appear to be appealable by right to this Court under N.C.G.S. § 7A-27(a1). Nonetheless, our consideration of an appeal from the 29 July 2015 order would be premature at this time because, *inter alia*, the parties have yet to settle and file an appropriate record on appeal. Therefore, we dismiss the Town's motion to supplement the record, filed 19 August 2015, without prejudice to the parties' rights to perfect an appeal of the July order, to settle and file the record on appeal, and to file appropriate briefs in accordance with the North Carolina Rules of Appellate Procedure. The

1. Although these motions were included in a single filing by the Town, they are treated as separate motions and dealt with as such in this order.

time periods within which to proceed with the record on appeal shall begin on the date of this order.

The Town of Boone's 31 March 2015 "Motion to Dismiss Appeal" is ALLOWED and the appeal from the orders entered on 29 December 2014 is DISMISSED with prejudice; the portion of the Town's 19 August 2015 motion which seeks to supplement the record with the final judgment of the three-judge panel is DISMISSED without prejudice to the parties' rights to perfect an appeal of the panel's July order in accordance with this order; the Town's 16 June 2015 "Motion to Supplement the Record on Appeal," the portion of its 19 August 2015 motion which seeks to expedite settlement of the record on appeal, and its 19 August 2015 "Motion to Submit the Case for Oral Argument Under the Summary Judgment Standard" are DISMISSED AS MOOT.

By order of the Court in Conference, this 5th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

5 NOVEMBER 2015

040P15-4	State v. Napoleon Junior Rankin	1. Def's *Pro Se* Motion for Production and Disclosure 2. Def's *Pro Se* Motion for Appeal of Judgments	1. Dismissed 2. Dismissed
084P15-2	State v. Curtis Louis Sangster	1. Def's *Pro Se* Motion to Remand 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **10/21/2015** 2. Denied **10/21/2015**
088P15-2	Mason W. Hyde v. State	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Petition for Prohibition 3. Def's *Pro Se* Motion for Petition for Writ of Error Coram Nobis 4. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 5. Def's *Pro Se* Motion for Petition for *Certiorari*	1. Denied **10/09/2015** 2. Denied **10/09/2015** 3. Denied 10/09/2015 4. Denied **10/09/2015** 5. Denied **10/09/2015**
093A15	Town of Boone v. State of North Carolina and County of Watauga	Plt's Motion to Dismiss Appeal	Special Order
093A15	Town of Boone v. State of North Carolina and County of Watauga	Plt's Motion to Supplement the Record on Appeal	Special Order
093A15	Town of Boone v. State of North Carolina and County of Watauga	1. Plt's Motion to Supplement the Record with Final Judgment of Three-Judge Panel 2. Plt's Motion to Expedite Settlement of Record on Appeal 3. Plt's Motion to Submit the Case for Oral Argument Under the Summary Judgment Standard	1. Special Order 2. Special Order 3. Special Order
099P15-2	State v. Jonathan Lavon Friend	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
126P15	Johnny L. Stoutamire v. Daniel Bailey, in his individual and official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-322)	Denied

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132P15	State v. Randy Carter Davis	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-547) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem Notice of Appeal and PDR Timely Filed 4. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 5. State's Motion to Dismiss Notice of Appeal	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order
162P95-5	State v. Isaac Jackson Stroud	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-522)	Dismissed
172P15-3	State v. Mohammed Nadder Jilani	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
174P15	Carlton Clark, Jr. v. Susan Belmain Dyer	1. Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA13-1230) 2. Plt's Petition for *Writ of Certiorari* to Review Order of District Court of Hoke County	1. Denied 2. Denied
175P12-2	State v. Aaron Pittman	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP14-452)	Dismissed **Ervin, J., recused**
180P15	State v. William Anthony Barnes	Def's PDR Under N.C.G.S. § 7A-31 (COA14-632)	Denied
184P15	State v. Jose Edis Carranza	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-318) 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
186P10-3	State v. David Felton	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *ex mero motu* 2. Allowed 3. Dismissed as moot

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187P15	State v. Aleksandr Sergeyevich Kiselev	1. State's Motion for Temporary Stay	1. Allowed **06/08/2015** Dissolved **11/05/2015**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31 (COA14-1020)	3. Denied
190P13-2	State v. Michael Ray King	1. Def's *Pro Se* Motion for PDR (COAP15-570)	1. Dismissed
		2. Def's *Pro Se* Motion in the Alternative for *Coram Noblis/ Certiorari* Petition	2. Dismissed
		3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	3. Allowed
		4. Def's *Pro Se* Motion to Appoint Counsel	4. Dismissed as moot **Ervin, J., recused**
190P15	Jill Crabtree, Employee v. EVP Properties, LLC, Employer, Non-Insured North Carolina Industrial Commission v. EVP Properties, LLC, Employer, Non-Insured, and James Malatesta and Brian J. Dempsey, Individually	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-928)	Denied
193A15	State v. Allen Ray West	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-983)	1. ---
		2. State's Motion to Dismiss Appeal	2. Allowed
200P15-2	State v. Kevin Mitchell	Def's *Pro Se* Motion to Dismiss	Dismissed

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201P15-2	Twan Bey (Antwan L. Burns) v. Harnett County District Court Jacquelyn L. Lee	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
202P15	State v. Charles Jacob Rumley	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1162)	Denied
209P15	State v. Keeandus Rashad Barnes aka Keeblocka El Rashad Ali	Def's PDR Under N.C.G.S. § 7A-31 (COA14-840)	Denied
223PA15	State v. Robert Bishop	1. Motion to Admit Eugene Volokh *Pro Hac Vice* 2. Electronic Frontier Foundation's Motion for Leave to File Amicus Brief	1. Allowed 2. Allowed
227P08-4	State v. Sabas Ibarra	Def's *Pro Se* Motion for PDR (COAP15-569)	Denied
232P15	State v. Edward Durant Hicks	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1175)	Denied
241P15	State v. Rashawn Mackey	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-883) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
246P15	Lisa Green-Hayes v. Handcrafted Homes, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-904)	Denied
252P15	In the Matter of D.L.W., D.L.N.W., V.A.W.	1. Petitioner and GAL's Motion for Temporary Stay (COA14-1341) 2. Petitioner and GAL's Petition for *Writ of Supersedeas* 3. Petitioner and GAL's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/22/2015** 2. Allowed 3. Allowed

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264P15	State v. Beamon Fowler	Def's *Pro S*e PDR Under N.C.G.S. § 7A-31 (COA14-1205)	Denied
268P15	State v. Delwood Earl Shelly	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court Order of Cumberland County (COAP14-294) 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
272P15	Susan Vaughan, Grandmother, Caretaker, Custodian v. Currituck DSS, et al.	1. Petitioner's *Pro Se* Motion for Temporary Stay (COAP14-997) 2. Petitioner's *Pro Se* Petition for *Writ of Supersedeas* 3. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **08/06/2015** 2. Denied 3. Denied
273P15	State v. Drew Martin	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1375) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Pitt County 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Allowed
274P15	Robert K. Stewart v. Maureen H. Krueger and Peter B. Strickland	1. Petitioner's *Pro Se* Motion for Complaint Obstructing Justice 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
282P08-3	State v. Farley L. Bernard	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County	Dismissed
283P13-2	State v. Windsor Devone Ingram	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

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285P15	Department of Transportation v. BB&R, LLC; Kenneth W. Fromknecht, II, Trustee; Andy Berry & Sons, Inc.; United Community Bank (Georgia); Marcia J. Ringle, Trustee; and Macon Bank, Inc.	Defs' (BB&R, LLC, and Andy Berry & Sons, Inc.) PDR Under N.C.G.S. § 7A-31 (COA14-1185)	Denied
287A15	State v. Warith Farad Muhammad	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1350) 2. State's Motion to Dismiss Appeal	1. — 2. Allowed
288P15	Neusoft Medical Systems, USA, Inc., Plaintiff v. NeuIsys, LLC, Defendant NeuIsys, LLC, Counterclaim-Plaintiff v. Neusoft Medical Systems, USA, Inc., Tom Buse, and Keith Mildenberger, Counterclaim-Defendants NeuIsys, LLC, Third-Party Plaintiff v. Neusoft Medical System Company, Ltd., Third-Party Defendant	1. Third-Party Def's Notice of Appeal Based Upon a Constitutional Question (COA14-779) 2. Third-Party Def's PDR Under N.C.G.S. § 7A-31 3. North Carolina Association of Defense Attorneys' Motion for Leave to File Amicus Brief 4. Plt and Counterclaim Def's (Neusoft Medical Systems, USA, Inc.) PDR Under N.C.G.S. § 7A-31 5. Counterclaim Defs' (Tom Buse and Keith Mildenberger) PDR Under N.C.G.S. § 7A-31 6. Third-Party Plt's (NeuIsys, LLC) Motion To Dismiss Appeal (of Third-Party Defendant) 7. Third-Party Plt's (NeuIsys, LLC) Conditional PDR Under N.C.G.S. § 7A-31 8. Third-Party Plt's (NeuIsys, LLC) Conditional PDR Under N.C.G.S. § 7A-31	1. — 2. Denied 3. Dismissed as moot 4. Denied 5. Denied 6. Allowed 7. Dismissed as moot 8. Dismissed as moot
291P15	John Richard Jordan and Danny Dwight Jordan v. Raymond Baxter Jordan	Plt's (John Richard Jordan) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-108)	Denied
294P15	Mark Charles v. Norma Charles aka Norma Graciano	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-196)	Denied

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298A15	Good Neighbors of Oregon Hill Protecting Property Rights and Ashley M. Wyatt v. County of Rockingham	1. Def's Notice of Appeal Based Upon a Dissent (COA15-121) 2. Def's PDR as to Additional Issues	1. Dismissed *ex mero motu* 2. Denied
299P15	State v. Jessica Rasheeda Jordan	1. State's Motion for Temporary Stay (COA14-1070) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/24/2015** Dissolved **11/05/2015** 2. Denied 3. Denied
301P15	House of Raeford Farms, Inc. v. North Carolina Department of Environmental and Natural Resources	1. Respondent's Motion for Temporary Stay (COA15-47) 2. Respondent's Petition for *Writ of Supersedeas* 3. Respondent's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion to Amend 5. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/26/2015** Dissolved **11/05/2015** 2. Denied 3. Denied 4. Allowed 5. Dismissed as moot
302P15	State v. Harley David Hamlin	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1191)	Denied
308A15	State v. Zachary David Thomsen	1. Def's Notice of Appeal Based Upon a Dissent (COA14-1235) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
310P15	State v. Stephanie Jean Holanek	Def's PDR Under N.C.G.S. § 7A-31 (COA14-951)	Denied
313P15	Bruce Fletcher Nelson and Jan Nelson MacInnis v. State Employees' Credit Union and Gwyn R. Parsons	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA14-1393) 2. Def's (State Employees' Credit Union) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
314P15	State v. Omar Kareem Sellers	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1272)	Denied

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315P15	Quality Built Homes Incorporated and Stafford Land Company, Inc. v. Town of Carthage	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA15-115) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Motion of the N.C. Home Builder's Association for Leave to File *Amicus Curiae* Brief 4. Motion of the Leading Builders of America for Leave to File *Amicus Curiae* Brief	1. Allowed 2. Allowed 3. Allowed 4. Allowed
316P15	The Estate of Jerry Jacobs, The Estate of Ann Shepard, The Estate of Connie Tindall, and The Estate of Joe (William Dallas) Wright v. State of North Carolina	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-146)	Denied
317P15	David W. Thompson v. Bank of America, N.A.; PRLRAP, Inc.; Nationwide Trustee Services, Inc.; BAC Home Loans Servicing, LP; Saxon Mortgage Services, Inc.; Wendy B. Cole; and Mattressa R. Morris	1. Plaintiff's *Pro Se* NOA Based Upon a Constitutional Question (COA15-20) 2. Plaintiff's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
319P15	State v. Carlton Washington Tomlinson	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR (COA14-1016)	1. Allowed **09/10/2015** Dissolved **11/05/2015** 2. Denied 3. Denied
322P15-2	State v. Raymond Alan Griffin	Petitioner's *Pro Se* Motion for Appeal of *Habeas Corpus*	Denied **10/21/2015**
323P15	Robert A. Izydore v. Alade Tokuta, Caesar Jackson, Bernice D. Johnson, North Carolina Central University and the State of North Carolina	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1220) 2. Plt's Conditional Motion to Treat His PDR as a Petition for *Certiorari*	1. Denied 2. Allowed

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324P15	East Town Market, L.P. v. 550 Foods, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA15-46)	Denied
326P15	Burl Anderson Howell v. North Carolina Wayne County Department of Health and Human Services, by and through, Resee Phelps; Lou Jones	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Office of Administrative Hearings 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
327P15	In the Matter of P.S.	1. Respondent-Mother's Petition for *Writ of Certiorari* (COA15-18) 2. Respondent-Mother's Petition for *Writ of Certiorari* to Review Order of District Court of Alleghany County	1. Denied 2. Dismissed
329P15	John Doe 1K and John Doe 2K v. Roman Catholic Diocese of Charlotte, NC	Plt's (Doe 1K) PDR Under N.C.G.S. § 7A-31 (COA15-102)	Denied
330P15	Derrick Lamont Taylor v. Harnett County Superior Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
332P15	State v. Roddie P. Dumas	Def's *Pro Se* Motion for *Writ of Error Coram Nubis* Pursuant to Miscarriage of Justice	Dismissed
333P15	State v. Dominique Alexander Jones	Def's *Pro Se* Motion to Expedite (COAP14-734)	Dismissed
335P15	Robert K. Stewart v. Moore Family Care, Dr. Thomas Leonard, M.D., and Vonda Reeves	1. Plt's *Pro Se* Motion for Medical Malpractice Civil Action 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
336P15	State v. Melissa Amber Dalton	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **10/06/2015** 2.

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337P15	State v. Aron Harper	1. Def's Motion for Temporary Stay (COA14-1182) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied **10/08/2015** 2. 3.
338P14-3	Waddell Bynum, Jr. v. Progressive Ins. Group, Inc.; Mark A. Valentine, Agent	Plt's *Pro Se* Motion to Appeal	Dismissed
343P15	State v. Ron Fitzgerald Kenney	Def's *Pro Se* Motion for PDR (COAP15-621)	Denied **10/07/2015**
344P14	State v. Gary Maurice Walters	1. State's Motion for Temporary Stay (COA14-51) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR of an Additional Issue	1. Allowed **09/19/2014** 2. Allowed 3. Allowed 4. Denied **Ervin, J., recused**
345P15	State v. Jonathan Lavon Friend El	1. Def's *Pro Se* Motion for Writ of Error 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed
346P15	In the Matter of the Estate of John Wesley Cash	Petitioner's *Pro Se* Motion for Emergency Injunctive Relief	Dismissed **10/14/2015**
347P15	State v. Antone Lamont Bell	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/14/2015**
351P04-5	State v. Robert Lee Thacker	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-637)	Dismissed

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353P15	Carolyn Joyner Driggers, Individually and as Co-Trust and Co-Beneficiary of the Barney G. Joyner Family Trust, and Phyllis M. Joyner, by and through Carolyn Driggers as Attorney-in-Fact v. David Lee Joyner and Ronald Dorrestein	1. Plt's (Carolyn Joyner Driggers) Petition for *Writ of Certiorari* to Review Order of COA 2. Plt's (Carolyn Joyner Driggers) Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County 3. Defs' Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	1. 2. 3. Allowed **10/27/2015**
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. 3.
356P15	Terry Wayne Stephenson, II v. Terry L. Palmatier, Linda G. Wideman, Rachel M. Jones, Virginia Campbell Zalman, James F. Ray, and Judy T. Ray	1. Plt's *Pro Se* Motion for PDR (COA15-515) 2. Plt's *Pro Se* Motion for Petition for Preliminary Injunction	1. Dismissed 2. Dismissed
359P15	Lorine Spence v. Laura Wasco	Plt's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/27/2015**
360P15	State v. Jorge Juarez	1. State's Motion for Temporary Stay (COA15-152) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/27/2015** 2. 3.
362P15	Bryant T. Dennings v. Earl R. Butler, Cumberland Co., and State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **10/29/2015**
366PA13	State v. Lester Gerard Packingham	1. Def's Motion to Withdraw as Private Assigned Counsel 2. Def's Motion to Appoint the Appellate Defender	1. Allowed 2. Allowed **Ervin, J., recused**

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368P12-2	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Inc., Paul Bolin, M.D. and Ralph Whatley, M.D., Sanjay Patel, M.D. and Cynthia Brown, M.D.	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1372) 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
374P13-5	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion for Rule 15 Discretionary Review 2. Def's *Pro Se* Motion for Exculpatory Evidence Information Record	1. Dismissed 2. Dismissed **Ervin, J., recused**
375P09-5	State v. Avenger Ridgeway	Def's *Pro Se* Motion for *En Banc*	Dismissed
378P11-2	Stephen C. Nicholson, Individually and as Administrator of the Estate of Geraldine Anne Nicholson v. Arleen Kaye Thom, M.D.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1053) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot **Ervin, J., recused**
398P08-2	Wesley Foust-Graham Goodwin, Surviving Spouse of James Lester Goodwin v. Norman B. Smith	1. Plt's *Pro Se* Motion to Toll the 30 Days Filing Rule (COA04-1206) 2. Plt's *Pro Se* Motion for PDR 3. Plt's *Pro Se* Motion for New Trial 4. Plt's *Pro Se* Motion to Correct the Original Complaint 5. Plt's *Pro Se* Motion to Deny Defendant's Prayer for Dismissal	1. Denied 2. Dismissed 3. Dismissed 4. Allowed 5. Dismissed
427P11-2	State v. Freddie Robinson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-525)	Dismissed **Ervin, J., recused**
462A14	Aaron Byrd and Eric Coombs v. Franklin County, North Carolina	Respondent's Motion to Strike Second Amendment Foundation, Inc.'s *Amicus Curiae* Brief	Dismissed as moot

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462A14	Aaron Byrd and Eric Coombs v. Franklin County, North Carolina	1. Petitioners' Motion to Amend Record on Appeal 2. Respondent's Motion to Strike Proposed Amendment to Record on Appeal 3. Respondent's Motion to Strike Reply Brief	1. Dismissed as moot 2. Dismissed as moot 3. Dismissed as moot
542P05-2	State v. Larry Eugene Allred	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-673)	Dismissed
667P03-05	Kenneth D. Bobbitt v. Danny Safrit, Administrator, Alexander Correctional Institution and Roy A. Cooper, III, Attorney General, State of North Carolina	1. State's Motion for Temporary Stay (COAP14-766) 2. State's Petition for *Writ of Supersedeas* 3. State's PWC to Review Decision of the COA	1. Allowed **10/17/2014** 2. Allowed 3. Allowed

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING *PRO BONO* PRACTICE

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 17, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning *pro bono* practice as particularly set forth in 27 N.C.A.C. 1D, 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 by Out of State Lawyers

(a) A lawyer licensed to practice in another state but not North Carolina who desires to provide legal services free of charge to indigent persons may file a petition with the secretary addressed to the council setting forth:

(1) ...

(d) Upon receipt of a petition and other information satisfying the provisions of 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...

(e) A petitioner may be a compensated employee of a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1 and, if granted *pro bono* practice status, may provide legal services to the indigent clients of that corporation subject to the following conditions:

(1) the petitioner has filed an application for admission with the North Carolina Board of Law Examiners (BLE) and has never previously been denied admission to the North Carolina State Bar for any reason; a copy of the petitioner's application shall be provided with the petition for *pro bono* practice;

(2) if the petitioner is granted *pro bono* practice status, that status will terminate when the BLE makes its final ruling on the petitioner's application for admission; and

(3) the petitioner is supervised in the provision of all legal services to indigent persons as set forth in paragraph (d).

(f) A lawyer who is paid in-house counsel for a business organization with offices in North Carolina may petition under this rule 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.

~~(e)~~ (g) ...

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 17, 2015.

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

.1801 Incomplete Applications: Reconsideration of Applications Rejected by Specialty Committee; and Reconsideration Procedure

(a) Incomplete Applications. The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. An application is incomplete if it does not include complete answers to every question on the application and copies of all documents requested on the application. The applicant will be notified in writing if an application is incomplete. The applicant must submit the information necessary to complete the application within 21 days of the date of the notice. If the applicant fails to provide the required information during the requisite time period, the executive director will return the application to the applicant together with a refund of the application fee less a fifty dollar ($50) administrative fee. The decision of the executive director to reject an application as incomplete is final unless the applicant shows good cause for an extension of time to provide the required information. This provision does not apply to an application with respect to which fewer than five completed peer review forms have been timely filed with the board.

(b) Denial of Application by Specialty Committee.

...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly approved by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015, in consequence of a resolution adopted by the Board of Law Examiners on June 12, 2015, a copy of which is attached hereto.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended as follows (additions are underlined):

Rules Governing Admission to the Practice of Law

.0101 Website Address

The Board of Law Examiners of the State of North Carolina shall maintain a public website that shall publish the location of its offices, its mailing address, office hours, telephone number, fax number, e-mail address and such other information as the Board may direct.

.0202 Definitions

For purposes of this Chapter, the following shall apply:

(1) "Chapter" or "Rules" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

(2) "Board" refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the Board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the Board.

(3) "Executive Director" refers to the "Executive Director of the Board of Law Examiners of the State of North Carolina."

(4) "Filing or "filed" shall mean received in the office of the Board of Law Examiners. Except that applications placed in the United States mail or other commonly recognized and accepted delivery service, properly addressed to the Board of Law Examiners, and bearing sufficient first class postage or like delivery cost and postmarked by the United States Postal Service or date-stamped by the recognized delivery service on or before a deadline date will be considered as having been timely filed if all required fees are included in the mailing. Mailings which are postmarked or date-stamped after a deadline or which if postmarked or date-stamped on or before a deadline and do not include required

fees or which include a check in payment of required fees which is not honored due to insufficient funds will not be considered as timely filed. Applications which are not properly signed and notarized; or which do not include the properly executed Authorization and Release forms; or which are illegible; or which answers to the questions are not complete will not be considered filed and will be returned.

(5) Any reference to a "state" shall mean one of the United States, and any reference to a "territory" shall mean a United States territory.

(6) "Panel" means one or more members of the Board specially designated to conduct hearings provided for in these Rules.

.0204 List

As soon as possible after each filing deadline for applications, the Executive Director shall prepare and maintain a list of general applicants for the ensuing examination.

.0401 How to Apply

Applications for admission must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by submitting a written request to the Board or by accessing the application via the Board's website: www.ncble.org.

.0402 Application Form

(1) The Application for Admission to Take the North Carolina Bar Examination form requires an applicant to supply full and complete information relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, credit status, involvement in disciplinary, civil or criminal proceedings, substance abuse, current mental and emotional impairment, and bar admission and discipline history. Applicants must list references and submit as part of the application:

- -- Certificates of Moral Character from four (4) individuals who know the applicant;
- -- A recent photograph;
- -- Two (2) sets of clear fingerprints;
- -- Two executed informational Authorization and Release forms;
- -- A birth certificate

- -- Transcripts from the applicant's undergraduate and graduate schools;
- -- A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;
- -- A certificate from the proper court or agency of every Jurisdiction in which the applicant is or has been licensed, that the applicant is in good standing, or otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charge of misconduct;
- -- Copies of any legal proceedings in which the applicant has been a party.

The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) An applicant who has aptly filed a complete Application for Admission to take the North Carolina Bar Examination for a particular bar examination may file a Supplemental Application on forms supplied by the board, along with the applicable fee for the next subsequent bar examination. An applicant who has filed a Supplemental Application as provided by this rule immediately preceding the filing deadline specified in Rule .0403 of this chapter may file a subsequent Supplemental Application along with the applicable fees for the next examination. The Supplemental Application will update the information previously submitted to the Board by the applicant. Said SUPPLEMENTAL APPLICATION must be filed by the deadline set out in Rule .0403 of this Chapter.

.0403 Filing Deadlines

(1) Applications shall be filed and received by the Executive Director at the offices of the Board on or before the first Tuesday in January immediately preceding the date of the July written bar examination and on or before the first Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $250 (in addition to all other fees required by these rules), an applicant may file a late application with the Board on or before the first Tuesday in March immediately preceding the July written bar examination and on or before the first Tuesday in November immediately preceding the February written bar examination.

(3) Applicants who fail to timely file their application will not be allowed to take the Bar Examination designated on the application.

(4) Any applicant who has aptly filed a General Application for the February or July written bar examination may make application to take the next immediately following bar examination by filing a Supplemental Application with the Executive Director of the Board at the offices of the Board on or before the following dates:

(a) If the applicant aptly filed a General Application for the February bar examination, the Supplemental Application for the following July bar examination must be filed on or before the first Tuesday in May immediately preceding the July examination; and

(b) If the applicant aptly filed a General Application for the July bar examination, the Supplemental Application for the following February bar examination must be filed on or before the first Tuesday in October immediately preceding the February Examination.

.0404 Fees

Every application by an applicant who:

(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $700.00.

(2) is or has been a licensed attorney in any other jurisdiction shall be accompanied by a fee of $1,500.00.

(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $400.00.

(4) is filing after the deadline set out in Rule .0403(1), but before the deadline set forth in Rule .0403(2), shall be accompanied by a late fee of $250.00 in addition to all other fees required by these rules.

.0405 Refund of Fees

Except as herein provided, no part of the fee required by Rule .0404 (1), (2), or (3) of this Chapter shall be refunded to the applicant unless the applicant shall file with the Executive Director a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination, in which event not more than one-half of the applicable fee may be refunded to the applicant at the discretion of the Board. No portion of any late fee will be refunded.

However, when an application for admission by examination is received from an applicant who, in the opinion of the Executive Director after consultation with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application; and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

.0502 Requirements for Comity Applicants

The Board in its discretion shall determine whether attorneys duly licensed to practice law in any state, or territory of the United States, or the District of Columbia, may be licensed to practice law in the State of North Carolina without written examination, other than the Multistate Professional Responsibility Examination; provided the conditions required by the state, or territory of the United States or the District of Columbia, for attorneys to be licensed to practice law in that jurisdiction without written examination are not considered by the Board to be unduly or materially greater than the conditions required by the State of North Carolina for licensure to practice law without written examination. A list of "approved jurisdictions", as determined by the Board pursuant to this rule, shall be available upon request.

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Executive Director, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing; the application requires:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary, or legal proceedings, whether currently mentally or emotionally impaired, references, the nature of the applicant's practice of law, and familiarity with the code of Professional Responsibility as promulgated by the North Carolina State Bar.

(b) That the applicant furnishes the following documentation:

i. Certificates of Moral Character from four (4) individuals who know the applicant;

ii. A recent photograph;

iii. Two (2) sets of clear fingerprints;

iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;

v. Transcripts from the applicant's undergraduate and graduate schools;

vi. A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

vii. A certificate of admission to the bar of any state, territory, or the District of Columbia;

viii. A certificate from the proper court or body of every jurisdiction in which the applicant is licensed therein that he is in good standing, or otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charges of misconduct;

(2) Pay to the Board with each typewritten application, a fee of $2,000.00, no part of which may be refunded to:

(a) an applicant whose application is denied; or

(b) an applicant who withdraws, unless the withdrawing applicant filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by comity is received from an applicant who, in the opinion of the Executive Director after consideration with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in one or more jurisdictions relied upon by the applicant for admission to practice law in North Carolina, that each jurisdiction relied upon by the applicant has been or should be approved by the Board, pursuant to this rule, for admission to practice

law in North Carolina without examination, and that the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the full-time practice of law pursuant to the license to practice law from one or more jurisdictions relied upon by the applicant. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include the following activities, if performed in a jurisdiction in which the applicant is admitted to practice law, or if performed in a jurisdiction that permits such activity by a licensed attorney not admitted to practice in that jurisdiction:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as house counsel for a person or other entity engaged in business; or

(d) Judicial service, service as a judicial law clerk, or other legal service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Legal Service with the United States, a state or federal territory, the District of Columbia, or any local governmental bodies or agencies, including military service ; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

For purposes of this rule, the active practice of law shall not include (a) work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which any person receiving the unauthorized service was located, or (b) the practice of law in any additional jurisdiction, pursuant to a license to practice law in that additional jurisdiction, and that additional jurisdiction is not an "approved jurisdiction" as determined by the Board pursuant to this rule.

(4) Be in good standing in every jurisdiction within each State, territory of the United States, or the District of Columbia, in which the applicant is licensed or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; however, the applicant must not only be in good standing, but also must be an active member of each jurisdiction upon which the applicant relies for admission by comity.

(5) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(6) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(7) Not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing the applicant's comity application;

(8) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board.

.0503 Requirements for Military Spouse Comity Applicants

A Military Spouse Comity Applicant, upon written application may, in the discretion of the Board, be granted a license to practice law in the State of North Carolina without written examination provided that:

(1) The Applicant fulfills all of the requirements of Rule .0502, except that:

(a) in lieu of the requirements of paragraph (3) of Rule .0502, a Military Spouse Comity Applicant shall prove to the satisfaction of the Board that the Military Spouse Comity Applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, and that the Military Spouse Comity Applicant has been for at least four out of the last eight years immediately preceding the filing of this application with the Executive Director, actively and substantially

engaged in the full-time practice of law. Practice of law for the purposes of this rule shall be defined as it would be defined for any other comity applicant; and

(b) Paragraph (4) of Rule .0502 shall not apply to a Military Spouse Comity Applicant.

(2) **Military Spouse Comity Applicant defined.** A Military Spouse Comity Applicant is any person who is

(a) An attorney at law duly admitted to practice in another state or territory of the United States, or the District of Columbia; and

(b) Identified by the Department of Defense (or, for the coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) as the spouse of a servicemember of the United States Uniformed Services; and

(c) Is residing, or intends within the next six months, to be residing in North Carolina due to the service member's military orders for a permanent change of station to the State of North Carolina.

(3) **Procedure.** In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the servicemember's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Applicant as the spouse of the servicemember.

(4) **Fee.** A Military Spouse Comity Applicant shall pay a fee of $1,500.00 in lieu of the fee required in paragraph (2) of Rule .0502. This fee shall be non-refundable.

.0604 Bar Candidate Committee

Every applicant shall appear before a bar candidate committee, appointed by the Chairman of the Board, in the judicial district in which the applicant resides, or in such other judicial districts as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a Panel may, in the Board's discretion, be excused from making a subsequent appearance before a bar candidate committee. The Board Chair may delegate to the Executive Director the authority to exercise such discretion. The applicant shall give such information as may be required on such forms

provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee the such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee. There can be no changes once the initial assignment is made.

.0802 Format

A protest shall be made in writing, signed by the person making the protest and bearing the person's home and business address, and shall be filed with the Executive Director

(a) if a general applicant, before the date the applicant is scheduled to be examined; or

(b) if a comity applicant, before the date of the applicant's final appearance before a Panel.

.0803 Notification; Right to Withdraw

The Executive Director shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Executive Director a written withdrawal as a candidate for admission.

.0804 Hearing

In case the applicant does not withdraw as a candidate for admission to the practice of law, the person or persons making the protest and the applicant in question shall appear before a Panel or the Board at a time and place to be designated by the Board Chair. If the applicant is an applicant for admission by examination and a hearing on the protest is not held before the written examination, the applicant may take the written examination.

.1001 Review

An applicant for admission by examination who has failed the written examination may, in the Board's offices, examine the applicant's answers to the essay portion of the examination and such other answers as the Board determines will be of assistance to the applicant.

.1002 Fees

The Board will furnish an unsuccessful applicant a copy of the applicant's essay examination at a cost to be determined by the Executive

Director, not to exceed an amount determined by the Board. No copies of the Board's grading guide will be made or furnished to the applicant.

.1005 Board Representative

The Executive Director of the Board serves as the representative of the Board during this review of the written bar examination by an unsuccessful applicant. The Executive Director is not authorized to discuss any specific questions and answers on the bar examination.

.1201 Nature of Hearings

(1) All general applicants may be required to appear before the Board or a Panel at a hearing to answer inquiry about any matter under these rules. In the event a hearing for an applicant for admission by examination is not held before the written examination, the applicant shall be permitted to take the written examination.

(2) Each comity applicant shall appear before the Board or Panel to satisfy the Board that he or she has met all the requirements of Rule .0502.

.1203 Conduct of Hearings

(1) All hearings shall be heard by the Board except that the Chair may designate two or more members or Emeritus Members as that term is defined by the Policy of the North Carolina State Bar Council creating Emeritus Members to serve as a Panel to conduct the hearings.

(2) The Panel will make a determination as to the applicant's eligibility for admission to practice law in North Carolina. The Panel may grant the application, deny the application, or refer it to the Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the Board by giving written notice to the Executive Director at the offices of the Board within ten (10) days following receipt of the Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the Board.

(3) The Board or a Panel may require an applicant to make more than one appearance before the Board or a Panel, to furnish information and documents as it may reasonably require, and to submit to reasonable physical or mental examinations,

pertaining to the moral character or general fitness of the applicant to be licensed to practice law in North Carolina.

(4) The Board or a Panel of the Board may allow an applicant to take the bar examination while the Board or a Panel makes a final determination that the applicant possesses the qualifications and general fitness requisite for an attorney and counselor at law, is possessed of good moral character, and is entitled to the confidence of the public.

.1204 Continuances; Motions for Such

Continuances will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuances should be made to the Executive Director and will be granted or denied by the Board Chair or by a Panel designated for the applicant's hearing.

.1205 Subpoenas

(1) The Board Chair, or the Board Chair's designee, shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(2) The Executive Director is delegated the power to issue subpoenas in the Board's name.

.1206 Depositions and Discovery

(1) A deposition may be used in evidence when taken in compliance with the North Carolina Rules of Civil Procedure, G.S. 1A-1.

(2) A Panel or the Board may consider sworn affidavits as evidence in a hearing. The Board will take under consideration sworn affidavits presented to the Board by persons desiring to protest an applicant's admission to the North Carolina Bar.

.1302 Licenses for General Applicants

Upon compliance with the rules of the Board, and all orders of the Board, the Executive Director, upon order of the Board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

.1401 Appeals

An applicant may appeal from an adverse ruling or determination by the Board as to the applicant's eligibility for admission to practice law in North Carolina.

.1402 Notice of Appeal

Notice of Appeal shall be provided, in writing, within twenty (20) days after notice of such ruling or determination. This Notice shall contain written exceptions to the ruling or determination and shall be filed with the Superior Court for Wake County, North Carolina. A filed copy of said Notice shall be given to the Executive Director. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

.1403 Record to be Filed

Within sixty (60) days after receipt of the notice of appeal, and after the applicant has paid the cost of preparing the record, the Executive Director shall prepare, certify, and file with the Clerk of the Superior Court of Wake County the record of the case, comprising;

(1) the application and supporting documents or papers filed by the applicant with the Board;

(2) a complete transcription of the testimony when taken at the hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the Board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

.1404 Wake County Superior Court

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence

not offered at the hearing shall be taken, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The findings of fact by the Board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse, or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

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 Governing Admission to the Practice of Law in the State of North Carolina were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on July 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as approved by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24th day of September, 2015.

s/Mark Martin
Mark D. Martin Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina 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 24th day of September, 2015.

s/Ervin, J.
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 April 25, 2014.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined in bold type, deletions are interlined):

Rule 5.3, *Responsibilities Regarding Nonlawyer ~~Assistants~~ Assistance*

[text of rule is unchanged]

Rule 5.5, *Unauthorized Practice of Law; Multijurisdictional Practice of Law*

[text of rule is unchanged]

Rule 7.3, *~~Direct Contact with Potential~~ Solicitation of Clients*

[text of rule is unchanged]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 25, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

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 24th day of September, 2015.

s/Ervin, J.
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 17, 2015.

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 be amended (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

Rule 5.6(b) Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) …; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy ~~between private parties~~.

Comment

[1] ….

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17. The Rule also does not prohibit restrictions on a lawyer's right to practice that are included in a plea agreement or other settlement of a criminal matter or the resolution of a disciplinary proceeding where the accused is a lawyer.

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership, as particularly set forth in 27 N.C.A.C. 1A, Section .0300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0300, Permanent Relinquishment of Membership in the State Bar

Section .0300 ~~Election and Succession of Officers~~ Permanent Relinquishment of Membership in the State Bar

[All rules currently in this section withdrawn and relocated, in their entirety, to the beginning of Section .0400.]

.0301 Effect of Relinquishment

(a) Order of Relinquishment. Pursuant to the authority of the council to resolve questions pertaining to membership status as specified in N.C. Gen. Stat. 84-23, the council may allow a member of the State Bar to relinquish his or her membership in the State Bar subject to the conditions set forth in this section. Upon the satisfaction of those conditions, the council may enter an order declaring that the individual is no longer a member of the State Bar and no longer has the privileges of membership set forth in N.C. Gen. Stat. 84-16 and in the rules of the State Bar.

(b) Requirements to Return to Practice of Law. If an individual who has been granted relinquishment of membership desires to return to the practice of law in the state of North Carolina, he or she must apply to the North Carolina Board of Law Examiners and satisfy all of the requirements to obtain a license to practice law in the state of North Carolina as if for the first time.

(c) Prohibition on Representations. Effective upon the date of the order of relinquishment, the former licensee is prohibited from representing that he or she is

(1) a lawyer in North Carolina,

(2) licensed to practice law in North Carolina,

(3) able to provide legal services in North Carolina, or

(4) a member of the North Carolina State Bar.

.0302 Conditions for Relinquishment

A member of the State Bar may petition the council to enter an order of relinquishment. An order of relinquishment shall be granted if the petition demonstrates that the following conditions have been satisfied:

(a) Unresolved Complaints. No open, unresolved allegations of professional misconduct are pending against the petitioner in any jurisdiction.

(b) No Financial Obligation to State Bar. The petitioner has paid all membership fees, Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar or the Disciplinary Hearing Commission, and all fees, fines, and penalties owed to the Board of Continuing Legal Education.

(c) Wind Down of Law Practice. The petitioner has completed the wind down of his or her law practice in compliance with the procedure for winding down the law practice of a suspended or disbarred lawyer set forth in paragraphs (a), (b), and (e) of Rule .0124 of Subchapter 1B and with any other condition on the wind down of a law practice imposed by state, federal, and administrative law. The petition must describe the wind down of the law practice with specificity.

(d) Acknowledgment. The petitioner acknowledges the following: the State Bar's authority to take the actions described in Rule .0303 of this section; that the sole mechanism for regaining active membership status with the State Bar is to apply to the North Carolina Board of Law Examiners for admission and to satisfy all of the requirements to obtain a license to practice law in the state of North Carolina as if for the first time; and that he or she is not entitled to confidentiality under Rule .0129 of Subchapter 1B of any information relating to professional misconduct received by the State Bar after the date of the entry of the order of relinquishment.

(e) Address. The petition includes a physical address at which the State Bar can communicate with the petitioner.

(f) Notarized Petition. The petition is signed in the presence of a notary and notarized.

.0303 Allegations of Misconduct Received by the State Bar On or After the Date of Relinquishment

(a) Post Relinquishment Action by State Bar. Relinquishment is not a bar to the initiation or investigation of allegations of professional misconduct and shall not prevent the State Bar from prosecuting a disciplinary action against the former licensee for any violation of the Rules of Professional Conduct that occurred prior to the date of the order of relinquishment.

(b) Procedure for Investigation. Allegations of misconduct shall be investigated pursuant to the procedures set forth in Section .0100 of Subchapter 1B.

(c) Release of Information from Investigation. Information from the investigation of allegations of misconduct shall be retained in the State Bar's records and may be released by the State Bar as required by law or as necessary to protect the interests of the public. Release may be made to, but is not limited to, the North Carolina Board of Law Examiners, any professional licensing authority, or any law enforcement or regulatory body investigating the former licensee.

Section .0400 Election, Succession, and Duties of Officers

.0401 Officers

[Relocated Rule .0301 from Subchapter 1A, Section .0300]

.0402 Eligibility for Office

[Relocated Rule .0302 from Subchapter 1A, Section .0300]

.0403 Term of Office

[Relocated Rule .0303 from Subchapter 1A, Section .0300]

.0404 Elections

[Relocated Rule .0304 from Subchapter 1A, Section .0300]

.0405 Nominating Committee

[Relocated Rule .0305 from Subchapter 1A, Section .0300]

.0406 Vacancies and Succession

[Relocated Rule .0306 from Subchapter 1A, Section .0300]

.0407 Removal from Office

[Relocated Rule .0307 from Subchapter 1A, Section .0300]

~~.0401~~ .0408 Compensation of Officers

...

[Re-numbering remaining rules.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015.

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 supervision of law students, as particularly set forth in 27 N.C.A.C. 1C, Section 0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0200 Rules Governing the Board of Law Examiners and the Training of Law Students

Rule .0205 Supervision

(a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar who has practiced law as a full-time occupation for at least two years;

(2) supervise no more than two legal interns concurrently, provided, however, there is no limit on the number of legal interns who may be supervised concurrently by an attorney who is a full or part-time member of a law school's faculty or staff whose primary responsibility as a faculty member is supervising legal interns in a legal aid clinic and, further provided, that an attorney who supervises legal interns through an externship or outplacement program of a law school legal aid clinic may supervise up to five legal interns;

(3) assume personal professional responsibility for any work undertaken by a legal intern while under his or her supervision;

(4) ...

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015.

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 .1803 Reconsideration of Failed Examination

(a) Review of Examination. Within ~~30~~ 45 days of the date of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director...

(b) Petition for Grade Review. If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within ~~45~~ 30 days ~~of the date of the notice of failure~~ after the last day of the exam review period and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded...

(c) ...

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015.

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 .1900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1900 Rules Concerning the Accreditation of Continuing Legal Education for the Purpose of the Board of Legal Specialization

Rule .1903 Accreditation Standards for Lecture-Type CLE Activities

(a) ...

(b) ...

(c) The CLE activity may be live; prerecorded in audio or video format; simultaneously broadcast by telephone, satellite, live web streaming (webcasting), or video conferencing; or online. ~~presented by either live instruction or mechanical or electronically recorded or reproduced material. If electronic transmission is used, an instructor should be present for comment or to answer questions. The board may reduce the hours of credit for electronic transmission when no instructor is present.~~ A prerecorded audio or video CLE activity must comply with the minimum registration and verification of attendance requirements in Rule .1604(d) of this chapter.

(d) ...

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Sections .1500 and .1600, be amended as follows (additions are underlined, deletions are interlined):

27 NCAC 1D, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1513 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: ….

(b) Investment Criteria - ….

(c) Disbursement - Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar pursuant to authority of the council….

(d) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund shall be applied first to the expense of administration of the CLE program including an adequate reserve fund; provided, however, that a portion of each sponsor or attendee fee, in an amount to be determined by the council ~~but not to exceed $1.00 for each credit hour~~, shall be paid to the Chief Justice's Commission on Professionalism and to the North Carolina Equal Access to Justice Commission for administration of the activities of ~~the commission~~ these commissions. Excess funds may be expended by the council on lawyer competency programs approved by the council.

Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1606 Fees

(a) Sponsor Fee - The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is ~~$3.00~~ $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; ~~$.050~~ $1.00 to the North Carolina Equal Access to Justice Commission; and $0.25 to the State Bar to administer the funds distributed to the commissions. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit:

> Fee: ~~$3.00~~ $3.50 x Total Approved CLE Hours (6) x Number of NC Attendees (100) = Total Sponsor Fee (~~$1800~~ $2100.00)

(b) Attendee Fee - The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney will be invoiced for any attendees fees owed following the submission of the attorney's annual report form pursuant to Rule .1522(a) of this subchapter. Payment shall be remitted within 30 (thirty) days of the date of the invoice. The amount of the fee, per approved CLE hour for which the attorney claims credit, is ~~$3.00~~ $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; ~~$.050~~ $1.00 to the North Carolina Equal Access to Justice Commission; and $0.25 to the State Bar to administer the funds distributed to the commissions.

It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit:

> Fee: ~~$3.00~~ $3.50 x Total Approved CLE hours (3.0) = Total Attendee Fee (~~$9.00~~ $10.50)

(c) Fee Review - The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The council shall annually review the assessments for the Chief Justice's Commission on Professionalism and the North Carolina Equal Access to Justice Commission and adjust them as necessary to maintain adequate finances for the operation of the commissions.

(d) Uniform Application and Financial Responsibility - ….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of October, 2015.

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. The amendments shall take effect on January 1, 2016.

This the 5th day of November, 2015.

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 5th day of November, 2015.

s/Ervin, J.
For the Court

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA CODE OF JUDICIAL CONDUCT

Canons 2 and 7 of the North Carolina Code of Judicial Conduct are hereby amended, in part, to read as follows:

Canon 2

. . .

B. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others except as permitted by this Code; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness.

. . .

Canon 7

. . .

B. Permissible political conduct. A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself/herself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event;

. . .

Adopted unanimously by the Court this the 5th day of November 2015. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of November 2015.

s/Christie S. Cameron Roeder
CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

The Order establishing the Chief Justice's Commission on Professionalism is hereby amended to read as follows:

THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

IN THE SUPREME COURT OF NORTH CAROLINA BY ORDER OF THE COURT

In recognition of the need for the emphasis upon and encouragement of professionalism in the practice of law, the Court hereby creates THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM.

The membership of the Commission shall be as follows:

The Commission's chair will be the Chief Justice or his or her designee. The chair will appoint the Commission's other members. The Commission's members will reflect the profession's four main constituents: practicing lawyers, judges, law school faculty, and the public. The chair will appoint from the constituents as follows:

1. Judges:

   (a) two judges chosen from those who serve actively or have served on the trial benches of the courts of North Carolina or the United States, and

   (b) an appellate court judge chosen from the Supreme Court of North Carolina, the North Carolina Court of Appeals, or the United States Court of Appeals.

2. Law School Faculty: two law school faculty members who are full-time faculty members from accredited North Carolina law schools, chosen on recommendations of the deans thereof.

3. Practicing Lawyers: seven practicing lawyers giving due and appropriate regard for diversity of representation and taking into account such factors as the chair shall deem just.

4. Public Members: Three non-lawyer citizens active in public affairs.

With the exception of the chairman, the members of the Commission shall serve for a term of three years provided, however, in the discretion of the chair, the initial appointments may be for a term of less than three years so as to accomplish staggered terms for the membership of the Commission.

CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

BY THIS ORDER, the Court issues to the Commission the following charge: The Commission's primary charge shall be to enhance professionalism among North Carolina's lawyers. In carrying out its charge, the Commission shall provide ongoing attention and assistance to the task of ensuring that the practice of law remains a high calling, enlisted in the service of clients and in the public good.

The Commission's major responsibilities should include:

1. to consider and encourage efforts by lawyers and judges to improve the administration of justice;

2. to examine ways of making the system of justice more accessible to the public;

3. to monitor and coordinate North Carolina's professionalism efforts in such institutional settings as the bar, the courts, the law schools, and law firms;

4. to monitor professionalism efforts in jurisdictions outside North Carolina;

5. to conduct a study and issue a report on the present state of lawyer professionalism within North Carolina;

6. to plan and conduct Convocations on Professionalism;

7. to provide guidance and support to the Board of Continuing Legal Education and to the various CLE providers accredited by the Board, in the implementation and execution of a CLE professionalism requirement of not less than one hour per year;

8. to implement a professionalism component in bridge-the-gap programs for new lawyers;

9. to make recommendations to the Supreme Court, the State Bar, the voluntary bars, and the Board of Continuing Legal Education concerning additional means by which professionalism can be enhanced among North Carolina lawyers;

10. to receive and administer grants and to make such expenditures therefrom as the Commission shall deem prudent in the discharge of its responsibilities.

Provided, however, the Commission shall have no authority to impose discipline upon any members of the North Carolina State Bar or to

amend, suspend, or modify the rules and regulations of the North Carolina State Bar including the Revised Rules of Professional Conduct.

By order of the Court in Conference, this the 12th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of January, 2016.

s/Christie Speir Cameron Roeder
Clerk of the Supreme Court

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