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AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE BOARD OF LAW EXAMINERS; AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNINGTHE LEGAL SPECIALIZATION PROGRAM; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION PROGRAM; AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS; AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS; AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER 30, 2016

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

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OF
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SUPREME COURT OF NORTH CAROLINA

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APPEAL AND ERROR

Appeal and Error—corrected Court of Appeals decision—reliance on original version—review by Supreme Court—The Supreme Court had authority under N.C. R. App. P. 16(a) to consider an issue raised by the decision of the Court of Appeals where neither party knew of the existence of a "corrected" version of the Court of Appeals' decision until two weeks before oral arguments in the Supreme Court. The differences between the two opinions that the Court of Appeals filed in this case went beyond changing the identity of the cases upon which the Court of Appeals relied in determining that the State's appeal should be dismissed to significantly changing the basis for the Court of Appeals' decision to dismiss the State's appeal. **State v. Miller, 729.**

Appeal and Error—preservation of issues—failure to timely object—Defendant failed to make a timely objection in a felony larceny case to a witness's testimony regarding the video surveillance, and thus, he failed to preserve that issue for appellate review. **State v. Snead, 811.**

Appeal and Error—preservation of issues—no objections—compelled self-incrimination—North Carolina Rules of Evidence Rule 614(c) provides that "[n]o objections are necessary with respect to . . . questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." This rule operates to preserve for appellate review the impropriety of a trial court's interrogation of a witness even if a party does not object. It does not apply when, as here, a party argues that the trial court's inquiry infringed upon a litigant's privilege against compelled self-incrimination. **Herndon v. Herndon, 826.**

CONSTITUTIONAL LAW

Constitutional Law—freedom of speech—cyberbullying statute unconstitutional—The Court of Appeals erred by finding no error in defendant's conviction for cyberbullying. The cyberbullying statute under N.C.G.S. § 14-458.1(a)(1)(d) (2015) was declared unconstitutional because it violated the First Amendment's guarantee of freedom of speech. It restricted speech, not merely nonexpressive conduct; the restriction was content based, not content neutral; and it was not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying. **State v. Bishop, 869.**

Constitutional Law—right against self-incrimination—not invoked—voluntary witness—The trial court did not infringe upon defendant's Fifth Amendment right against self-incrimination in a Domestic Violence Protective Order proceeding

where defendant did not invoke the privilege against self-incrimination and defendant was in control of her testimony by virtue of her decision to take the stand. The right against self-incrimination operates differently depending on whether a witness is compelled to testify or testifies voluntarily. A voluntary witness cannot claim an immunity from cross-examination on the matters he has himself put in dispute. **Herndon v. Herndon, 826.**

CONTRACTS

Contracts—non-compete agreement—overbroad restrictions—court may not amend—blue pencil doctrine not available—The trial court correctly declined to enforce a covenant not to compete even though the parties expressly agreed in their contract that a court could rewrite overbroad temporal and territorial limitations that would otherwise render the covenant unenforceable. A court may not unilaterally amend the terms of a non-compete contract, and parties cannot contract to give a court power that it does not have. Further, the blue pencil doctrine could not save the non-compete agreement because the only restrictions in the agreement—restrictions to all of North Carolina and South Carolina—were unreasonable, and nothing would remain if the court struck out the unreasonable portions. **Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 693.**

EMINENT DOMAIN

Eminent Domain—inverse condemnation—Map Act—recordation of highway corridor map—taking without just compensation—The Court of Appeals did not err by reversing the dismissal of plaintiffs' inverse condemnation claim. The use of the Map Act by defendant Department of Transportation to record the pertinent highway corridor map resulted in a taking of plaintiffs' property rights without just compensation. On remand, the trier of fact must determine the value of the loss of these fundamental rights by calculating the value of the land before and after the corridor map was recorded, taking into account all pertinent factors including the restriction on each plaintiff's fundamental rights as well as any effect of the reduced ad valorem taxes. **Kirby v. N.C. Dep't of Transp., 847.**

EMPLOYER AND EMPLOYEE

Employer and Employee—patent bonuses—liquidated damages—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not abuse its discretion by concluding that plaintiff was not entitled to liquidated damages on the jury's award of issuance bonuses associated with unissued patents. The employer had reason to believe that it did not owe plaintiff the bonuses. **Morris v. Scenera Research, LLC, 857.**

Employer and Employee—patent bonuses—rescission—money damages sufficient remedy—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the Court of Appeals erred by holding that plaintiff was entitled to rescission. A party may pursue rescission only when a material breach occurs *and* all legal remedies fall short of compensating the injured party for its loss. Plaintiff claimed that his employer owed him $5,000 to $10,000 for each patent at issue, and money damages provided him with a complete remedy. **Morris v. Scenera Research, LLC, 857.**

Employer and Employee—patent bonuses—Retaliatory Employment Discrimination Act damages—not trebeled—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not err when it declined to treble the jury's award of Retaliatory Employment Discrimination Act (REDA) damages. Proving a willful violation of N.C.G.S. § 95-241 requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute. Competent evidence supported the trial court's decision to not treble plaintiff's REDA award. **Morris v. Scenera Research, LLC, 857.**

Employer and Employee—Wage and Hours Act—patent bonuses—calculability—question for jury—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the Supreme Court affirmed the holding of the Court of Appeals that the question of whether a wage is "calculable" under the Wage and Hours Act is one of fact, not law, and that the trial court properly submitted the question to the jury. Plaintiff argued at trial that value of the patent issuance bonuses for patent applications still pending with the U.S. Patent and Trademark Office could be calculated using the following formula: 150 outstanding patents x $5,000 for each successfully issued patent x 90% patent issuance success rate = $675,000. The employer failed to offer any other formula at trial, and the meaning of "calculable" includes "capable of being estimated." **Morris v. Scenera Research, LLC, 857.**

Employer and Employee—Wage and Hours Act—patent bonuses—patents pending when employment ended—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not err by denying the employer's motions for direct verdict and judgment notwithstanding the verdict on the issue of whether plaintiff was entitled to patent issuance bonuses for patents still pending when his employment ended. Plaintiff presented more than a scintilla of evidence supporting his Wage and Hours Act claim: Plaintiff testified that his bonuses were earned at the time the patents were filed, and another witness confirmed that bonuses were earned at the time patents were filed. **Morris v. Scenera Research, LLC, 857.**

EVIDENCE

Evidence—authentication—video surveillance—The Court of Appeals erred by reversing defendant's conviction for felony larceny based on a video showing defendant stealing shirts from a Belk Department Store. By presenting evidence that the video surveillance system was reliable and that the video presented at trial had not been altered, the State properly authenticated the video. **State v. Snead, 811.**

Evidence—expert opinion testimony—general characteristics of child sexual assault victims—possible reasons for delayed reporting of allegations—subject to disclosure in discovery in sexual offense prosecution— In defendant's prosecution for sexual offenses perpetrated against two minors, the State failed to satisfy its statutory obligations when it did not produce summaries of its expert witnesses' opinions and the basis for those opinions in response to defendant's discovery requests. Expert testimony about the general characteristics of child sexual assault victims and the possible reasons for delayed reporting of sexual assault allegations constitutes expert opinion testimony, subject to disclosure in discovery under N.C.G.S. § 15A-903(a)(2). The Supreme Court modified

EVIDENCE—Continued

and affirmed the decision of the Court of Appeals upholding defendant's conviction because defendant failed to show that there was a reasonable possibility that the jury would have reached a different result absent the erroneously admitted expert opinion testimony. **State v. Davis, 794.**

Evidence—expert witness testimony—excluded—no abuse of discretion— The trial court did not abuse its discretion in a first-degree murder prosecution in which defendant claimed self-defense by excluding evidence from a defense expert, Mr. Cloutier, on the use of force. The trial court concluded that Mr. Cloutier's testimony about pre-attack cues and use of force variables would not assist the jury because those matters were within the jurors' common knowledge; that Mr. Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system; and that Mr. Cloutier's reaction time testimony was based on speculation and not reliable. **State v. McGrady, 880.**

Evidence—expert witness testimony—standards—adoption of federal standard—A 2011 amendment to Rule 702(a) of the North Carolina Rules of Evidence adopted the federal standard for the admission of expert witness testimony articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its line of cases. The proper interpretation of Rule 702(a) remains an issue of state law, and previous N.C. cases are still good law if they do not conflict with the *Daubert* standard. **State v. McGrady, 880.**

Evidence—expert witness testimony—standards—application of new rule— Rule 702(a) of the North Carolina Rules of Evidence has three main parts, and expert testimony must satisfy each to be admissible. Expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience and must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case" for its own. Expertise can come from practical experience as much as from academic training, but the question remains whether the witness has enough expertise to be in a better position than the trier of fact to have an opinion on the subject. And, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the witness must have applied the principles and methods reliably to the facts of the case. **State v. McGrady, 880.**

INDICTMENT AND INFORMATION

Indictment and Information—damage to real property—identity of property vital—owner's name not essential—An indictment charging injury to real property was valid on its face where the indictment alleged damage to "Katy's Great Eats" rather than the proper legal name of the corporate entity, "Katy's Great Eats, Inc." Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. In an indictment alleging injury to real property, identification of the property itself rather than the owner or ownership interest is vital. The owner or lawful possessor's name may be used to identify the specific parcel of real estate but it is not an essential element of the offense that must be alleged in the indictment. The indictment gave defendant reasonable notice of the charge against him. **State v. Spivey, 739.**

JUDGMENTS

Judgments—entry of order—absence of written order—The Court of Appeals erred by dismissing the State's appeal from the trial court's order in an intoxicated driving case on the theory that the order had never been properly entered. The Court of Appeals had noted that the record on appeal did not include a written copy of the order and held that it lacked jurisdiction in the absence of a written order. However, a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session. The order from which the State noted its appeal was, in fact, entered in accordance with *State v. Oates*, 366 N.C. 264 (2012). **State v. Miller, 729.**

JUVENILES

Juveniles—petition—illegible signature—Respondent failed to show that a juvenile petition was not properly verified where a space on the petition for "Signature of Person Authorized to Administer Oaths" had an illegible signature and the space for the person's title was not filled in. By signing in a space with such a conspicuous designation, the person who did so necessarily represented that he or she possessed such authority, and there was nothing in the record indicating that this person lacked the authority he or she claimed to possess. **In re N.T., 705.**

KIDNAPPING

Kidnapping—disjunctive verdict—no error—The trial court's disjunctive jury instruction in a first-degree kidnapping prosecution did not violate defendant's constitutional right to be convicted only by the unanimous verdict of a jury in open court. The Court of Appeals concluded that the challenged instruction would have allowed one or more jurors to convict defendant based on a theory not supported by the evidence, but our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense. **State v. Walters, 749.**

SCHOOLS AND EDUCATION

Schools and Education—Career Status Law—did not in itself create vested rights—A statute governing the employment of teachers, the Career Status Law (now repealed), did not itself create any vested contractual rights. That statute contemplated the creation of individual contracts between school boards and teachers but did not itself establish any benefit provided to teachers by the State nor create any relationship between them. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

Schools and Education—Career Status Law—implied inclusion in local contracts—Although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

Schools and Education—impairment of teachers vested rights—method not reasonable and necessary—Even if a legitimate public purpose existed justifying an impairment of vested teachers' rights by repeal of the Career Status Law, the method adopted for alleviating that harm must be necessary and reasonable. Less sweeping alternatives were possible. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777**.

Schools and Education—repeal of Career Status Law—impairment of vested rights—Teachers' vested rights were substantially impaired by the repeal of the Career Status Law. Retroactively revoking this status from those whose career status rights had already vested deprived career teachers of the promise of continuing employment as well as the right to a hearing in circumstances in which their now-shortened contracts may not be renewed. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

Schools and Education—teachers—impairment of contractual rights—no legitimate public purpose—Although a substantial impairment of teacher's contractual rights can still be upheld if the impairment was a reasonable and necessary means of serving a legitimate public purpose, there was not a legitimate public purpose for which it was necessary to impair substantially the vested contractual rights of career status teachers. Alleviating difficulties in dismissing ineffective teachers might be a legitimate end justifying changes to the Career Status Law, but no evidence indicates that such a problem existed. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

SEXUAL OFFENDERS

Sexual Offenders—failure to register—after initial compliance and subsequent incarceration—The trial court did not err by denying defendant's motion to dismiss one count of failure to register as a sex offender under N.C.G.S. § 14-208.11. The State's evidence showed that defendant had been incarcerated, had previously filled out his registration paperwork, and, following his release, did not provide in-person or written notice that he had changed his address to the Urban Ministry Center. **State v. Crockett, 717.**

Sexual Offenders—failure to register—after initial compliance and subsequent incarceration—out-of-state residence—The trial court did not err by denying defendant's motion to dismiss one count of failure to register as a sex offender under N.C.G.S. § 14-208.11. The State's evidence showed that defendant had been incarcerated, had signed a registration form upon his release, and had failed to provide the required notification when he later moved to South Carolina. **State v. Crockett, 717.**

Sexual Offenders—registration—after initial compliance and subsequent incarceration—On discretionary review of the Court of Appeals' decision affirming defendant's convictions for failure to register as a sex offender, the Supreme Court held that N.C.G.S. § 14-208.9, the "change of address" statute—not section 14-208.7, the "registration" statute—governs in situations in which a sex offender who has already complied with the initial registration requirements is later incarcerated and then released. **State v. Crockett, 717.**

Sexual Offenders—registration—failure to notify of new address after release from incarceration—The Court of Appeals erred in a termination of parental rights case by concluding the trial court did not have subject matter jurisdiction based on the unverified petition. The signature of the person before whom it was verified was illegible and nothing in the record identified that person's name or title. In light of the presumption of regularity which places the burden of proof on the party challenging jurisdiction, respondent failed to show that the petition was not properly verified. Respondent never submitted any evidence, or even any specific allegations, tending to overcome the presumption of regularity. **State v. Barnett, 710.**

TERMINATION OF PARENTAL RIGHTS

Termination of Parental Rights—failure to make reasonable progress—budgeting, housing, transportation, domestic violence—The trial court did not err by terminating respondent-mother's parental rights for failure to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of her children. The trial court found that respondent had failed to budget her funds, resulting in continuing failure to use incoming funds to meet her children's needs; that she had not maintained consistent housing and had been evicted from several residences for failure to pay rent; that she had lost employment due to incarceration as a result of a domestic violence incident with the father; and that she continued to drive without a valid North Carolina driver's license. These findings demonstrated that respondent's failure to correct the conditions that led to the removal of her children was not simply a result of poverty, and the Court of Appeals erred by holding that the trial court did not have the authority to order respondent to comply with the corresponding requirements of her case plan. **In re D.L.W., 835.**

Termination of Parental Rights—neglect—domestic violence between parents—placed children at risk—The trial court did not err by terminating respondent-mother's parental rights on the basis of neglect due to domestic violence between the parents. In its order terminating respondent's parental rights, the trial court found that the domestic violence between the parents put the children at risk and that one of the children had intervened in an argument between the parents; that there were further incidents of domestic violence after the adjudication order; and that respondent could not articulate what she had learned in her domestic violence counseling sessions. The trial court's findings were sufficient to support its conclusion that there would be a repetition of neglect based upon the juveniles "liv[ing] in an environment injurious to [their] welfare." The Court of Appeals erred by concluding that the ongoing domestic violence was irrelevant to a determination of whether the juveniles were neglected. **In re D.L.W., 835.**

TORTS, OTHER

Torts, Other—tortious interference with contract—no express or implied-in-fact contract—Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for tortious interference with contract. Plaintiff failed to establish a contract—express or implied-in-fact—with its customers. There was no evidence of any legal obligation of a third-party customer to the companies sold to plaintiff, and defendants were not restrained by the overbroad non-compete covenant. **Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 693.**

Torts, Other—tortious interference with prospective economic advantage—mere expectation of continuing business relationship—no evidence of contract—no evidence of malice—Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for tortious interference with prospective economic advantage. Plaintiff's mere expectation of a continuing business relationship with the customers of defendants' former business was insufficient to establish this claim. Plaintiff could not show that a contract would have resulted but for defendants' malicious intervention. **Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 693.**

UNFAIR TRADE PRACTICES

Unfair Trade Practices—contract claims failed—no basis for claim—Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, plaintiff's unfair and deceptive trade practices claim failed because the Supreme Court held that plaintiff's contract claims failed. The Supreme Court also rejected plaintiff's request for injunctive relief because the non-compete covenant was unenforceable. **Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 693.**

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
April 13
May 17, 18
August 29, 30, 31
October 10, 11, 12, 13
December 12, 13, 14

BEVERAGE SYSTEMS OF THE CAROLINAS, LLC
v.
ASSOCIATED BEVERAGE REPAIR, LLC, LUDINE DOTOLI, AND CHERYL DOTOLI

No. 316A14

Filed 18 March 2016

1. Contracts—non-compete agreement—overbroad restrictions—court may not amend—blue pencil doctrine not available

The trial court correctly declined to enforce a covenant not to compete even though the parties expressly agreed in their contract that a court could rewrite overbroad temporal and territorial limitations that would otherwise render the covenant unenforceable. A court may not unilaterally amend the terms of a non-compete contract, and parties cannot contract to give a court power that it does not have. Further, the blue pencil doctrine could not save the non-compete agreement because the only restrictions in the agreement—restrictions to all of North Carolina and South Carolina—were unreasonable, and nothing would remain if the court struck out the unreasonable portions.

2. Torts, Other—tortious interference with contract—no express or implied-in-fact contract

Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for tortious interference with contract. Plaintiff failed to establish a contract—express or implied-in-fact—with its customers. There was no evidence of any legal obligation of a third-party customer to the companies sold to plaintiff, and defendants were not restrained by the overbroad non-compete covenant.

3. Torts, Other—tortious interference with prospective economic advantage—mere expectation of continuing business relationship—no evidence of contract—no evidence of malice

Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for tortious interference with prospective economic advantage. Plaintiff's mere expectation of a continuing business relationship with the customers of defendants' former business was insufficient to establish this claim. Plaintiff could not

show that a contract would have resulted but for defendants' malicious intervention.

4. Unfair Trade Practices—contract claims failed—no basis for claim

Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, plaintiff's unfair and deceptive trade practices claim failed because the Supreme Court held that plaintiff's contract claims failed. The Supreme Court also rejected plaintiff's request for injunctive relief because the non-compete covenant was unenforceable.

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. ___, 762 S.E.2d 316 (2014), reversing an order granting summary judgment for defendants entered on 3 October 2013 by Judge A. Robinson Hassell in Superior Court, Iredell County, and remanding for additional proceedings and for trial. Heard in the Supreme Court on 31 August 2015.

Jones, Childers, McLurkin & Donaldson, PLLC, by Kevin C. Donaldson and Dennis W. Dorsey, for plaintiff-appellee.

Eisele Ashburn Greene & Chapman, PA, by Douglas G. Eisele, for defendant-appellants.

Higgins Benjamin PLLC, by Jonathan Wall; and Winslow Wetsch, PLLC, by Laura J. Wetsch, for North Carolina Advocates for Justice, amicus curiae.

EDMUNDS, Justice.

The trial court in this case declined to enforce a covenant not to compete, even though the parties expressly agreed in their contract that a court could rewrite overbroad temporal and territorial limitations that would otherwise render the covenant unenforceable. We agree that the trial court correctly refused to amend the covenant. In addition, we conclude that the trial court properly entered summary judgment in defendants' favor on plaintiff's claims for tortious interference with contract, tortious interference with prospective economic advantage, and unfair and deceptive practices. Accordingly, we reverse the decision of the Court of Appeals reversing the trial court.

Elegant Beverage Products, LLC ("Elegant") and Imperial Unlimited Services, Inc. ("Imperial") were two businesses that supplied, installed, and serviced beverage products and beverage dispensing equipment in parts of North Carolina and South Carolina. Elegant sold premium coffee and tea, and Imperial serviced soft drink dispensers. At the time these companies were sold to plaintiff, Thomas Dotoli owned Imperial, while Thomas's wife Kathleen and their son Loudine Dotoli[1] owned Elegant. Both Imperial and Elegant operated out of Statesville, North Carolina.

Mark Gandino entered into negotiations with Thomas and Kathleen Dotoli to purchase the business and the assets of both companies. Gandino organized plaintiff Beverage Systems of the Carolinas, LLC ("Beverage Systems" or "plaintiff") under North Carolina law in May 2009, and on or about 20 July 2009, Gandino purchased Elegant and Imperial to operate as Beverage Systems. Specifically, Beverage Systems entered into an Asset Purchase Agreement with Thomas, Kathleen, and Loudine Dotoli, and with Elegant and Imperial to purchase the assets, customer lists, equipment, existing inventory, and associated real property of Elegant and Imperial for $650,000.

The closing, sale, and purchase were completed on 30 September 2009. That same day, the parties executed a "Non-Competition, Non-Solicitation and Confidentiality Agreement" ("the Agreement") in which Loudine and his parents agreed not to compete with plaintiff's business in either North or South Carolina before 1 October 2014. Paragraph six of the Agreement contained a provision permitting the trial court to revise its temporal and geographic limits should a court find them to be unreasonably broad. The Dotoli family members, Elegant, and Imperial received $10,000 of the purchase price as consideration for the Agreement.

Defendant Cheryl Dotoli, Loudine's wife, was not a party to either the purchase contract or the Agreement. In 2011, Cheryl formed defendant Associated Beverage Repair, LLC ("Associated Beverage"). Associated Beverage began to install and service beverage dispensing equipment in parts of North and South Carolina, thus operating in a manner similar to Imperial. Gandino learned of Associated Beverage's existence in March 2011 when Thomas Dotoli communicated to representatives of Bunn-O-Matic, one of Imperial's former customers, that Imperial had been sold to Beverage Systems, which had vacated the building that

1. Throughout their pleadings and briefs, the parties refer to the son as both "Ludine" and "Loudine." We will follow the spelling used by Loudine in his affidavit.

Imperial previously had occupied. Thereafter, Bunn-O-Matic elected to conduct business with defendant Associated Beverage rather than plaintiff Beverage Systems.

After plaintiff's requests that defendants cease and desist went unanswered, Beverage Systems filed a complaint on 14 June 2012 in Superior Court, Iredell County, against Loudine, Cheryl, and Associated Beverage, seeking injunctive relief and damages. Plaintiff alleged against Loudine breach of the Agreement not to compete. Plaintiff also alleged claims against all defendants for tortious interference with contract, tortious interference with plaintiff's prospective economic advantage, and unfair and deceptive practices. Defendants filed their answer on 4 October 2012. Although defendants asserted multiple defenses, they admitted that Associated Beverage "with the help of L[o]udine Dotoli, intends to compete with Plaintiff," but "denied that such competition violates any Non-Competition Agreement." Defendants contended, *inter alia*, that neither Cheryl Dotoli, the sole member in Associated Beverage, nor Associated Beverage signed the Agreement not to compete, and therefore they were not bound by its terms. Defendants also asserted that the Agreement was unenforceable by virtue of being overly broad in geographic scope. On 11 September 2013, defendants moved for summary judgment on all issues. After conducting a hearing, the trial court entered an order on 3 October 2013 granting defendants' motion for summary judgment in all respects. Plaintiff appealed.

In a divided opinion, the Court of Appeals reversed the trial court's order. *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, ___ N.C. App. ___, ___, 762 S.E.2d 316, 326 (2014). Addressing first the Agreement not to compete, the majority found that the Agreement's five-year temporal restriction was reasonable, *id.* at ___, 762 S.E.2d at 320-21, but that its geographic scope was unreasonable because it included areas beyond those "necessary to maintain plaintiff's customer relationships," *id.* at ___, 762 S.E.2d at 321. The Court of Appeals then observed that paragraph six of the Agreement expressly authorized the trial court to revise the unreasonable territorial restriction. *Id.* at ___, 762 S.E.2d at 321. Addressing the effect of paragraph six, the Court of Appeals, citing *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961), acknowledged that North Carolina has adopted the "strict blue pencil doctrine" under which a court cannot rewrite a faulty covenant not to compete but may enforce divisible and reasonable portions of the covenant while striking the unenforceable portions. *Beverage Sys.*, ___ N.C. App. at ___, 762 S.E.2d at 321. Here, though, the majority found that the limitations of the

blue pencil doctrine did not apply because the Agreement gave the trial court carte blanche to rewrite all the geographical terms of the covenant. *Id.* at___, 762, S.E.2d at 321. Nevertheless, relying on paragraph six of the Agreement and reasoning that the parties to the contract and the Agreement had relatively equal bargaining power, the Court of Appeals concluded that the trial court erred by declining to revise the Agreement pursuant to that paragraph "to make it reasonable based on the evidence before it." *Id.* at ___, 762 S.E.2d at 322. The Court of Appeals remanded the case to the trial court to revise the territorial scope of the Agreement. *Id.* at ___, 762 S.E.2d at 326. In addition, the majority also concluded that plaintiff forecast sufficient evidence of all remaining claims to survive defendants' motion for summary judgment and remanded the case for trial. *Id.* at ___, 762 S.E.2d at 326.

The dissenting judge agreed with the majority that the geographic scope of the Agreement was overbroad. *Id.* at ___, 762 S.E.2d at 326 (Elmore, J., dissenting). However, the dissenter argued that the blue pencil doctrine applied because the language of paragraph six limited the trial court's power to revise the Agreement to those measures "permitted by law." *Id.* at ___, 762 S.E.2d at 327. This limitation meant that the trial court lacked the authority to rewrite the restrictions set out in the Agreement that were not reasonable. *Id.* at ___, 762 S.E.2d at 327. Since the Agreement contained no reasonable territorial restrictions, the dissenter would affirm the order of the trial court granting summary judgment in defendants' favor as to breach of the covenant not to compete, despite the provisions in paragraph six of the Agreement. *Id.* at ___, 762 S.E.2d at 327.

The dissenting judge also argued that plaintiff presented insufficient evidence of implied contracts with third-party customers, *id.* at ___, 762 S.E.2d at 328, or that, but for defendants' actions, contracts with third-party customers would have been formed, *id.* at ___, 762 S.E.2d at 328-29. Concluding that there were no genuine issues of material fact as to plaintiff's remaining claims for relief, the dissenter would have affirmed the trial court's order granting summary judgment in favor of defendants on all of plaintiff's remaining claims. *Id.* at ___, 762 S.E.2d at 329. Defendants appeal as a matter of right.

We review an opinion of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). When an appeal is based on a dissent, our review is limited to "consideration of those issues that are . . . specifically set out in the dissenting opinion." N.C. R. App. P. 16(b). Here, we review the trial court's grant of defendants' motion for summary judgment. To prevail

on a motion for summary judgment, the moving party must show that, viewed in the light most favorable to the nonmovant, *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted), no genuine issue exists "as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c).

[1] Contending that the Court of Appeals erred when it remanded this matter to the trial court to revise the geographical terms of the Agreement, defendants first argue that the Agreement is too broad in territorial scope to be enforceable and that neither paragraph six of the Agreement nor the blue pencil doctrine empowers the trial court to amend that aspect of the Agreement. We begin by considering the territorial limits set out in the Agreement.

This Court will enforce a covenant not to compete made in connection with the sale of a business "(1) if it is reasonably necessary to protect the legitimate interest of the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public." *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 662-63, 158 S.E.2d 840, 843 (1968) (citations omitted). Ordinarily, a covenant's geographic scope will be found reasonable if it encompasses the area served by the business that the covenant protects, *Thompson v. Turner*, 245 N.C. 478, 481-82, 96 S.E.2d 263, 266 (1957), or, more specifically, if the protected business had clientele in the area covered by the covenant, *Noe v. McDevitt*, 228 N.C. 242, 245, 45 S.E.2d 121, 123 (1947) (citations omitted) (finding the territorial limitation of North and South Carolina unreasonable when the business's services were confined to eastern North Carolina); *Manpower of Guilford Cty., Inc. v. Hedgecock*, 42 N.C. App. 515, 523, 257 S.E.2d 109, 115 (1979) ("A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in maintaining his customers.").

Here, the Agreement prohibits defendants from engaging in a competing business venture "in the states of North Carolina or South Carolina." The record indicates that, at the time the Agreement was executed, Imperial's North Carolina market did not extend east of Stanly County, while Elegant's North Carolina market did not extend east of Wake County. Neither company had a market west of Morganton, North Carolina, or in the Sandhills. In South Carolina at that time, neither Imperial nor Elegant operated east of the City of Rock Hill or south of the City of Spartanburg. A glance at a map reveals that neither Imperial nor Elegant had a presence in sizeable portions of either state. A primary purpose of the type of covenant not to compete found in the Agreement is to provide some protection to the seller for a defined time or space,

or both, *see*, *e.g.*, *A.E.P. Indus.*, *Inc. v. McClure*, 308 N.C. 393, 408, 302 S.E.2d 754, 763 (1983) (addressing covenants not to compete in employment contexts), but when the Agreement was executed, Imperial and Elegant had no customers to protect in large swaths of the area covered by the Agreement. As a result, we agree with the Court of Appeals that this geographical restriction is unreasonably broad.

We next consider whether the Agreement may be rewritten, blue-penciled, or revised. As to the first alternative, when an agreement not to compete is found to be unreasonable, we have held that the court is powerless unilaterally to amend the terms of the contract. *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) ("The courts will not rewrite a contract if it is too broad but will simply not enforce it."). If the parties have agreed upon territorial limits of competition, these limits will be enforced "as written or not at all," for courts will not carve out reasonable subdivisions of an otherwise overbroad territory. *Welcome Wagon*, 255 N.C at 251, 120 S.E.2d at 744 (Bobbitt, J., dissenting) (citing *Noe*, 228 N.C. at 245, 45 S.E.2d at 123).

Plaintiff argues that the blue pencil doctrine should save the Agreement. As discussed above, blue-penciling is the process by which "a court of equity will take notice of the divisions the parties themselves have made [in a covenant not to compete], and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable." *Welcome Wagon*, 255 N.C. at 248, 120 S.E.2d at 742 (majority opinion). That doctrine is unavailable here. The Agreement's territorial limits cannot be blue-penciled unless the Agreement can be interpreted so that it sets out both reasonable and unreasonable restricted territories. *Id.* at 248, 120 S.E.2d at 742. We found above that the restrictions to all of North Carolina and South Carolina, the only territorial restrictions in the Agreement, are unreasonable. Striking the unreasonable portions leaves no territory left within which to enforce the covenant not to compete. As a result, blue-penciling cannot save the Agreement.

Finally, plaintiff argues that the parties gave the trial court the power under paragraph six of the Agreement to revise its territorial limits to make them reasonable. However, parties cannot contract to give a court power that it does not have. *Id.* at 248, 120 S.E.2d at 742 ("The court is without power to vary or reform the contract by reducing either the territory or the time covered by the restrictions."); *see also Penn v. Standard Life Ins. Co.*, 160 N.C. 399, 402, 76 S.E. 262, 263 (1912) ("Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore,

determine what they meant by what they have said—what their contract is, and not what it should have been."). Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure. Accordingly, the parties' Agreement is unenforceable at law and cannot be saved.

[2] We now consider plaintiff's remaining claims. Plaintiff contends that the trial court erred in granting defendants' motion for summary judgment on its claims of tortious interference with contract and tortious interference with prospective economic advantage. The elements of a claim for tortious interference with contract are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954)). Interference with a contract is "justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors." *Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992) (citing *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 221-22, 367 S.E.2d 647, 650 (1988)).

Thus, plaintiff must first establish the existence of a valid contract between plaintiff and its customers. Evidence in the record indicates that the industry custom is for owners of beverage-dispensing equipment to engage companies providing repairs to the equipment on an as-needed basis only, not via contract, and plaintiff concedes that the Court of Appeals correctly found that no express contracts existed. Nevertheless, plaintiff argues that defendants interfered with implied-in-fact contracts. To establish the existence of these implied contracts, plaintiff alleged in its complaint that when it purchased Elegant and Imperial, the "contracts and customers" of those companies "transferred to" plaintiff. In addition, plaintiff points out that Gandino stated in an affidavit that plaintiff purchased "the business, goodwill and

equipment of Imperial and Elegant, specifically including, any and all customers and customer lists," giving plaintiff "the exclusive right to continue the on-going business relationships that Imperial and Elegant had fostered with their customers." However, even considered in the light most favorable to plaintiff, this evidence fails sufficiently to establish the evidence of implied-in-fact contracts. In fact, the evidence does not establish any legal obligation of a third-party customer to Elegant or Imperial that would have been transferred to Beverage Systems through the Agreement. At most, this evidence indicates only a general business relationship. Moreover, because defendants were not restrained by the covenant not to compete, they were free to engage in routine business competition with Beverage Systems. Accordingly, we conclude that the trial court properly allowed summary judgment as to this issue.

[3] Plaintiff argues that the trial court also erred when it allowed defendants' motion for summary judgment on its claim for tortious interference with prospective economic advantage. This tort arises when a party interferes with a business relationship "by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference, . . . if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights." *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965) (citations omitted). However, a plaintiff's mere expectation of a continuing business relationship is insufficient to establish such a claim. *Dalton*, 353 N.C. at 655, 548 S.E.2d at 710. Instead, a plaintiff must produce evidence that a contract would have resulted but for a defendant's malicious intervention. *Id.* at 655, 548 S.E.2d at 710.

Plaintiff alleged that defendants "sought after the customers of Beverage System[s] which were previously transferred to Beverage Systems" and "purposely and intentionally interfered with the contracts and agreements of Beverage Systems with the intent to steal the customers away from Beverage Systems." Plaintiff contends that it "had an expectation to receive an economic advantage as a result of its business relationship with the Customers." However, plaintiff has not demonstrated that any contract would have ensued but for defendants' conduct, nor has plaintiff identified a particular business with which it lost an economic advantage. Instead, plaintiff appears to rely on the expectation that Elegant's and Imperial's former customers would continue to do business with plaintiff, an expectation insufficient to support a claim for either tortious interference with contract or tortious interference with prospective economic advantage. *Id.* at 655, 548 S.E.2d

at 710. Moreover, because the geographical limitations set out in the Agreement were unenforceable, its temporal limitations were applicable either everywhere, plainly an absurd result here, or nowhere. As a result, defendants were free to compete for customers with plaintiff. In the absence of evidence that defendants' conduct was maliciously motivated, any interference by defendants was a legitimate exercise of their right to compete. Therefore, summary judgment was also appropriate as to this claim.

[4] Finally, plaintiff argues that defendants' actions rise to the level of unfair and deceptive practices under N.C.G.S. § 75-1.1, and that their conduct should be enjoined based upon breach of the Agreement. Plaintiff's section 75-1.1 claim presupposes success of at least one of plaintiff's contract claims. Because we hold that each of those claims fails, plaintiff's unfair and deceptive practices claim also fails. Similarly, plaintiff's request for injunctive relief hinges on the validity of the Agreement. Because we have established that the Agreement is unenforceable, there is no basis on which to enjoin defendant Loudine's conduct.

The trial court correctly allowed defendants' motion for summary judgment as to all claims. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

IN THE MATTER OF THE FORECLOSURE OF THE DEEDS OF TRUST EXECUTED BY GROVER C. BROWN and wife, MARGARET C. BROWN, dated April 1, 1980, Recorded in Book 949 at Page 109, and Book 949 at Page 111 of the Buncombe County Registry

No. 224PA15

Filed 18 March 2016

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 771 S.E.2d 829 (2015), affirming an order entered on 9 April 2014 by Judge J. Thomas Davis in Superior Court, Buncombe County. Heard in the Supreme Court on 16 February 2016.

Bull and Reinhardt, PLLC, by Adam W. Bull, for petitioner-appellee, Executor of the Estate of Merton L. Brown.

Wilder Wadford and Christopher Musial for respondent-appellants.

John R. Dillard for First Choice Title, LLC, d/b/a First Choice Title Company of North Carolina, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE M.P.M.

[368 N.C. 704 (2016)]

IN THE MATTER OF M.P.M.

No. 340A15

Filed 18 March 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 776 S.E.2d 687 (2015), affirming an order entered on 12 December 2014 by Judge Michelle Fletcher in District Court, Guilford County. Heard in the Supreme Court on 15 February 2016.

Mercedes O. Chut for Guilford County Department of Health and Human Services, petitioner-appellee.

Opoku-Mensah Law Firm, PLLC, by Gertrude Opoku-Mensah, for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant father.

PER CURIAM.

AFFIRMED.

IN THE MATTER OF N.T.

No. 119PA15

Filed 18 March 2016

Juveniles—petition—illegible signature

Respondent failed to show that a juvenile petition was not properly verified where a space on the petition for "Signature of Person Authorized to Administer Oaths" had an illegible signature and the space for the person's title was not filled in. By signing in a space with such a conspicuous designation, the person who did so necessarily represented that he or she possessed such authority, and there was nothing in the record indicating that this person lacked the authority he or she claimed to possess.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 658 (2015), vacating an order entered on 7 May 2014 by Judge Monica M. Bousman in District Court, Wake County. Heard in the Supreme Court on 15 February 2016.

Office of the Wake County Attorney, by Roger A. Askew and Claire H. Duff, for petitioner-appellant Wake County Human Services.

Poyner Spruill LLP, by John Michael Durnovich, for appellant Guardian ad Litem.

W. Michael Spivey for respondent-appellee father.

JACKSON, Justice.

In this case we consider whether a juvenile petition was properly verified when the signature of the person before whom it was verified is illegible and nothing in the record identifies that person's name or title. In light of the presumption of regularity which places the burden of proof on the party challenging jurisdiction, we conclude that respondent has failed to show that the petition was not properly verified. Accordingly, we reverse.

On 21 May 2012, Wake County Human Services (WCHS) obtained non-secure custody of N.T. On 22 May 2012, WCHS filed a juvenile petition alleging that N.T. was a neglected juvenile. The petition contains a

section for an authorized representative of the director of WCHS to sign and verify the following statement: "Being first duly sworn, I say that I have read this Petition and that the same is true of my own knowledge, except as to those matters alleged upon information and belief, and as to those, I believe it to be true." It is signed by Diamond Wimbish. The verification section also designates a space for "Signature of Person Authorized to Administer Oaths," which is signed with the letter "C" followed by an illegible signature. Although there is also a space for the person's title, the space has not been filled in with any title.

The trial court entered an adjudication order concluding that N.T. was a neglected juvenile and continuing custody of N.T. with WCHS. Subsequently, the trial court ceased reunification efforts and changed the permanent plan for N.T. to adoption. On 24 September 2013, WCHS filed a motion to terminate parental rights alleging grounds of neglect, failure to make reasonable progress to correct the conditions that led to N.T.'s removal from the home, and failure to pay a reasonable portion of the cost of care. On 7 May 2014, the trial court entered an order terminating the parental rights of respondent and N.T.'s mother. Respondent appealed.

In a published opinion filed on 17 March 2015, the North Carolina Court of Appeals vacated the order terminating parental rights. *In re N.T.*, ___ N.C. App. ___, ___, 769 S.E.2d 658, 661 (2015). The Court of Appeals stated that "[a] trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *Id.* at ___, 769 S.E.2d at 660 (quoting *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006)). After reviewing the record and noting the illegible signature on the juvenile petition, the Court of Appeals concluded that the trial court never obtained subject matter jurisdiction over this case because "[n]othing in the record . . . establishes that the person before whom the petition was verified was authorized to acknowledge the verification." *Id.* at ___, 769 S.E.2d at 661. In a footnote the Court of Appeals acknowledged that WCHS had requested to amend the record to include an affidavit from Wake County Magistrate Christopher H. Graves stating that the illegible signature was his and that he signed the petition in his official capacity as a magistrate. *Id.* at ___ n.2, 769 S.E.2d at 661 n.2. However, the court determined that the affidavit could not be considered because it had not been a part of the record before the trial court. *Id.* at ___ n.2, 769 S.E.2d at 661 n.2. We allowed WCHS's petition for discretionary review.

In its appeal WCHS argues that, although it is the better practice for a judicial officer who acknowledges a verification to identify his or

her name and office, the absence of this information does not render the verification invalid. In response, respondent contends that a juvenile petition must be verified before a person who has the authority to administer oaths. Respondent asserts that here the affidavit of verification "fails to show that the truth of the contents of the petition were sworn to or affirmed before an officer having authority to administer an oath." We disagree with the latter assertion and conclude that respondent had the burden of showing that the petition, which appears facially valid, was not verified before a person authorized to administer oaths.

"In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to [Rule 9 of the North Carolina Rules of Appellate Procedure]." N.C. R. App. P. 9(a). "Although the question of subject matter jurisdiction may be raised at any time . . . where the trial court has acted in a matter, 'every presumption not inconsistent with the record will be indulged in favor of jurisdiction. . . .' " *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987) (internal citations omitted) (quoting *Dellinger v. Clark*, 234 N.C. 419, 424, 67 S.E.2d 448, 452 (1951)). Nothing else appearing, we apply "the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." *Williamson v. Spivey*, 224 N.C. 311, 313, 30 S.E.2d 46, 47 (1944) (citations omitted). As a result, "[t]he burden is on the party asserting want of jurisdiction to show such want." *Dellinger*, 234 N.C. at 424, 67 S.E.2d at 452.

A juvenile petition alleging dependency, abuse, or neglect "shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing." N.C.G.S. § 7B-403(a) (2015). "[V]erification of the petition in an abuse, neglect, or dependency action as required by N.C.G.S. § 7B-403 is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other." *In re T.R.P.*, 360 N.C. at 591, 636 S.E.2d at 791. In *In re T.R.P.*, the juvenile petition was notarized, but "was neither signed nor verified by the Director . . . or any authorized representative thereof." *Id.* at 589, 636 S.E.2d at 789. In concluding that the absence of proper verification deprived the trial court of subject matter jurisdiction, this Court emphasized "the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors." *Id.* at 592, 636 S.E.2d at 791. Specifically, we observed that a juvenile petition may be based upon an anonymous report and frequently results in "immediate interference" with a parent's fundamental rights to the custody,

care, and control of his or her children. *Id.* at 591-92, 636 S.E.2d at 791. Noting the "gravity" of these interests, we explained that the verification requirement is a reasonable means by which the General Assembly could ensure "that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations." *Id.* at 592, 636 S.E.2d at 791. We determined that "in the absence of the verification . . . the trial court's order was void ab initio." *Id.* at 588, 636 S.E.2d at 789.

A pleading is verified by means of an affidavit stating "that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true." N.C.G.S. § 1A-1, Rule 11(b) (2015). "Any officer competent to take the acknowledgement of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes." *Id.* § 1-148 (2015). This Court has been clear that "[g]enerally there is a presumption that a public official in the performance of an official duty acts in accordance with the law and the authority conferred upon him. The burden is upon the contesting party to overcome this presumption." *State v. Watts*, 289 N.C. 445, 449, 222 S.E.2d 389, 391 (1976) (citations omitted).

Here the juvenile petition contains a verification that appears facially valid—it is signed by an authorized representative of the director of WCHS who "vouches" for the truth of the allegations in the petition, *see In re T.R.P.*, 360 N.C. at 592, 636 S.E.2d at 791, and another signature appears in a space clearly reserved for "Signature of Person Authorized to Administer Oaths." By signing in a space with such a conspicuous designation, the person who did so necessarily represented that he or she possessed such authority, and there is nothing in the record indicating that this person lacked the authority he or she claimed to possess. Respondent never submitted any evidence, or even any specific allegations, tending to overcome the presumption of regularity. Instead, respondent's argument is based upon speculation as to whether a person who represented that he or she had the authority to administer oaths actually had such authority. Considering only the materials contained in the record on appeal and the presumption of regularity that attaches to the trial court's decision to exercise jurisdiction, the Court of Appeals had no basis to conclude that the petition was not properly verified. Accordingly, we reverse that court's decision.

REVERSED.

SAMMY R. PRUETT, Plaintiff
v.
JOEL D. BINGHAM and JEAN'S BUS SERVICE, INC., Defendants and Third-Party Plaintiffs
v.
GREGORY ALAN WIGGINS, MATTHEW BRACKETT, and MOUNTAIN HOME FIRE & RESCUE DEPARTMENT, INC., Third-Party Defendants

No. 34A15

Filed 18 March 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 357 (2014), affirming an order entered on 17 October 2013, as amended by an order entered on 23 January 2014, both by Judge Hugh B. Lewis in Superior Court, Rutherford County. Heard in the Supreme Court on 17 February 2016.

Davis & Hamrick, LLP, by Ann C. Rowe and H. Lee Davis, Jr., for defendants and third-party plaintiff-appellants.

Michael E. Casterline; and Brazil & Burke, P.A., by Meghann K. Burke and W.O. Brazil, III, for third-party defendant-appellees Matthew Brackett and Mountain Home Fire & Rescue Department, Inc.

PER CURIAM.

AFFIRMED.

STATE v. BARNETT

[368 N.C. 710 (2016)]

STATE OF NORTH CAROLINA
v.
KEITH ANTONIO BARNETT

No. 65PA15

Filed 18 March 2016

Sexual Offenders—registration—failure to notify of new address after release from incarceration

The Court of Appeals erred by vacating defendant's sex offender registration conviction arising from a 1997 felony conviction for taking indecent liberties with a child. Although defendant had last registered with the Gaston County Sheriff's Office, he failed to report in person or provide written notice of the fact that his address had changed from the facility or institution in which he had been incarcerated to his new residence following his release from custody no later than the third business day after the change as required by N.C.G.S. § 14-208.9(a).

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 327 (2015), vacating, in part, a judgment entered on 10 December 2013 by Judge F. Donald Bridges in Superior Court, Gaston County. Heard in the Supreme Court on 16 November 2015.

Roy Cooper, Attorney General, by J. Joy Strickland and William P. Hart, Jr., Assistant Attorneys General, for the State-appellant.

Guy J. Loranger for defendant-appellee.

ERVIN, Justice.

Defendant Keith Antonio Barnett was convicted of violating the sex offender registration laws and resisting, delaying, and obstructing a public officer. A unanimous panel of the Court of Appeals vacated defendant's sex offender registration conviction. We now reverse that decision of the Court of Appeals.

Defendant is required to register as a sex offender pursuant to the North Carolina Sex Offender and Public Protection Registration

Program because of a 1997 felony conviction for taking indecent liberties with a child. On 6 January 2010, defendant pleaded guilty to and was convicted of failing to register as a sex offender in October 2009. On 15 February 2010, defendant completed the initial registration process with the Gaston County Sheriff's Office, at which point defendant was required to report his physical address and to review "notice of duty to register" documentation. During the initial registration process, defendant reported that he resided at 554 South Boyd Street in Gastonia.

On 17 August 2011, a jury found defendant guilty of a second sex offender registration offense. Based upon that conviction, defendant was sentenced to an active term of twenty-eight to thirty-four months imprisonment. On 2 October 2012, the Court of Appeals filed an opinion vacating defendant's 17 August 2011 conviction based upon a determination that the indictment that had been returned against him in that case was fatally defective. *State v. Barnett*, 223 N.C. App. 65, 72, 733 S.E.2d 95, 100 (2012). On 14 November 2012, the North Carolina Division of Adult Correction released defendant from its custody in accordance with the Court of Appeals' decision.

In early February 2013, Deputy Luther Hester of the Gaston County Sheriff's Office received a telephone call concerning defendant. Upon receiving the information provided by the caller, Deputy Hester researched defendant's records and determined that, even though defendant was no longer incarcerated, he had not reported his current residence in the aftermath of his release from the custody of the Division of Adult Correction. According to Deputy Hester, the address of a registered sex offender is changed to the location of any facility or institution at which the offender in question is incarcerated, with the offender being required to update his address information upon release.

On 6 February 2013, Deputy Hester, accompanied by two other deputies, went to 332 North Mountain Street in Gastonia, which was the address at which defendant was suspected of residing. As the deputies arrived, they observed defendant, who had been standing in the front yard, run into the house. After presenting himself at the front door of the residence and speaking with a woman who identified herself as defendant's mother, Deputy Hester was allowed to enter the house in order to look for defendant.

When Deputy Hester located defendant on the back porch of the residence and informed defendant that he was being placed under arrest for failing to provide notice that he had changed his address, defendant stated that he was not going back to jail and stood "in a competitive

manner with his fists up in the air." After defendant refused to submit himself to arrest after repeated demands had been made that he lower his hands, Deputy Hester used a Taser to subdue defendant, handcuffed him, and placed him under arrest.

On 6 February 2013, warrants for arrest charging defendant with failing to notify the Gaston County Sheriff's Office of his address within three business days after having changed his address and with resisting, delaying, and obstructing a public officer were issued. On 18 February 2013, a Gaston County grand jury returned bills of indictment charging defendant with failing to notify the Gaston County Sheriff's Office of his address within three business days after having changed his address and resisting, delaying, and obstructing a public officer. The charges against defendant came on for trial before the trial court and a jury at the 9 December 2013 criminal session of the Superior Court, Gaston County. At the appropriate time, defendant unsuccessfully moved to dismiss the sex offender registration charge for insufficiency of the evidence. After hearing the evidence, the arguments of counsel, and the trial court's instructions, the jury found defendant guilty as charged. In light of the jury's verdict, the trial court consolidated defendant's convictions for judgment and entered a judgment sentencing defendant to a term of twenty-five to thirty-nine months imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the trial court had erred by denying his motion to dismiss the sex offender registration charge for insufficiency of the evidence on the grounds that the record evidence did not tend to show defendant's guilt of the offense charged in the indictment and that there was a fatal variance between the charge alleged in the indictment and the evidence adduced at trial. *State v. Barnett*, ___ N.C. App. ___, ___, 768 S.E.2d 327, 329 (2015).[1] A unanimous panel of the Court of Appeals agreed with defendant's contention. After noting that the indictment returned against defendant alleged that he had violated N.C.G.S. § 14-208.11 by "fail[ing] to register as a sexual offender, in that the defendant did fail to notify the Gaston County Sheriff's Office, within three business days of his change of address," *id.* at ___, 768 S.E.2d at 330, the court determined that the State had proceeded against defendant at trial

1. In his brief before the Court of Appeals, defendant also argued that, in the event that his trial counsel had failed to advance a variance-based argument at trial, his failure to do so constituted ineffective assistance of counsel. However, given that the Court of Appeals vacated defendant's failure to register conviction for insufficiency of the evidence, the Court of Appeals never reached his ineffective assistance claim.

on the theory that he had failed to register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution" as required by N.C.G.S. § 14-208.7(a), *id.* at ___, 768 S.E.2d at 331. In view of the fact that "defendant [had been] indicted on an allegation that he failed to register as a sex offender in that he failed to notify the Gaston County Sheriff's Office within three business days of his change of address in accordance with the requirements of N.C. Gen. Stat. § 14-208.9," the Court of Appeals held that "the trial court [had] erred in denying defendant's motion to dismiss." *Id.* at ___, 768 S.E.2d at 332.

The extent to which the evidence presented at trial suffices to support the denial of a motion to dismiss for insufficiency of the evidence is a question of law reviewed de novo by the appellate court. *See, e.g.*, *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). As this Court has previously stated:

> When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime.

State v. Blake, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citations omitted). "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). "A motion to dismiss is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged." *Id.* at 445, 183 S.E.2d at 646. However, "[i]n order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to '[t]he gist of the offense.' " *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (quoting *Waddell*, 279 N.C. at 445, 183 S.E.2d at 646).

N.C.G.S. § 14-208.11(a)(2) provides that a person required to register as a sex offender in accordance with Article 27A of Chapter 14 of the General Statutes is guilty of a Class F felony if he willfully "[f]ails to notify the last registering sheriff of a change of address as required by this Article." N.C.G.S. § 14-208.11(a)(2) (2015). According to N.C.G.S. § 14-208.9(a), "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." *Id.* § 14-208.9(a) (2015). "If [a] person [required to register] is a current resident of North Carolina, the person shall register . . . [w]ithin three business days of release from a penal institution or arrival in a county to live outside a penal institution." *Id.* § 14-208.7(a)(1) (2015).

In the opinion that we filed today in *State v. Crockett*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Mar. 18, 2016) (No. 29PA15), this Court clarified that N.C.G.S. § 14-208.7(a) applies solely to a sex offender's initial registration. N.C.G.S. § 14-208.9(a), on the other hand, applies to instances in which an individual previously required to register following his release from a penal institution or upon his conviction in the event that no active term of imprisonment was imposed as required by N.C.G.S. § 14-208.7(a) changes his address from the address on file with the sheriff of the county in which the sex offender last registered to a new address. In other words, contrary to the result reached in the Court of Appeals, we hold that there was no variance between the offense with which defendant was charged and the offense that defendant was convicted of committing. As a result, once defendant had initially registered as a sex offender on 15 February 2010 in accordance with N.C.G.S. § 14-208.7(a), any subsequent failure to notify the appropriate law enforcement agency that he had changed his address would constitute a violation of N.C.G.S. § 14-208.9(a) and subject him to prosecution under section N.C.G.S. § 14-208.11(a)(2) even if his change of address resulted from a release from incarceration.

At trial, Deputy Hester testified that, when a registered sex offender is incarcerated after the date upon which he initially registers, his address for sex offender registration purposes changes to the facility or institution in which he is housed. As long as the registrant remains incarcerated, his address is that of the facility or institution in which he is confined. *See State v. Abshire*, 363 N.C. 322, 331, 677 S.E.2d 444, 451 (2009) (concluding that "a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary"), *superseded on other grounds by*

statute, An Act to Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, sec. 8(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070-71. Although the State did not elicit any evidence tending to show the location at which defendant had been incarcerated prior to his release from the custody of the Division of Adult Correction on 14 November 2012, his address necessarily changed when he was released from incarceration. As a result, in accordance with N.C.G.S. § 14-208.9(a), defendant was required to "report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." Although defendant had last registered with the Gaston County Sheriff's Office, he failed to report in person or provide written notice of the fact that his address had changed from the facility or institution in which he had been incarcerated to his new residence following his release from the custody of the Division of Adult Correction on 14 November 2012. In other words, given that the evidence adduced at trial tended to show that defendant was a "person required . . . to register" as a result of his 1997 conviction for taking indecent liberties with a child, N.C.G.S. § 14-208.11(a), that he had changed his address at the time that he was released from the custody of the Division of Adult Correction on 14 November 2012,[2] and that defendant "[f]ailed to notify the last registering sheriff of a change of address," *id.* § 14-208.11(a)(2), "not later than the third business day after the change," *id.* § 14-208.9(a), the State presented evidence tending to show the existence of each element of the offense with which defendant had been charged. *See Abshire*, 363 N.C. at 328, 677 S.E.2d at 449 (delineating the elements of the crime of failing to notify the appropriate sheriff of a sex offender's change of address under N.C.G.S. § 14-208.11(a)). Because the trial court properly denied defendant's dismissal motion,[3] the Court of Appeals erred by

2. As an aside, defendant asserts in his new brief that the record was devoid of any evidence tending to show that he remained a North Carolina resident. However, the fact that defendant had been a resident of Gaston County for some time, had reported having an address in Gaston County, and was apprehended in Gaston County, coupled with the absence of any evidence to the effect that he had moved out of state, sufficed to permit a jury determination that he had not established a place of abode out of state following his release from the custody of the Division of Adult Correction on 14 November 2012.

3. In his new brief, defendant also argues that, as previously stated by this Court in *State v. Williams*, "[t]he failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amounted to a dismissal of that charge and all lesser included offenses." *Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986). We do not, however, believe that the principle upon which defendant relies has any application to this case given that, in light of the facts revealed by the present record, the trial court's instructions accurately stated the determinations that the jury would need to make in order to convict defendant of the offense that he had been charged with committing.

determining that the record did not contain sufficient evidence to permit a determination that defendant committed the offense of failure to register. As a result, for all of these reasons, the Court of Appeals' decision vacating defendant's conviction for failure to register is reversed.[4]

REVERSED.

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

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4. As an alternative to his substantive challenge to the denial of his dismissal motion, defendant argued before the Court of Appeals that, in the event that defendant's trial counsel had not properly preserved his fatal variance claim, any such failure on the part of defendant's trial counsel deprived defendant of his right to the effective assistance of counsel. However, our decision to address and reject defendant's fatal variance claim on the merits renders his ineffective assistance of counsel claim moot.

STATE OF NORTH CAROLINA
v.
DARRETT CROCKETT

No. 29PA15

Filed 18 March 2016

1. Sexual Offenders—registration—after initial compliance and subsequent incarceration

On discretionary review of the Court of Appeals' decision affirming defendant's convictions for failure to register as a sex offender, the Supreme Court held that N.C.G.S. § 14-208.9, the "change of address" statute—not section 14-208.7, the "registration" statute—governs in situations in which a sex offender who has already complied with the initial registration requirements is later incarcerated and then released.

2. Sexual Offenders—failure to register—after initial compliance and subsequent incarceration

The trial court did not err by denying defendant's motion to dismiss one count of failure to register as a sex offender under N.C.G.S. § 14-208.11. The State's evidence showed that defendant had been incarcerated, had previously filled out his registration paperwork, and, following his release, did not provide in-person or written notice that he had changed his address to the Urban Ministry Center.

3. Sexual Offenders—failure to register—after initial compliance and subsequent incarceration—out-of-state residence

The trial court did not err by denying defendant's motion to dismiss one count of failure to register as a sex offender under N.C.G.S. § 14-208.11. The State's evidence showed that defendant had been incarcerated, had signed a registration form upon his release, and had failed to provide the required notification when he later moved to South Carolina.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 78 (2014), finding no error after appeal from a judgment entered on 3 July 2013 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Supreme Court on 2 September 2015.

Roy Cooper, Attorney General, by Lauren Tally Earnhardt, Assistant Attorney General, for the State.

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

HUDSON, Justice.

Defendant Darrett Crockett was convicted on 8 October 1997 of an offense for which he was required to register as a sex offender and comply with the requirements of the North Carolina Sex Offender and Public Protection Registration Program. On 28 November 2011, defendant was indicted on one count of failure to register as a sex offender under N.C.G.S. § 14-208.11; this indictment referred to the period between 24 January 2011 and 6 November 2011. On 12 March 2012, defendant was indicted on a second count of failure to register as a sex offender; this second indictment referred to the period between 1 December 2011 and 23 February 2012. On appeal to this Court, defendant argues that the trial court erred by denying his motion to dismiss both charges because, he contends, the State failed to present sufficient evidence showing that he committed the offenses as alleged in the indictments. Because we conclude that the State offered sufficient evidence of each offense as alleged in the indictments, we affirm the decision of the Court of Appeals.

I. FACTUAL AND PROCEDURAL HISTORY

On 8 October 1997, defendant was convicted of an offense for which he was required to register as a sex offender under N.C.G.S. § 14-208.7(a). He signed the initial registration paperwork at the Mecklenburg County Sheriff's Department on 12 April 1999, and for the next several years, defendant reported changes of address to the Sheriff's Department in compliance with the statutory registration requirements.

On 27 June 2007, defendant provided a written notice to the Department changing his address to 945 North College Street, the address of the Urban Ministry Center, a nonprofit organization that provides services to the homeless. Urban Ministries is open during most business hours, from 8:30 a.m. until 4:00 p.m. on weekdays, and from 9:00 a.m. until 12:30 p.m. on weekends. It provides a range of services and amenities necessary for everyday life, such as food, shower facilities and restrooms, laundry and changing rooms, telephones, transportation, mail services, and counseling; however, no one lives at the facility, it has no beds, and no one is allowed to spend the night.

From 15 April 2009 until 20 January 2011, defendant was incarcerated in the Mecklenburg County Jail. Upon his release, defendant declined to sign the "Notice of Duty to Register" form or to provide

an address on the form. Similarly, after his release, defendant did not appear in person at the Mecklenburg County Sheriff's Department, nor did he provide written notice to the Sheriff regarding where he would live. Rather, the only record the Department received regarding defendant's location upon release was an e-mail sent by the jail stating that he would live at Urban Ministries.[1]

On 7 November 2011, defendant was arrested again on an unrelated charge and held at the Mecklenburg County Jail for approximately ten days. Upon his release on 17 November 2011, defendant signed a "Notice of Duty to Register" form, on which he again listed 945 North College Street as his address.

Several months later, defendant mailed a letter to the Honorable Yvonne Evans, Resident Superior Court Judge at the Superior Court in Mecklenburg County. This letter, which was signed by defendant, stated in part that "[m]y cousin Gerald Dixon . . . let me live in one of his houses . . . on Orr Dr. in Rock Hill. S.C. where my dog was taken from." The envelope in which the letter was sent indicated that defendant had mailed it on or about 15 February 2012 from the York County Detention Center in South Carolina. But defendant never gave the Mecklenburg County Sheriff's Department any written notice indicating that he was considering moving, or had moved, from Urban Ministries to South Carolina.

Defendant was indicted on 28 November 2011 for failure to register as a sex offender under N.C.G.S. § 14-208.11; this indictment referred to

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1. According to the trial transcript, the following exchange occurred between the prosecuting attorney and Laura Stutts, an employee with the Mecklenburg County Sheriff's Office who kept track of sex offender records:

> Q. Anything in your records indicate where he was living at that point, where he was residing once he left jail?
>
> A. The system has that we received an e-mail from [jail] release stating that he was going to live at 945 North College Street, but he didn't list it on the paper.
>
> . . . .
>
> Q. If you're aware, when's the next time the Mecklenburg County Sheriff's Office had any contact with Mr. Crockett?
>
> A. November 8 -- or November 7, 2011.
>
> Q. Do you know what kind of contact that was?
>
> A. When he was arrested.

the period between 24 January and 6 November 2011. On 12 March 2012, defendant was indicted on a second count of failure to register under § 14-208.11; this indictment referred to the period between 1 December 2011 and 23 February 2012. In July 2013, defendant was tried in the Superior Court in Mecklenburg County, and the jury found him guilty of both counts on 3 July 2013. Defendant appealed to the Court of Appeals, and, in a unanimous opinion, the Court of Appeals affirmed defendant's convictions. On 10 June 2015, we allowed defendant's petition for discretionary review.

II. ANALYSIS

The sole issue presented in this appeal is whether the trial court properly denied defendant's motion to dismiss, which argued that that the State had presented insufficient evidence showing that defendant had committed the offenses as alleged in the indictments. The standard a North Carolina trial court applies to a motion to dismiss is well settled:

> "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." In deciding whether substantial evidence exists: "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion."

State v. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 842-43 (2011) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002), and *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo. *E.g.*, *State v. Cox*, 367 N.C. 147, 150-51, 749 S.E.2d 271, 274-75 (2013) (citations omitted). Because defendant challenges both of his convictions for failure to register as a sex offender under N.C.G.S. § 14-208.11, we will address each in turn.

A. Indictment and Conviction for the Period from 24 January 2011 through 6 November 2011

[1] Defendant was indicted for the first count of failure to register under N.C.G.S. § 14-208.11 on 28 November 2011. Subsection 14-208.11(a) lists several distinct offenses, each of which applies to a different fact pattern, and each of which refers explicitly or implicitly to other provisions within Article 27A of Chapter 14 of the North Carolina General Statutes, governing sex offender registration programs. *See* N.C.G.S. § 14-208.11 (a) (1) – (10). Of the provisions to which section 14-208.11 refers, section 14-208.9 requires an offender who changes address to provide written notice within three business days after the change of address:

> If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered.

Id. § 14-208.9(a) (2015). Similarly, section 14-208.7 requires an offender who is released from a penal institution to register within three business days after his release:

> A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. . . . If the person is a current resident of North Carolina, the person shall register . . . [w]ithin three business days of release from a penal institution or arrival in a county to live outside a penal institution . . . . ”

Id. § 14-208.7(a)(1) (2015). However, despite its seemingly plain text, section 14-208.7 appears in context to refer only to *initial* registration requirements. Not only does subsection (a) of that statute apply to offenders who first move to North Carolina from other states, *see id.* § 14-208.7(a) (2015) (“If the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first.”), and to those who are convicted but receive no active term of imprisonment, *see id.* § 14-208.7(a)(2) (“If the person is a current resident of North Carolina, the person shall register . . . [i]mmediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.”), it also refers specifically to “initial county registration,” *id.* § 14-208.7(a)

("Registration shall be maintained for a period of at least 30 years following the date of *initial county registration* . . . ." (emphasis added)). In that same vein, subsection (b) specifies what information a sheriff must collect on registration forms, *see id.* § 14-208.7(b) (2015), and subsection (c) directs him to retain the originals, *see id.* § 14-208.7(c) (2015)—all of which suggests that section 14-208.7 applies only to a sex offender's initial registration. As a result of the limited application of section 14-208.7, neither section 14-208.7 nor section 14-208.9 clearly and specifically governs the situation in which a registered offender who has already been released from confinement for the offense for which he became required to register is later reincarcerated and rereleased.

In light of this ambiguity, different panels of the Court of Appeals have reached different conclusions regarding whether this situation is controlled by section 14-208.7 or by section 14-208.9. Here, for example, the Court of Appeals applied section 14-208.9, the "change of address" statute. *See State v. Crockett*, ___ N.C. App. ___, ___, ___ n.4, 767 S.E.2d 78, 83-84, 84 n.4 (2014) (rejecting defendant's argument that section 14-208.7 applies and applying section 14-208.9 instead). In at least one other case, however, the Court of Appeals concluded that section 14-208.7 applies. *See State v. Barnett*, ___ N.C. App. ___, ___, 768 S.E.2d 327, 331-32 (2015) ("We disagree with the State's interpretation of the statutes in Chapter 14, Article 27A, and hold the State errs in combining the requirements of N.C. Gen. Stat. § 14-208.9(a) governing changes in address with the requirements of N.C. Gen. Stat. § 14-208.7(a) governing registration upon release from a penal institution. It is clear from the language of N.C. Gen. Stat. § 14-208.7(a) that it governs registration upon release from penal institutions."), *rev'd*, ___ N.C. ___, ___ S.E.2d ___ (Mar. 18, 2016) (No. 65PA15).

We now hold that N.C.G.S. § 14-208.9, the "change of address" statute, and not section 14-208.7, the "registration" statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released. While the statutory provisions themselves may be ambiguous, this decision accords with our decision in *State v. Abshire*, in which we offered a functional definition of the statutory term "address" in the absence of a definition provided by the legislature. *See* 363 N.C. 322, 329-32, 677 S.E.2d 444, 449-51 (2009), *superseded on other grounds by statut*e, An Act to Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, Sec. 8(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070. Specifically, we opined:

> We conclude that the legislature intended the definition of address under the registration program to carry an ordinary meaning of describing or indicating the location where someone lives. As such, the word indicates what this Court has considered to be a person's residence. . . . . Thus, a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. Notably, a person's residence is distinguishable from a person's domicile. Domicile is a legal term of art that "denotes one's permanent, established home," whereas a person's residence may be only a "temporary, although actual," "place of abode."
>
> . . . .
>
> . . . [M]ere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address. Adding any further nuance to the definition is unnecessary at this time.

Id. at 330-32, 677 S.E.2d at 450-51 (quoting *Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972), *modified*, *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979)).[2] Our holding today regarding the applicability of N.C.G.S. § 14-208.9 accords with this definition and recognizes that the facility in which a registered sex offender is confined after conviction functionally serves as that offender's address. This interpretation is also consistent with N.C.G.S. § 14-208.5, which indicates that the primary purpose of Article 27A is

> to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of

2. We note that this portion of *Abshire* may be read to suggest that whether a particular location can qualify as an offender's "address" is a question of fact for the jury. But because "address" is a statutory term, the question of whether a particular place could qualify as an "address" is a question of law to be resolved by a judge, not a jury. The factual question of whether a registered offender changed his address, however, remains the province of the jury.

> sex offenses or certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize access to necessary and relevant information about those offenders to others . . . .

N.C.G.S. § 14-208.5 (2015).

[2] We now turn to the first charge against defendant. As noted, defendant was first indicted for failure to register on 28 November 2011; that indictment states:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about and between the 24th day of January, 2011 and the 6th day of November, 2011, in Mecklenburg County, Darrett Crockett did unlawfully, willfully and feloniously as a person required by Article 27A of Chapter 14 of the General Statutes of North Carolina to register as a sexual offender, knowingly and with the intent to violate the provisions of said Article, fail to register as a sexual offender in that said defendant, a Mecklenburg County, North Carolina resident, changed his address and failed to provide written notice of his new address no later than three (3) days after the change to the Sheriff's Office in the county with whom he had last registered.

Having resolved the central statutory issue, the key question becomes whether the State provided sufficient evidence tending to show that defendant willfully failed to register as a sex offender as alleged in the indictment.

We conclude that the State did so. The State's evidence tended to show that defendant was incarcerated in the Mecklenburg County Jail from 15 April 2009 until 20 January 2011; that he had previously filled out registration paperwork, which signals that he was aware of his duty to register (although he refused to sign the required form on this occasion); that following his release, he did not provide in-person or written notice that he would reside at Urban Ministries; and that the only written notice the Sheriff's Department received regarding defendant's post-release residence was via an e-mail sent by the jail. Taken in the light most favorable to the State, this evidence was sufficient for the jury to conclude that defendant had willfully failed to provide written notice that he had changed his address from the Mecklenburg County Jail to

the Urban Ministry Center. *See also Abshire*, 363 N.C. at 328, 677 S.E.2d at 449 (explaining that the State must prove three essential elements to establish guilt of failure to register: (1) that the defendant was a "person required . . . to register," (2) that the defendant " 'change[d]' his or her 'address,' " and (3) that the defendant willfully "fail[ed] to notify the last registering sheriff of [the] change of address within the requisite time period" (quoting N.C.G.S. § § 14-208.11(a), -208(11)(a)(2) and -208.9(a) (2005) respectively)). Accordingly, we affirm defendant's first conviction for failure to register as a sex offender.

B. Indictment and Conviction for the Period from 1 December 2011 through 23 February 2012

[3] Defendant was indicted on 12 March 2012 for the second count of failure to register; that indictment reads:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about and between the 1st day of December, 2011 and the 23rd day of February, 2012, in Mecklenburg County, Darrett Damon Crockett did unlawfully, willfully and feloniously as a person required by Article 27A of Chapter 14 of the General Statutes of North Carolina to register as a sexual offender, knowingly and with the intent to violate the provisions of said Article, fail to register as a sexual offender in that said defendant, a Mecklenburg County, North Carolina resident, changed his address and failed to provide written notice of his new address no later than three (3) days after the change to the Sheriff's Office in the county with whom he had last registered.

Related to this indictment, the State's evidence tended to show that, upon his release from jail on 17 November 2011, defendant signed a "Notice of Duty to Register" form listing the address at which he would reside as "945 N. College St.," the address of Urban Ministries, and that he again provided that address on 17 January 2012. The State's evidence also tended to show, and defendant appears to concede, that he wrote a letter to Superior Court Judge Yvonne Evans, postmarked 15 February 2012, in which he stated that his cousin let him live in a house in Rock Hill, South Carolina. Finally, the State also provided evidence regarding defendant's history of updating the Sheriff's Department regarding his residence, but none of that evidence indicated that defendant had given written notice that he had moved, or planned to move, to South Carolina in 2012. Taken in the light most favorable to the State, this was sufficient

for the jury to find that defendant had willfully changed his address from Urban Ministries to Rock Hill, South Carolina without providing written notice to the Sheriff's Department.

Defendant argues, despite this evidence, that dismissal of this charge was required because the evidence presented at trial did not conform to the allegations in the indictment. Specifically, defendant contends that this indictment alleges that he violated N.C.G.S. § 14-208.9(a) by "fail[ing] to provide written notice" of his change of address within three days *after* the move; however, defendant argues, the evidence showed that he moved out of state, to South Carolina—and that situation, defendant contends, is governed by N.C.G.S. § 14-208.9(b), which requires a registered offender to notify the Sheriff's Department three business days *before* the move. *See* N.C.G.S. § 208.9(b) (2015) ("If a person required to register intends to move to another state, the person shall report in person to the sheriff of the county of current residence *at least three business days before the date the person intends to leave this State* to establish residence in another state or jurisdiction." (emphasis added)). To hold otherwise and apply section 14-208.9(a) to defendant's out-of-state move, defendant suggests, would lead to the absurd result of requiring an offender who has already moved out of state—even to a distant state—to return to North Carolina to report in person and provide written notice of the address change.

Defendant's argument is unavailing. The plain text of section 14-208.9(a) states in full:

> If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address. Upon receipt of the notice, the sheriff shall immediately forward this information to the Department of Public Safety. When the Department of Public Safety receives notice from a sheriff that a person required to register is moving to another county in the State, the Department of Public Safety shall inform the sheriff of the new county of the person's new residence.

Id. § 14-208.9(a). Though the text of this section is, as defendant notes, focused on in-state changes of address, there is nothing in the plain text limiting its operation or effect to in-state address changes, or precluding its application to out-of-state address changes. And there is no need to depart from the plain text because giving effect to that plain text is not likely to lead to absurd results: When a registered offender plans to move out of state, appearing in person at the Sheriff's Department and providing written notification three days *before* he intends to leave, as required by subsection 14-208.9(b), would appear to satisfy the requirement in subsection 14-208.9(a) that he appear in person and provide written notice *not later than* three business days *after* the address change. *Compare id.* § 14-208.9(a) *with id.* § 14-208.9(b). Therefore, the scenario defendant envisions, in which a registered offender moves out of state and is required by law to return to North Carolina to notify the Sheriff's Department with which he last registered of that move, will likely occur only when the registered offender moves out of state without having at least a few days of advance notice. Because there is no reason to believe that such situations will be common, we see no need to depart from the plain text of the statute. Accordingly, we affirm defendant's second conviction for failure to register as a sex offender.

III. CONCLUSION

In conclusion, we hold that the State presented sufficient evidence which, when taken in the light most favorable to the State, would allow a jury to convict defendant of the offenses as alleged in the indictments. On this basis, we affirm the decision of the Court of Appeals.[3]

AFFIRMED.

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3. Because we affirm the Court of Appeals on this basis, we do not address its alternate basis for affirming defendant's convictions, namely, its conclusion that the "Urban Ministry is not a valid address at which Defendant could register in compliance with the sex offender registration statute because Defendant could not *live* there." *Crockett*, 767 S.E.2d at 84 (emphasis in original).

STATE OF NORTH CAROLINA
v.
RICHARD DARNELL JAMES

No. 281A15

Filed 18 March 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 774 S.E.2d 871 (2015), finding no error after appeal from a judgment entered on 26 August 2014 by Judge Claire V. Hill in Superior Court, Johnston County, and dismissing defendant's appeal in part. Heard in the Supreme Court on 7 December 2015.

Roy Cooper, Attorney General, by Mary Carla Babb, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

PER CURIAM.

For the reasons stated in *State v. Williams*, ___ N.C. ___, ___ S.E.2d ___ (2016) (No. 333PA14), the decision of the Court of Appeals is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
BRENT TYLER MILLER

No. 199PA15

Filed 18 March 2016

1. Appeal and Error—corrected Court of Appeals decision—reliance on original version—review by Supreme Court

The Supreme Court had authority under N.C. R. App. P. 16(a) to consider an issue raised by the decision of the Court of Appeals where neither party knew of the existence of a "corrected" version of the Court of Appeals' decision until two weeks before oral arguments in the Supreme Court. The differences between the two opinions that the Court of Appeals filed in this case went beyond changing the identity of the cases upon which the Court of Appeals relied in determining that the State's appeal should be dismissed to significantly changing the basis for the Court of Appeals' decision to dismiss the State's appeal.

2. Judgments—entry of order—absence of written order

The Court of Appeals erred by dismissing the State's appeal from the trial court's order in an intoxicated driving case on the theory that the order had never been properly entered. The Court of Appeals had noted that the record on appeal did not include a written copy of the order and held that it lacked jurisdiction in the absence of a written order. However, a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session. The order from which the State noted its appeal was, in fact, entered in accordance with *State v. Oates*, 366 N.C. 264 (2012).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 574 (2015), dismissing the State's appeal from an oral order entered on 2 June 2014 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Supreme Court on 15 February 2016.

Roy Cooper, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin and Aisha J. Dennis, for defendant-appellee.

ERVIN, Justice.

This case requires us to determine whether the Court of Appeals properly dismissed the State's appeal from a determination made by the trial court that the decision of the district court to allow defendant's pretrial suppression motion, which was predicated on the theory that a law enforcement officer had stopped defendant's vehicle in the absence of the required reasonable articulable suspicion, and to dismiss a driving while impaired charge and driving after consuming alcohol while less than twenty-one years of age charge on the grounds that the order from which the State purported to appeal had not been properly entered. For the reasons set forth below, we conclude that the trial court did, in fact, properly enter an order affirming the district court's decision.

At approximately 1:40 a.m. on 26 October 2012, Officer J.F. Jackson of the Charlotte-Mecklenburg Police Department stopped the vehicle that defendant was driving because defendant had taken evasive action while approaching a driving while impaired checkpoint and cited defendant for driving while impaired and driving after consuming alcohol while less than twenty-one years of age. On 3 June 2013, defendant made an oral motion to suppress evidence obtained as a result of the stop and to dismiss the charges that had been lodged against him on the grounds that the stop of defendant's vehicle was not supported by the required reasonable articulable suspicion. After orally indicating that the motion would be allowed on 7 June 2013, Judge Kimberly Best-Staton filed written findings and conclusions in support of a preliminary indication that defendant's motions should be allowed on 12 July 2013.

On 18 July 2013, the State filed a written notice of appeal from Judge Best-Staton's preliminary indication to the Superior Court, Mecklenburg County, that included a request for a de novo hearing pursuant to N.C.G.S. § 20-38.7. On 25 October 2013, defendant filed a motion seeking the dismissal of the State's appeal on the grounds that the State had only "made a generalized objection" to Judge Best-Staton's findings of fact; that the State's notice of appeal constituted "a blanket 'catch all' exception" that was "not made in good faith"; that "there [was] no way the State . . . [could] have an objection [to] every [f]inding[ ] of [f]act made by the District Court"; and that "the State's primary purpose" for noting an appeal was to argue that " 'the District Court's decision to grant . . . [d]efendant's [m]otion to [s]uppress was contrary to law.' "

The trial court heard defendant's dismissal motion at the 12 November 2013 session of the Superior Court, Mecklenburg County. On 15 November 2013, the trial court entered an order denying the State's request for a de novo hearing because "the State could not articulate in the written [n]otice of [a]ppeal [the] specific" findings of fact or conclusions of law to which the State was objecting; determining that Judge Best-Staton's preliminary indication "was not [an] abuse of discretion" and that her findings and conclusions "require[d] that [the superior court] affirm the decision of the District Court"; and "affirm[ing] the suppression of both [criminal] charges" and remanding this case "for entry of a suppression order by the District Court."

On 16 January 2014, Judge Best-Staton entered a "final order" allowing defendant's "pre-trial motion to suppress for lack of reasonable suspicion" and dismissing the charges that had been lodged against defendant. On the same date, the State noted an appeal from Judge Best-Staton's order to the Superior Court, Mecklenburg County, pursuant to N.C.G.S. § 20-38.7 and N.C.G.S. § 15A-1432, in which the State contended that Judge Best-Staton's final order "was contrary to the law" and that the State was "appeal[ing] the final ruling to Superior Court." The State's appeal from Judge Best-Staton's final order came on for hearing before the court at the 2 June 2014 criminal session of the Superior Court, Mecklenburg County. At that time, the State informed the court that, while the State was expecting that the court would uphold Judge Best-Staton's order, it had noted an appeal from that order on the grounds that, in accordance with N.C.G.S. § 15A-1432(e), the State could not seek review by the Court of Appeals unless the superior court affirmed Judge Best-Staton's final order. At the conclusion of the hearing, the court orally affirmed Judge Best-Staton's order, at which point the State orally noted an appeal to the Court of Appeals from the superior court's order upon making the required assertion that the appeal was not being taken for the purpose of delay and filed a written notice of appeal and certification, "in accord with the provisions of N.C.[G.S.] § 15A-1432(e), that the instant appeal [was] not [being] taken for the purpose of delay."

In challenging the superior court's order before the Court of Appeals, the State argued that the superior court had erred by denying the State's request for a de novo hearing as requested in its notice of appeal from Judge Best-Staton's preliminary indication. In response, defendant argued that the State was not entitled to de novo review of Judge Best-Staton's preliminary indication given its failure to comply with the requirements of N.C.G.S. § 15A-1432(b) as construed in *State v. Palmer*, 197 N.C. App. 201, 676 S.E.2d 559 (2009), *disc. rev. denied*,

363 N.C. 810, 692 S.E.2d 394 (2010), and that the State had waived its right to appellate review by requesting the trial court to affirm Judge Best-Staton's final order, assertions with which the State disagreed in its reply brief. In addition, defendant filed a motion seeking the dismissal of the State's appeal on the grounds that the State's written notice of appeal (1) failed to designate the trial court's order upholding Judge Best-Staton's preliminary indication as an order which the State sought to challenge on appeal, and (2) cited an incorrect statute as support for the contention that the State had a right to seek appellate review of the challenged decisions. In response, the State noted that the sufficiency of the State's notice is governed by Rule 4 of the North Carolina Rules of Appellate Procedure; that any error in the statutory reference contained in the State's written notice of appeal did not matter given the absence of any specification requirement in the rule provisions governing oral notices of appeal and given that the discussion on the record before the trial court made the identity of the orders that the State sought to challenge on appeal clear; that nothing in Rule 4(b) requires the State to correctly recite the statute which authorizes the State's appeal; and that defendant could not reasonably claim that he was confused or prejudiced by the State's written notice of appeal given that the State had clearly indicated the identity of the orders that it sought to challenge on appeal during the hearing held before the trial court immediately prior to the noting of its appeal. In addition, the State argued that its oral notice of appeal sufficed to support a challenge to the trial court's decision to refuse to review the State's appeal from Judge Best-Staton's preliminary indication on a de novo basis; that the State had "repeatedly" stated its intention to challenge the trial court's refusal to conduct a de novo review of its challenge to Judge Best-Staton's preliminary indication pursuant to the only available statutory provision, which required the State to wait and appeal from the trial court's 2 June 2014 "final order alone"; that the State's notice of appeal should be construed as a request for review of each of the orders that had been entered in this case given that the State had repeatedly objected to the denial of its request for de novo review of Judge Best-Staton's preliminary indication; and that, even if the State was required to make a reference to the order refusing to review the State's challenge to Judge Best-Staton's preliminary indication on a de novo basis in its written notice of appeal, the State had made its intention to challenge that decision on appeal clear to the trial court and to defendant. Finally, in the event that the Court of Appeals deemed the State's notices of appeal to be insufficient to support review of the trial court's refusal to review Judge Best-Staton's preliminary indication on a de novo basis, the State requested the Court of Appeals to issue a

writ of certiorari authorizing review of that decision on the grounds that any deficiencies in the notices of appeal "were inadvertent"; that defendant had always fully understood the nature of the issues that the State sought to present for the Court of Appeals' consideration; and that the State's legal arguments had substantive merit and were ripe for appellate review.

On 19 May 2015, the Court of Appeals filed a unanimous, unpublished opinion dismissing the State's appeal and determining that it would "not [be] appropriate" for the court "to treat the State's purported notice of appeal as a petition to issue the writ of certiorari." *State v. Miller*, No. COA14-1310, slip op. at 7 (N.C. App. May 19, 2015) (unpublished) [*Miller I*]. The Court of Appeals did not base this decision on any arguments advanced in defendant's dismissal motion. Instead, the Court of Appeals noted that the record on appeal did not "include a written copy of the [2 June 2014] order appealed from" and held that, "[i]n the absence of a written order," the court lacked "jurisdiction to hear the State's appeal," *Miller I*, slip op. at 6-7, given that " '[e]ntry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court," *id.* at 6-7 (quoting *State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388 (citations omitted), *cert. denied*, 350 N.C. 312, 535 S.E.2d 35 (1999), and citing *S. Furn. Hdwe., Inc. v. Branch Banking & Tr. Co.*, 136 N.C. App. 695, 702, 526 S.E.2d 197, 201 (2000) (stating that, "[w]hen an oral order is not reduced to writing, it is non-existent" (citing *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388))).

On 21 May 2015, the State filed a motion requesting the Court of Appeals to "withdraw and amend [its] opinion." In support of this request, the State asserted that "defendant neither raised nor argued th[e] basis for dismissal" adopted by the Court of Appeals, so that the State had been deprived of the "opportunity to defend against" that argument, and that the logic underlying the Court of Appeals' decision was inconsistent with numerous decisions from this Court, including *State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012), *State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005), and *State v. Boon*e, 310 N.C. 284, 311 S.E.2d 552 (1984), *abrogated by Oates*, 366 N.C. at 267, 732 S.E.2d at 573-74. In response, defendant asserted that the Court of Appeals had made a correct decision in that the "plain language" of N.C.G.S. § 15A-1432(e) allows the State to seek appellate review only after an order "has been entered by the superior court"; that the Court of Appeals had repeatedly stated that an order had not been entered until it had been reduced to writing, signed by the trial court, and filed with the Clerk of Superior Court; that the opinion in *Oates* "confirmed, rather than undermined,"

the existence of this requirement; and that the Court of Appeals' decision does not conflict with *Oates* or any other decision of this Court. On 8 June 2015, the Court of Appeals entered an order denying the State's motion.

On 24 September 2015, this Court allowed the State's petition for discretionary review. In their new briefs before this Court, the parties debate the issue of whether the Court of Appeals had erred by dismissing the State's appeal on the grounds that the order from which the State had noted its appeal had not been entered by virtue of the fact that it had not been reduced to writing and filed with the Clerk. Approximately two weeks before the date upon which oral argument was scheduled to be held in this case, the Court learned that the version of the Court of Appeals' opinion on the basis of which the State had sought discretionary review, which was identical to the version contained in the LexisNexis and Westlaw on-line reporting services, differed from the version of the Court of Appeals' decision contained in the North Carolina appellate courts on-line database. On 4 February 2016, a representative of the authoring judge sent an e-mail to the attorneys for the parties, representatives from LexisNexis and Westlaw, and representatives of the offices of the Clerk of the Court of Appeals and this Court noting the fact that differing versions of the Court of Appeals' opinion in this case had been disseminated and stating that:

> After this Court's opinion was filed on 19 May 2015, the State filed a Motion to Withdraw and Amend the Opinion prior to the Issuance of the Mandate. This Court denied the Motion to Withdraw the Opinion but corrected the opinion to remove the references to State v. Gary and Southern Furn. Hdwe, Inc. v. Branch Banking & Trust on p.7. The correct opinion refers to State v. Oates and State v. Hadden on p. 7. The corrected opinion . . . was uploaded prior to the issuance of the mandate. At the time of the correction, we were advised that re-uploading . . . would [be] all we would need to do.

As we understand the record, neither party knew of the existence of the "corrected" version of the Court of Appeals' decision prior to receiving this communication. On the same date, defendant filed a motion seeking to have the record on appeal supplemented with a correct copy of the Court of Appeals' decision and suggesting that discretionary review had been improvidently allowed on the theory that the State's central argument had been that the Court of Appeals had erred by relying on *Gary* and *Southern Furniture* and that the references to these two decisions

had been removed from the Court of Appeals' opinion. In response, the State argued that "[t]he opinion's substance — its holding and result — is the exact same" and "remains erroneous for the very same reasons"; that the corrected opinion conflicts with numerous decisions of this Court, including *Oates*, and involves significant legal principles; and that any reliance upon *State v. Hadden* would be misplaced because *Hadden* was, in reality, a civil rather than a criminal case and because *Hadden* relied on *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388 for the premise that an order not reduced to writing "is a nullity," *Hadden*, 226 N.C. App. 330, 332-33, 741 S.E.2d 466, 468 (2013). In addition, the State pointed out that the Court had the correct version of the Court of Appeals' opinion at the time that it granted discretionary review in this case. On 5 February 2016, this Court entered an order dismissing defendant's motion to supplement the record as moot and taking no action on defendant's request that this Court dismiss the State's discretionary review petition as improvidently allowed.

[1] The differences between the two opinions that the Court of Appeals filed in this case go beyond changes in the identity of the cases upon which the Court of Appeals relied in determining that the State's appeal should be dismissed. Instead, the corrected opinion significantly changes the basis for the Court of Appeals' decision to dismiss the State's appeal. *Compare Miller I*, slip op. at 6-7, *with State v. Miller*, No. COA14-1310, slip op. at 7-8 (N.C. App. May 19, 2015, mandate issued June 8, 2015) (unpublished) [*Miller II*]. Instead of noting that the record on appeal "[did] not include a written copy of the order appealed from" and holding that "the absence of a written order" necessitates a conclusion that the State's appeal should be dismissed on the theory that " '[e]ntry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court," *Miller I*, slip op. at 6-7 (quoting *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388), and citing *S. Furn. Hdwe.*, 136 N.C. App. at 702, 526 S.E.2d at 201), the corrected opinion states that, because "the record on appeal . . . does not indicate the superior court's 2 June 2014 was entered," the State's appeal should be dismissed for lack of an "entered" order given this Court's statement in *Oates* that, "[f]or the purposes of entering notice of appeal in a criminal case under [Appellate] Rule 4(a)":

> [A] judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under [Rule 4(a)] <u>when the clerk of court records or files the judge's decision regarding the judgment or order</u>.

Oates, 366 N.C. at 266, 732 S.E.2d at 573 (quoted in *Miller II*, slip op. at 7 (underlining added by Court of Appeals)). In addition, after citing *Hadden*, the corrected opinion states:

> N.C.[G.S.] § 15A-1432, the statute that provides the State with a right to appeal from the superior court's order affirming the district court's final order, specifically requires the superior court to "enter an order affirming the judgment of the district court" if the superior court determines the order of the district court was correct.

Miller II, slip op. at 7 (quoting N.C.G.S. § 15A-1432(e) (2013)). As a result, rather than relying on the absence of a written order, the Court of Appeals held in *Miller II* that it lacked the authority to consider the State's appeal given the absence of any indication that the order from which the State sought to appeal had been entered in accordance with the process spelled out in *Oates*.

Although Rule 16 of the North Carolina Rules of Appellate Procedure limits discretionary review by this Court to the "issues stated in . . . the petition for discretionary review and the response thereto," N.C. R. App. P. 16(a), and although the exact issue specified in the State's discretionary review petition was whether the Court of Appeals had "err[ed] in determining that no order was entered because it was not reduced to writing," we do not believe that the fact that, unbeknownst to the State, the Court of Appeals changed the basis upon which it decided to dismiss the State's appeal necessitates dismissal of the State's petition as improvidently allowed. When read more broadly, the issue posed in the State's petition asked us to determine whether the Court of Appeals had erred by concluding that no order from which an appeal could properly be taken had ever been entered. As a result, we conclude that we have the authority under Rule 16 to consider the issue raised by the corrected Court of Appeals' decision and will proceed to do so.

[2] Our decision in *Oates* addressed the issue of whether the State had noted an appeal from a trial court order in a timely manner as required by Rule 4(a). As we stated in *Oates*,

> Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial or . . . the pretrial hearing. Otherwise, notice of appeal must be in writing and filed with the clerk of court. Such written notice may be filed at any time between the date of the rendition of the judgment or

> order and the fourteenth day after entry of the judgment or order.

366 N.C. at 268, 732 S.E.2d at 574 (citing N.C. R. App. P. 4(a)(1), (a)(2)). On the one hand, "*[r]endering* a judgment or an order 'means to "pronounce, state, declare, or announce" [the] judgment' or order, and 'is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy.' " *Id.* at 266, 732 S.E.2d at 573 (second alteration in original) (citations omitted). "*Entering* a judgment or an order," on the other hand, "is 'a ministerial act which consists in spreading it upon the record.' " *Id.* at 266, 732 S.E.2d at 573 (citations omitted). "For the purposes of entering notice of appeal in a criminal case under Rule 4(a), a judgment or an order . . . is entered . . . when the clerk of court records or files the judge's decision regarding the judgment or order." *Id.* at 266, 732 S.E.2d at 573. In reaching this conclusion, this Court noted, among other things, that the Court of Appeals' statement in *Oates* predicated on *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388, that " '[e]ntry of an order [in the criminal context] occurs when it is reduced to writing' is incorrect." *Oates*, 366 N.C. at 267, 732 S.E.2d at 574 (alterations in original) (citation omitted). As a result, the basis for the Court of Appeals' initial decision in this case in *Miller I*, which was that an order from which an appeal could be taken had not been entered unless it had been reduced to writing and filed with the Clerk, rested upon a misapprehension of the applicable law.

The Court of Appeals' reliance upon *Hadden* for the proposition that "the superior court's order requiring [the] defendant to enroll in satellite-based monitoring was never 'entered' and was a nullity where it bore no indication it was filed with the clerk" as a basis for dismissing the State's appeal in its corrected opinion, *Miller II*, slip op. at 7 (citing *Hadden*, 226 N.C. App. at 332-33, 741 S.E.2d at 468), is misplaced as well. As an initial matter, it is well established that *Hadden*, which stemmed from a satellite-based monitoring proceeding, involved the application of the rules governing appeals in civil, rather than criminal, cases. *See, e.g.*, *State v. Clark*, 211 N.C. App. 60, 70-71, 714 S.E.2d 754, 761-62 (2011), *disc. rev. denied*, ___ N.C. ___, 722 S.E.2d 595 (2012). Secondly, as the State noted in response to defendant's motion to supplement the record and dismiss the State's petition as improvidently allowed, *Hadden* cited to and relied upon *Gary*, which this Court rejected in *Oates*, for the proposition that " '[e]ntry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court.' " *Hadden*, 226 N.C. App. at 332-33, 741 S.E.2d at 468. As a result, *Hadden* simply has no bearing on the proper resolution of this case.

Here the parties agree that N.C.G.S. § 15A-1432(e) is the statutory provision that authorizes the State's appeal from the trial court's 2 June 2014 order and that this statute requires an order to be entered in order for the Court of Appeals to acquire jurisdiction over the State's appeal. N.C.G.S. § 15A-1432(e) (2015) ("If the superior court finds that the order of the district court was correct, it must enter an order affirming the judgment of the district court. The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay."). The ultimate problem with the logic adopted by the Court of Appeals in *Miller II* is that it conflicts with this Court's statement in *Oates* that "a judgment or an order is entered under [Rule 4(a)] when the clerk of court records or files the judge's decision regarding the judgment or order." 366 N.C. at 266, 732 S.E.2d at 573. As we have already noted, *Oates* held, among other things, that a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session. The Court of Appeals appears to have simply overlooked the possibility that the trial court's 2 June 2014 order from which the State noted its appeal in this case had been entered in this fashion, perhaps because the record presented for its review did not reflect that such a procedure had been followed in this case. However, this Court has determined, during its consideration of this case, that, after the trial court announced its decision to affirm Judge Best-Staton's order, the courtroom clerk noted that "Court affirms appeal. State appeals court ruling" in the minutes relating to the relevant session of the Superior Court, Mecklenburg County.[1] As a result, contrary to the result reached by the Court of Appeals in *Miller II*, the order from which the State noted its appeal was, in fact, entered in accordance with our decision in *Oates*. Thus, the Court of Appeals erred by dismissing the State's appeal from the trial court's order on the theory that the order in question had never been properly entered. As a result, the Court of Appeals' decision in *Miller II* is vacated and this case is remanded to the Court of Appeals for consideration of the remaining issues in this case, including whether the State's appeal is subject to dismissal on any other basis not addressed in this opinion.

VACATED AND REMANDED.

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1. As authorized by Rule 15(f)(1) of the North Carolina Rules of Appellate Procedure, the Court has entered a separate order amending the record on appeal in this case to include the relevant minutes entry.

STATE OF NORTH CAROLINA
v.
JACOB MARK SPIVEY

No. 143PA15

Filed 18 March 2016

Indictment and Information—damage to real property—identity of property vital—owner's name not essential

An indictment charging injury to real property was valid on its face where the indictment alleged damage to "Katy's Great Eats" rather than the proper legal name of the corporate entity, "Katy's Great Eats, Inc." Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. In an indictment alleging injury to real property, identification of the property itself rather than the owner or ownership interest is vital. The owner or lawful possessor's name may be used to identify the specific parcel of real estate but it is not an essential element of the offense that must be alleged in the indictment. The indictment gave defendant reasonable notice of the charge against him.

Justice JACKSON dissenting.

Justice ERVIN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 841 (2015), finding no error in part and vacating in part judgments entered on 9 May 2014 by Judge Phyllis M. Gorham in Superior Court, New Hanover County, and remanding for resentencing on defendant's remaining convictions. Heard in the Supreme Court on 7 December 2015.

Roy Cooper, Attorney General, by Brent D. Kiziah, Assistant Attorney General, for the State-appellant.

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

NEWBY, Justice.

In this case we decide whether an indictment charging defendant with injury to real property "of Katy's Great Eats" is fatally flawed because it does not specifically identify "Katy's Great Eats" as a corporation or an entity capable of owning property. An indictment for injury to real property must describe the property in sufficient detail to identify the parcel of real property the defendant allegedly injured. The indictment needs to identify the real property itself, not the owner or ownership interest. By describing the injured real property as "the restaurant, the property of Katy's Great Eats," the indictment sufficiently identifies the crime being charged. Because it gives defendant reasonable notice of the charge against him and enables him to prepare his defense and protect against double jeopardy, the indictment is facially valid. We therefore reverse the decision of the Court of Appeals on that issue.

The State presented evidence at trial that showed that on 11 January 2013, defendant was at a restaurant called "Katy's Great Eats" to sing karaoke. When defendant went outside to the patio to smoke a cigarette, another patron, Christina Short, made a joke about President Obama and mocked defendant for voting for him. Defendant did not respond and went back inside the restaurant to eat his food. Approximately ten minutes later, as defendant was leaving the restaurant and walking to his car, Ms. Short made another derogatory comment toward him. Defendant again did not respond. Instead, angered by Ms. Short's comments, defendant got into his car, backed it across the parking lot, and drove it straight into the patio area of the restaurant where Ms. Short and other patrons stood. The car crashed into the front window and outside wall of the restaurant before stopping. Defendant attempted to flee in his car, but police stopped him a short distance away. Defendant admitted to police that he drove his car into the restaurant with the intent to hurt Ms. Short, but he denied trying to kill her.

A grand jury returned six bills of indictment for a variety of charges stemming from the incident, including attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, felony hit and run, injury to real property, reckless driving to endanger, and eleven counts of assault with a deadly weapon. The indictment in Case Number 13CRS050341 stated:

> I. The jurors for the State upon their oath present that . . . the defendant . . . unlawfully, willfully, and feloniously did fail to immediately stop the vehicle the defendant was driving at the scene of an accident and collision in which the defendant was involved. This accident and collision occurred at Katy's Great Eats

> 1054 S. College Rd, Wilmington, North Carolina and resulted in injury to a person, to wit: Christina Marie Short. The defendant knew and reasonably should have known that the vehicle that the defendant was operating was involved in the accident and collision and that the accident and the collision had resulted in injury to a person, to wit: Christina Marie Short.
>
> II. The jurors for the State upon their oath present that . . . the defendant . . . unlawfully and willfully did wantonly damage, injure and destroy real property, front patio, façade, and porch of the restaurant, the property of Katy's Great Eats.
>
> III. The jurors for the State upon their oath present that . . . the defendant . . . unlawfully and willfully did operate a motor vehicle on a public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger persons or property.

At the close of the State's evidence at trial, defendant moved to dismiss several charges, including Count II in the above indictment for injury to real property. Defendant argued that the indictment failed to allege "Katy's Great Eats" was a legal entity capable of owning property and that the proper legal name of the corporate entity is "Katy's Great Eats, Inc." The trial court denied defendant's motion. Defendant did not present any evidence.

During closing argument, defense counsel admitted that defendant was at "Katy's" on the night in question, that Ms. Short insulted defendant on two separate occasions, and that defendant subsequently drove his car into "Katy's bar." Defendant's primary defense was that his conduct was not deliberate or premeditated; rather, he drove his car into the restaurant with the general intent to hurt, not kill, Ms. Short. In fact, defense counsel not only admitted that defendant drove his car into "Katy's bar," but also asked the jury to find defendant guilty of assault with a deadly weapon inflicting serious injury, felony hit and run, and, significant here, injury to real property. Ultimately, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury, six counts of assault with a deadly weapon, and one count each of felony hit and run, reckless driving to endanger, and injury to real property.

The Court of Appeals vacated defendant's conviction for injury to real property and remanded the matter for resentencing. *State v. Spivey*, ___ N.C. App. ___, ___, 769 S.E.2d 841, 844 (2015). The Court of Appeals

concluded that Count II of the indictment charging injury to real property "is invalid on its face" because it "does not contain any allegation that the victim, 'Katy's Great Eats,' is a legal entity capable of owning property, and the name 'Katy's Great Eats' does not otherwise import a corporation or other entity capable of owning property." *Id.* at ___, 769 S.E.2d at 844. We allowed the State's petition for discretionary review.

It is well settled "that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). The Criminal Procedure Act of 1975 (1975 Act) requires that an indictment 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." N.C.G.S. § 15A-924(a)(5) (2015). The 1975 Act was intended "to simplify criminal proceedings." *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). Under this statutory framework,

> it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

Sturdivant, 304 N.C. at 311, 283 S.E.2d at 731 (citation omitted). An indictment must allege "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 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)), *cert. denied*, 539 U.S. 985 (2003), but it is generally sufficient if couched in the language of the statutory offense, *State v. Williams*, ___ N.C. ___, ___, 781 S.E.2d 268, 272 (2016) ("[T]his Court has acknowledged the general rule that an indictment using 'either literally or substantially' the language found in the statute defining the offense is facially valid and that 'the quashing of indictments is not favored.' " (quoting *State v. James*, 321 N.C. 676, 681, 365 S.E.2d 579, 582 (1988))).

Here defendant was charged with injury to real property under section 14-127, which makes it a crime to "willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature." N.C.G.S. § 14-127 (2015). Count II of defendant's indictment

specifically alleges that he "unlawfully and willfully did wantonly damage, injure and destroy real property, front patio, façade, and porch of the restaurant, the property of Katy's Great Eats." The indictment mirrors the language of the controlling statute, and the description of the real property as "the property of Katy's Great Eats" clearly identifies the specific parcel of real property defendant allegedly injured. It is clear from the transcript that there was no confusion or controversy at trial regarding which establishment defendant damaged. Consequently, the indictment sufficiently advised defendant of the conduct that is the subject of the accusation.

Ideally, an indictment for injury to real property should include the street address or other clear designation, when possible, of the real property alleged to have been injured; however, under N.C.G.S. § 15A-925, had defendant been confused regarding which parcel of real property he was accused of injuring or "need[ed] more information to mount his preferred defense, he [could have] 'request[ed] a bill of particulars to obtain information to supplement the facts contained in the indictment.' " *State v. Jones*, 367 N.C. 299, 310-11, 758 S.E.2d 345, 353 (2014) (Martin, J., concurring in part and dissenting in part) (quoting *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984)).

Defendant argues, and the Court of Appeals agreed, that we should treat indictments charging injury to real property no differently than indictments charging crimes involving personal property, such as larceny, embezzlement, or injury to personal property. In so holding, the Court of Appeals relied on its own decision in *State v. Lilly*, 195 N.C. App. 697, 673 S.E.2d 718, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 214 (2009). In *Lilly* the Court of Appeals recognized that N.C.G.S. § 14-127 "does not appear to require that an indictment for injury to real property contain any allegation at all regarding the owner or possessor of the property," *id.* at 702, 673 S.E.2d at 722, but the court nonetheless concluded the indictment was required to contain an allegation regarding ownership or possession, *id.* at 702-03, 673 S.E.2d at 722. The statute under which defendant here was charged, N.C.G.S. § 14-127, does not require that the real property be "of another." Instead, it criminalizes damaging "any real property whatsoever," making the identity of the owner largely irrelevant as long as a defendant has adequate notice to prepare a defense. N.C.G.S. § 14-127.

Moreover, there is a fundamental difference between personal property and real property. Personal property is often fungible, such that two items can essentially be indistinguishable. Because personal property is easily moved, identifying information is particularly valuable. A

description of the owner of personal property is useful to differentiate between two similar pieces of personal property, thereby notifying the defendant of " 'the particular transaction on which the indictment is founded' and giv[ing] the [defendant] 'the benefit of the first acquittal or conviction if accused a second time of the same offense.' " *Jones*, 367 N.C. at 308-09, 758 S.E.2d at 352 (majority) (quoting *State v. Tisdale*, 145 N.C. 422, 425, 58 S.E. 998, 1000 (1907)); *see id.* at 311, 758 S.E.2d at 354 (Martin, J., concurring in part and dissenting in part) (noting it is "nearly impossible" to "[d]ifferentiat[e] between two jugs of malt liquor, two sacks of tobacco seed, or two baggies of cocaine").

Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. Thus, in an indictment alleging injury to real property, identification of the property itself, not the owner or ownership interest, is vital to differentiate between two parcels of property, thereby enabling a defendant to prepare his defense and protect against further prosecution for the same crime. While the owner or lawful possessor's name may, as here, be used to identify the specific parcel of real estate, it is not an essential element of the offense that must be alleged in the indictment, so long as the indictment gives defendant reasonable notice of the specific parcel of real estate he is accused of injuring. To the extent *Lilly* is inconsistent with this opinion, it is overruled.

We therefore conclude that by tracking the language of N.C.G.S. § 14-127 and clearly identifying the real property onto which defendant drove his car, the indictment "charges the offense of [injury to real property] in a plain, intelligible, and explicit manner" and fulfills the purpose of the 1975 Act. *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746; *accord* N.C.G.S. § 15-153 (2015). The indictment gives defendant reasonable notice of the charge against him, including the specific parcel of real property he is accused of injuring, so that he may prepare his defense and protect himself against double jeopardy. Accordingly, the indictment charging injury to real property is valid on its face. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to these matters remains undisturbed.

REVERSED.

Justice JACKSON dissenting.

In concluding that an indictment for injury to real property pursuant to N.C.G.S. § 14-127 need not identify the owner or lawful possessor of

the property, the majority ignores over one hundred and sixty years of precedent establishing that "[i]n indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal."[1] *State v. Hicks*, 233 N.C. 31, 34, 62 S.E.2d 497, 499 (1950) (quoting *State v. Mason*, 35 N.C. (13 Ired.) 341, 342 (1852)), *cert. denied*, 342 U.S. 831 (1951). I respectfully dissent.

Section 14-127 states, "If any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a Class 1 misdemeanor." N.C.G.S. § 14-127 (2015). Interpreting this language, the majority concludes that the statute "does not require that the real property be 'of another' " and that "the owner or lawful possessor's name . . . is not an essential element of the offense that must be alleged in the indictment, so long as the indictment gives defendant reasonable notice of the specific parcel of real estate he is accused of injuring."

In 1852, faced with a statute that similarly lacked an explicit element stating that the allegedly injured property must be that of another, this Court rejected the majority's interpretation. In *State v. Mason* the defendant was accused of injury to a dwelling house in violation of a statute that stated:

> [I]f any person or persons . . . shall unlawfully and wilfully demolish, pull down, deface, or by other ways or means destroy, injure or damage any dwelling house, or any uninhabited house, out house, or other building, or shall unlawfully or wilfully burn, destroy, or remove any fence, wall, or other inclosure or any part thereof, surrounding or about any yard, garden, or cultivated grounds, he, she, or they shall be deemed guilty of a misdemeanor . . . .

Act of Jan. 14, 1847, ch. 70, 1846-47 N.C. Sess. Laws 137; *see also Mason*, 35 N.C. (13 Ired.) at 342 (referencing this statute). Like section 14-127, this statute did not specify that the dwelling house must belong to someone other than the defendant. Nevertheless, this Court stated that "[i]n indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." *Mason*, 35 N.C. (13 Ired.) at 342. This Court explained that "although [the statute] protects houses and inclosures from destruction or injury, yet necessarily an exception

1. The statute at issue in *Hicks*, unlike the statutes at issue in other cases cited in this dissent, required that there be damage to the property "of another" as a precondition for a finding of liability. *See* 233 N.C. at 34, 62 S.E.2d at 499.

is to be implied when the destruction or damage is by the owner." *Id.* at 343. The Court determined that if the statute "had been intended to embrace the acts of willful waste by a tenant, there would have been express words to take in the case where the premises are in the possession of the offender." *Id.* As established in *Mason*, even if a statute prohibiting injury to some property does not state that the property must be that of another, such a requirement is implied, and an indictment for violation of that statute must identify the owner or lawful possessor.

Although *Mason* "was decided in 1852 when great particularity in criminal pleading was required," *State v. Taylor*, 172 N.C. 892, 893, 90 S.E. 294, 295 (1916), this Court has reaffirmed and applied its holding in multiple different contexts, *see*, *e.g.*, *State v. Watson*, 272 N.C. 526, 527, 158 S.E.2d 334, 335 (1968) (per curiam) (indictment for safecracking); *State v. Cooke*, 246 N.C. 518, 520, 98 S.E.2d 885, 887 (1957) (indictment for trespassing). In *Taylor*, after implicitly suggesting that the level of particularity required in indictments may have diminished since *Mason* was decided, this Court concluded that an indictment for unlawfully removing a fence "sufficiently charges that the property was in the possession of the [prosecuting witness] H. F. Otten" in part because the indictment stated that Otten "owned the property." 172 N.C. at 893, 90 S.E. at 295. Thus, even as we acknowledged that pleading requirements should be viewed more liberally than in the past, we still retained the requirement of identifying the owner or lawful possessor.

Our more recent decision in *Hicks* relied upon *Mason*. The defendant and a codefendant allegedly engaged in a conspiracy, part of which involved a plan to destroy an electrical transformer "by the use of dynamite or other high explosive." 233 N.C. at 31, 62 S.E.2d at 497. He was charged, *inter alia*, with both conspiracy to commit injury to real property and conspiracy to injure personal property, but the latter charge was dismissed. The jury found him "[g]uilty of conspiracy to damage real property." *Id.* at 33, 62 S.E.2d at 499. We noted that "[t]he indictment charge[d] the defendants with conspiring to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company," while the evidence showed that the property actually belonged to the Duke Power Company. *Id.* at 34, 62 S.E.2d at 499. Relying upon *Mason* and subsequent cases cited in *Hicks*, we concluded that there was a fatal variance. *Id.* at 34, 62 S.E.2d at 499. *Hicks* confirms the vitality of our long-standing rule that indictments for injury to real property must identify the owner or lawful possessor of the property. In a later case we cited *Hicks* to establish that for the offense of "malicious injury to property," "it is necessary to allege in the warrant

or bill of indictment the rightful owner or possessor of the property, and the proof must correspond with the charge." *Cooke*, 246 N.C. at 520, 98 S.E.2d at 887. Similarly, the North Carolina Court of Appeals has relied upon *Hicks*, *Cooke*, and *Mason* in concluding that an indictment for injury to real property must name either the owner or lawful possessor of the property. *State v. Lilly*, 195 N.C. App. 697, 702-03, 673 S.E.2d 718, 722, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 214 (2009).

Contrary to the majority's suggestion, this principle was not affected by the enactment of the Criminal Procedure Act "to simplify criminal proceedings." *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). The Criminal Procedure Act confirms that "every element of a criminal offense" must be alleged by the indictment. N.C.G.S. § 15A-924(a)(5) (2015). Although section 14-127 does not state that the injured property must be that of another, common sense dictates that this element is implied. *See Mason*, 35 N.C. (13 Ired.) at 343 (making a similar implication with respect to a similar statute). In addition, section 14-127 requires that the defendant have acted "willfully and wantonly." N.C.G.S. § 14-127. Willfulness refers to "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (per curiam) (citation omitted). "Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956) (citations omitted). In the context of injury to real property, the elements of willfulness and wantonness cannot be shown when a person injures his or her own property. This Court's established definition of wantonness explicitly provides the reference to "the rights . . . of others" that section 14-127 omitted. Furthermore, ownership of real property provides a complete justification for causing damage to it—including total demolition and replacement of buildings and fixtures. As a result, even though section 14-127 does not set out the element explicitly, the statute implicitly requires the State to show that the property belonged to another. *See State v. Chamberlain*, 232 N.C. App. 246, 253, 753 S.E.2d 725, 730 (2014) ("[I]t was for the jury to determine whether the shrubs [belonging to a neighbor] were planted on [the neighbor's] property or Defendant's and whether Defendant was legally justified in cutting them down."). As this Court's jurisprudence establishes, this element must be alleged in the indictment.

Applying this long-standing rule in the case *sub judice*, it is clear that the indictment is fatally defective. "When alleging ownership in an entity, an indictment must specify that the owner, 'if not a natural person,

is a corporation or otherwise a legal entity capable of owning property,' unless the entity's name itself 'imports an association or a corporation capable of owning property.' " *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (quoting *State v. Thornton*, 251 N.C. 658, 661, 111 S.E.2d 901, 903 (1960)). In *Campbell* we held that a larceny indictment identifying the property owner as "Manna Baptist Church" was sufficient because "alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property." *Id.* at 87, 772 S.E.2d at 444. At the same time, we distinguished *Thornton*, in which "an indictment alleging the defendant embezzled money belonging to 'The Chuck Wagon' was 'fatally defective' because it failed to allege 'that "The Chuck Wagon" is a corporation, and the words "The Chuck Wagon" do not import a corporation.' " *Id.* at 86, 772 S.E.2d at 443 (quoting *Thornton*, 251 N.C. at 662, 111 S.E.2d at 904). Here the indictment alleges that defendant damaged real property belonging to "Katy's Great Eats," a name which—like The Chuck Wagon—does not import a corporation or other legal entity capable of owning property.

Today the majority disposes of a well-established requirement without acknowledging over a century of precedent supporting the existence of that requirement. Even as the majority overturns the decision of the Court of Appeals in *Lilly*, it ignores that decision's reliance upon *Cooke*, *Hicks*, and *Mason*. Therefore, I respectfully dissent.

Justice ERVIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
GARY MAURICE WALTERS

No. 344PA14

Filed 18 March 2016

Kidnapping—disjunctive verdict—no error

The trial court's disjunctive jury instruction in a first-degree kidnapping prosecution did not violate defendant's constitutional right to be convicted only by the unanimous verdict of a jury in open court. The Court of Appeals concluded that the challenged instruction would have allowed one or more jurors to convict defendant based on a theory not supported by the evidence, but our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense.

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, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 765 S.E.2d 122 (2014), finding no error in part in judgments entered on 28 June 2013 by Judge William R. Pittman in Superior Court, Robeson County, but vacating defendant's conviction for first-degree kidnapping and ordering a new trial on that charge. Heard in the Supreme Court on 17 February 2016.

Roy Cooper, Attorney General, by Mary Carla Babb, Assistant Attorney General, for the State-appellant.

Paul F. Herzog for defendant-appellee.

HUDSON, Justice.

Defendant Gary Maurice Walters was convicted on 28 June 2013 of first-degree kidnapping, attempted first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, the Court of Appeals vacated defendant's conviction for first-degree

kidnapping on the basis that the trial court had given "a disjunctive instruction concerning the purpose for which [d]efendant acted that lacked adequate evidentiary support," which, the Court of Appeals concluded, effectively allowed defendant to be convicted based on a non-unanimous jury verdict. *State v. Walters*, ___ N.C. App. ___, 765 S.E.2d 122, 2014 WL 4292074, at *9 (2014) (unpublished). We allowed the State's petition for discretionary review on 5 November 2015. Because we now conclude that the trial court's disjunctive jury instruction did not violate defendant's constitutional right to be convicted only by the unanimous verdict of a jury in open court, *see* N.C. Const. art. I, § 24, we reverse in part the decision of the Court of Appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of 17 August 2005, Paul Franklin began a two-day period of repeatedly buying and using cocaine, during which he was introduced to, and purchased cocaine from, defendant. After Franklin ran out of money while staying at the Redwood Inn in Lumberton, North Carolina, he allowed defendant to use his vehicle, a gray Ford Windstar van, in exchange for more cocaine. This arrangement continued through the next day, with defendant bringing Franklin cocaine every few hours in exchange for the continued use of the van.

Early in the morning of 19 August 2005, at approximately 3:30 a.m., Franklin's paycheck was deposited into his bank account, and defendant drove him in the van to an ATM to withdraw money. After Franklin made the withdrawal, defendant offered to bring Franklin "a third of cocaine" in exchange for the one hundred dollars Franklin had available to spend. However, when defendant arrived back at the Redwood Inn with the cocaine, Franklin believed it to be worth less than the full amount he had offered to pay; he offered defendant seventy-five dollars instead. In response, defendant reached down and broke off the leg of a table in the hotel room, then used the table leg to beat Franklin.

A short time later, at approximately 5:30 or 6:00 a.m., defendant arrived at the home of Christopher Bass and Shelly Scott. At defendant's request, Bass used Scott's Honda Civic to follow defendant while defendant drove Franklin's Windstar. They eventually parked near a river, and defendant told Bass that he had a man in the van. Defendant opened the door to show him Franklin in the back seat. According to Bass, Franklin's face "was mangled and beat up, and it sounded like he was breathing heavy." Defendant told Bass that the injuries were the product of a "tussle" stemming from "a drug deal gone wrong" at

the Redwood Inn. Bass answered in the negative when defendant asked him if he should kill Franklin. Defendant left the van at the scene and Bass used the Civic to drive defendant back to defendant's mother's house.

The injuries Franklin endured were severe. As a result of the beating, every bone in Franklin's face was broken; he suffered optic nerve damage, which caused him to have blind spots; and his eye socket was so badly damaged that doctors could not correctly realign his eyes, which resulted in double vision. He suffered such extensive facial scarring that he "went a year with no nose." When doctors attempted reconstructive surgery, an antibiotic-resistant staph infection prevented them from completing it successfully. As a result of the damage to his vision, Franklin could no longer continue his employment as a truck driver.

On 8 May 2006, defendant was indicted in Robeson County for first-degree kidnapping, attempted first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. The charges against defendant were called for trial on 24 June 2013, and a jury was selected and impaneled the next day. The State presented evidence from 26 June through 28 June; defendant presented evidence on 28 June. Also on 28 June 2013, the trial court instructed the jury regarding the offenses with which defendant had been charged: attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and first-degree kidnapping. Regarding the elements of first-degree kidnapping, the trial court instructed as follows:

> The defendant has been charged with first degree kidnapping. For you to find the defendant guilty of this offense, the State must prove five things beyond a reasonable doubt: First, that the defendant unlawfully removed a person from one place to another; second, that the person did not consent; third, that the defendant removed that person for the purpose of facilitating his commission of or flight after committing the felony of assault with a deadly weapon with intent to kill inflicting serious injury; fourth, that this removal was a separate, complete act, independent of and apart from the assault; and fifth, that the person was not released by the defendant in a safe place or had been seriously injured.

Later that day, the jury returned verdicts convicting defendant of all three offenses. Defendant entered a written notice of appeal to the Court of Appeals on 5 July 2013.

At the Court of Appeals, defendant argued, *inter alia*, that he had been denied his right to a unanimous jury verdict regarding the first-degree kidnapping charge; defendant took particular issue with the instruction allowing the jury to convict him of first-degree kidnapping if it found beyond a reasonable doubt that he had committed the kidnapping "for the purpose of facilitating the commission of or flight following the commission of a felony." Applying its precedent in *State v. Johnson*, 183 N.C. App. 576, 646 S.E.2d 123 (2007), the Court of Appeals agreed, concluding that the challenged instruction would have allowed one or more jurors to convict defendant based on a theory not supported by the evidence, namely, that defendant had committed the kidnapping to facilitate the assault of Franklin rather than a subsequent escape. *See Walters*, 2014 WL 4292074, at *8-9. The Court of Appeals therefore ordered a new trial on the charged offense of first-degree kidnapping. *Id.* at *9. The State filed a petition for discretionary review, which we allowed on 5 November 2015.

II. ANALYSIS

Defendant contends to this Court, as he did to the Court of Appeals, that the trial court's "disjunctive" instruction to the jury regarding the charge of first-degree kidnapping allowed the jury to convict him through a non-unanimous verdict. Defendant argues in essence that the relevant instruction—that to convict, the jury must find that defendant "removed [Franklin] for the purpose of facilitating *the commission of **or** flight following* the commission of a felony" (emphases added)—allowed each individual juror to vote to convict on either basis. As a result, this argument continues, some jurors obeying this instruction may have found as fact that defendant kidnapped Franklin "to facilitate the commission of" the assault or attempted murder, but not the flight afterward, while others may have found that defendant kidnapped Franklin "to facilitate . . . flight following the commission of" the assault or attempted murder, but not the assault or attempted murder itself. In that event, there would be no unanimously agreed-upon basis for the conviction, in seeming violation of the unanimity requirement.

Because this argument has previously been considered and rejected by this Court, we now reverse in part the decision of the Court of Appeals. *See State v. Bell*, 359 N.C. 1, 29-30, 603 S.E.2d 93, 112-13 (2004), *cert. denied*, 544 U.S. 1052 (2005). Both the North Carolina Constitution and the North Carolina General Statutes protect the right of the accused to be convicted only by a unanimous jury in open court. *See* N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous

verdict of a jury in open court . . . .");[1] N.C.G.S. § 15A-1237(b) (2015) (requiring that a jury verdict "be unanimous, and . . . be returned by the jury in open court"). But it does not follow from these constitutional and statutory guarantees that every disjunctive jury instruction violates one or both of those guarantees. Rather, as we explained in *Bell*, which the Court of Appeals did not mention even though that case also concerned a jury instruction for first-degree kidnapping, our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense. *See* 359 N.C. at 29-30, 603 S.E.2d at 112-13. As we explained in *Bell*:

> Two lines of cases have developed regarding the use of disjunctive jury instructions. *State v. Diaz* [317 N.C. 545, 346 S.E.2d 488 (1986), and its progeny] stand[ ] for the proposition that "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." In such cases, the focus is on the conduct of the defendant.
>
> In contrast, this Court has recognized a second line of cases [stemming from *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990),] standing for the proposition that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

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1. This provision of the constitution was amended in 2014 and now states in full:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

N.C. Const. art. I, § 24.

Id. at 29-30, 603 S.E.2d at 112-13 (emphases in original) (internal citations omitted) (quoting *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991)).

This case falls within the second category of cases described in *Bell*. There, as here, the defendant was charged with first-degree kidnapping; there, as here, the trial court instructed the jury that it could convict the defendant only if it found beyond a reasonable doubt that the defendant had committed one or more specific acts, any of which could establish an essential element of the offense; and there, as here, the defendant argued that the trial court's "disjunctive" instruction violated his right under the North Carolina Constitution to be convicted only through a unanimous jury verdict. In that virtually identical context, this Court held that the trial court's disjunctive instruction did not deprive the defendant of this right. *See id.* at 29, 603 S.E.2d at 112 ("The trial court instructed the jury as to first-degree kidnapping, in accord with the pattern jury instructions . . . . Defendant contends that the trial court's disjunctive instructions were fatally ambiguous because the jury could have convicted defendant without a unanimous decision that defendant confined, restrained, or removed the victim for the purpose of committing a specific crime. We disagree."). We then went on to explain:

> It is not necessary for the State to prove, nor for the jury to find, that a defendant committed a particular act other than that of confining, restraining, or removing the victim. Beyond that, a defendant's intent or purpose is the focus, thus placing the case *sub judice* squarely within the *Hartness* line of cases. The trial court's instructions and the verdict form were proper.

Id. at 30, 603 S.E.2d at 113. Accordingly, consistent with our previous opinion in *Bell*, we now reverse in part the decision of the Court of Appeals.[2]

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2. We also note, despite the Court of Appeals' conclusion to the contrary, *see Walters*, 2014 WL 4292074, at *8-9, that the State's evidence, when viewed in the light most favorable to the State, was sufficient to support a finding by the jury that defendant had kidnapped Franklin in order to facilitate defendant's assault of Franklin with the intent to kill inflicting serious injury. As reviewed above, the State's evidence tended to show that, after beating Franklin with a table leg, defendant loaded Franklin into the Windstar, drove that Windstar to an isolated location near a river, and asked Christopher Bass whether he ought to kill Franklin. Because this testimony tends to show that defendant still may have intended to kill Franklin even after the beating was over and he had removed Franklin from the Redwood Inn, it appears that the State presented sufficient evidence to support

III. CONCLUSION

For the reasons set forth above, we reverse the Court of Appeals' holding that defendant is entitled to a new trial for the first-degree kidnapping charge. We do not address, and leave undisturbed, the Court of Appeals' conclusions regarding the convictions for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury.

REVERSED IN PART.

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

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a reasonable inference that defendant moved Franklin to "facilitate[ ] his commission of . . . the felony of assault with a deadly weapon with intent to kill inflicting serious injury." *Cf. State v. Kyle*, 333 N.C. 687, 695, 430 S.E.2d 412, 416 (1993) ("[T]he fact that all [the] essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it was completed." (citation omitted) (quoting *State v. Hall*, 305 N.C. 77, 82-83, 286 S.E.2d 552, 555-56 (1982), *overruled on other grounds by Diaz*, 317 N.C. at 555, 346 S.E.2d at 495)). Accordingly, it appears that the State's evidence was sufficient to support either portion of the trial court's disjunctive jury instruction.

STATE OF NORTH CAROLINA
v.
CHARLES DIONE WARREN

No. 312A15

Filed 18 March 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 775 S.E.2d 362 (2015), affirming an order entered on 3 September 2014 and a judgment entered on 3 July 2014, both by Judge Richard T. Brown in Superior Court, Johnston County. Heard in the Supreme Court on 16 February 2016.

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

Bryan E. Gates, Jr. and John J. Korzen for defendant-appellant.

PER CURIAM.

AFFIRMED.

MARGARET DICKSON, ET AL.

v.

ROBERT RUCHO, ET AL.

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL.

v.

THE STATE OF NORTH CAROLINA, ET AL.

From Wake County

No. 201PA12-3

ORDER

Plaintiff-Appellants' Rule 31 Petition for Rehearing is denied as to the second and third issues. As to the remaining first issue, plaintiff-appellants' petition is dismissed on procedural grounds. Plaintiff-appellants waived review of this argument by failing to raise it in their brief on remand. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

This Court's 18 December 2015 opinion is modified as follows: the sentence stating "Alabama's Constitution does not contain a Whole County Provision" is deleted, and the words in the next sentence, "that state," are replaced with the word, "Alabama." *Dickson v. Rucho*, No. 201PA12-3, 2015 N.C. LEXIS 1281, at *34 (Dec. 18, 2015).

By order of the Court in Conference, this 11th day of February, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of February, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

FAIRES v. STATE BD. OF ELECTIONS

[368 N.C. 758 (2016)]

SABRA FAIRES, BENNETT COTTON, AND DIANE P. LAHTI, PLAINTIFF-APPELLEES v. STATE BOARD OF ELECTIONS; A. GRANT WHITNEY, JR., CHAIR, AND RHONDA K. AMOROSO, JOSHUA D. MALCOLM, MAJA KRICKER, AND JAMES L. BAKER, MEMBERS OF THE STATE BOARD (IN THEIR OFFICIAL CAPACITIES ONLY); AND KIM WESTBROOK STRACH, EXECUTIVE DIRECTOR OF THE STATE BOARD (IN HER OFFICIAL CAPACITY ONLY), DEFENDANT-APPELLANTS	)	From Wake County

No. 84A16

ORDER

Parties' Joint Motion for Expedited Hearing is allowed as follows. The Record on Appeal and Defendant-Appellants' brief are due on or before 24 March 2016. Plaintiff-Appellees' brief is due on or before 31 March 2016. Defendant-Appellants' reply brief, if any, is due on or before 5 April 2016. Oral Argument will be heard at 9:30 a.m. on 13 April 2016.

By order of the Court in Conference, this the 10th day of March, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of March, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

ROBERT E. KING AND WIFE, JO ANN O'NEAL	)	
v.	)	From Cumberland County
MICHAEL S. BRYANT, M.D., AND VILLAGE SURGICAL ASSOCIATES, P.A.	)	

No. 294PA14

ORDER

On 21 August 2015, this Court ordered this case certified to the trial court for additional findings of fact as to "[w]hether a physician-patient relationship existed at the time Mr. King signed the arbitration agreement." On 6 November 2015, the trial court entered the additional findings of fact.

Now, the Court, on its own motion, orders that the parties submit supplemental briefs on the effect of the trial court's additional findings of fact on the proceedings in this case. Appellants' supplemental brief shall be filed no later than thirty days after the date of this order, and appellees' supplemental brief shall be filed no later than thirty days following appellants' filing.

By order of the Court in Conference, this 19th day of February, 2016.

s/Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of February, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. MILLER

[368 N.C. 760 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
BRENT TYLER MILLER	)	

No. 199PA15

ORDER

This case has come before this Court on discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 574 (2015), dismissing the State's appeal from an oral order rendered on 2 June 2014 by Judge Linwood O. Foust in Superior Court, Mecklenburg County, based on the Court of Appeals' determination that the record did not contain any indication that the order from which the State sought to appeal had been entered in accordance with the process set out in *State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012). While this case was pending before us, it came to the attention of this Court that the official minutes relating to the 2 June 2014 criminal session of the Superior Court, Mecklenburg County, reflected that, after Judge Foust orally announced his decision to affirm Judge Best-Staton's 16 January 2014 order, the courtroom clerk made a notation of Judge Foust's ruling in the minutes, establishing that Judge Foust's order had, in fact, been properly entered. The minute entry reflecting the entry of Judge Foust's order were not included in the record on appeal submitted for the consideration of the Appellate Division of the General Court of Justice.

Now, therefore, this Court, on its own motion, pursuant to N.C. R. P. 15(f), ORDERS that the record on appeal in this matter be AMENDED to include a certified copy of the minutes relating to the 2 June 2014 session of the Superior Court, Mecklenburg County, that reflect the courtroom clerk's notations regarding Judge Foust's ruling and the State's intent to appeal to the Court of Appeals therefrom, a copy attached to this order.

By order of the Court in Conference, this 17th day of March, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of March, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Iredell County
	)	
JAMES EDWARD JOYNER	)	

No. 414P15

ORDER

Upon consideration of the Petition for Discretionary Review filed by defendant on the 11th day of December 2015, the Petition is ALLOWED for the limited purpose of remanding to the Court of Appeals for reconsideration and review for plain error.

By order of this Court in Conference, this 17th day of March, 2016.

s/Ervin, J.
For the Court

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

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

17 March 2016

004P14-2	State v. Raymond Dakim Harris Joiner	Def's *Pro Se* Motion for Order of Dismissal	Dismissed
004P16	State v. Jamonte Dion Baker	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 **Ervin, J., recused**
006P16	State v. Tunisia Dawson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-420)	Denied
007P16	Gilbert Breedlove and Thomas Holland v. Marion R. Warren, in his Official Capacity, as Director of the N.C. Administrative Office of the Courts, and the North Carolina Administrative Office of the Courts	Plts' PDR Prior to a Decision of the COA (COA15-1381)	Denied
008P16	State v. Teon Jamell Williams	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-863) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Denied 2. Allowed 3. Dismissed as moot 4. Denied **03/03/2016**
009P16	State v. Jordan Leon Mustard	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-147)	Denied
010P16	State v. Purcell Orlando Jones, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as moot
011P16	Robert Lee Hood v. N.C. Department of Public Safety	Plt's *Pro Se* Motion for Notice of Appeal (COAP15-934)	Dismissed

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

17 MARCH 2016

012P16	State v. Don Christopher Hawes	1. Def's *Pro Se* Motion for Petition for *Writ of Error Coram Nobis* and Post Conviction Relief 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
014P16	State v. Robert Wayne Johnson	1. Def's *Pro Se* Motion for Re-Sentencing Hearing 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
015P16	State v. Jose Luis Dominguez	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-933) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 4. Def's *Pro Se* Motion for Subpoena *Duces Tecum*	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Dismissed as moot **Jackson, J., recused**
017P16	State v. Fernando Hurtado	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-211) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion to Withdraw Notice of Appeal and PDR	1. --- 2. --- 3. Dismissed as moot 4. Allowed
018P16	State v. D'Marcus Delton Ballard	Def's PDR Under N.C.G.S. § 7A-31 (COA15-335)	Denied
020P16	Ricardo L. Bailey v. Ford Motor Company; Ford Motor Credit Company, LLC; and Kathleen Burns, Individually	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-9)	Denied
021P16	State v. Lee Edward Hutchens	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-275) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
022P16	State v. Jeremy Lynn Benfield	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA00-1236)	Denied **Hudson, J., recused**

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023P16	State v. Jeremy Lynn Benfield	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA01-780)	Denied **Hudson, J., recused**
024P16	State v. Oakland McCulloch	1. State's Motion for Temporary Stay (COA15-290) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/21/2016** Dissolved **03/17/2016** 2. Denied 3. Denied
028P16	State v. Brian Levi Byford	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
029P16	Timothy Clarke, Personal Representative of the Estate of Erica Bohn v. Ashraf Gad Bakhom Mikhail, M.D.; Jessica Lynn Hardin, P.A., and Coastal Carolina Neuropsychiatric Center, P.A.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA15-235) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Amend PDR	1. Denied 2. Dismissed as moot 3. Allowed
032A16	Michael Orban v. Pike Corporation, J. Eric Pike, Charles E. Bayless, James R. Helvey III, Peter Pace, Daniel J. Sullivan, James L. Turner, Court Square Capital Partners, Pioneer Parent, Inc., and Pioneer Merger Sub, Inc.	Plt's Motion to Dismiss Appeal	Denied **02/08/2016**
032A16	Michael Orban v. Pike Corporation, J. Eric Pike, Charles E. Bayless, James R. Helvey III, Peter Pace, Daniel J. Sullivan, James L. Turner, Court Square Capital Partners, Pioneer Parent, Inc., and Pioneer Merger Sub, Inc.	Def's Consent Motion to Hold Appeals in Abeyance Pending Settlement	Allowed **03/15/2016**

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033A16	Collin Lieberg, on Behalf of Himself and All Others Similarly Situated v. Pioneer Parent, Inc., Pioneer Merger Sub, Inc., J. Eric Pike, Charles E. Bayless, James R. Helvey, III, General Peter Pace, Daniel J. Sullivan, and James L. Turner and Pike Corporation	Plt's Motion to Dismiss Appeal	Denied **02/08/2016**
034A16	Edwin Beickert, On Behalf of Himself and All Others Similarly Situated v. J. Eric Pike, Charles E. Bayless, James R. Helvey III, Peter Pace, Daniel J. Sullivan, James L. Turner, Pioneer Parent Inc., Pioneer Merger Sub Inc., and Court Square Capital Partners and Pike Corporation	Plt's Motion to Dismiss Appeal	Denied **02/08/2016**
035P16	State v. William Miller Baker	1. State's Motion for Temporary Stay (COA15-649) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/05/2016** 2.
036P16	State v. James Anthony Barnett, Jr.	1. State's Motion for Temporary Stay (COA15-200) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/05/2016** 2.
037P16	Annabelle Umberger v. Pike Corporation, J. Eric Pike, Charles E. Bayless, James R. Helvey III, Peter Pace, Daniel J. Sullivan, James L. Turner, Court Square Capital Partners, Pioneer Parent, Inc., and Pioneer Merger Sub, Inc.	1. Def's (Pike Corporation) PDR Prior to a Determination of COA 2. Def's (Pike Corporation) Motion to Consolidate Appeals	1. Allowed **02/08/2016** 2. Allowed **02/08/2016**

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038P16	Dr. Catherine B. Newkirk v. CVS-Caremark Corp., et al.	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-857)	Denied
039P16	State v. John David Watson	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **02/09/2016** 2.
040P16	State v. Kadeem Kirk	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-83) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
047P16	State v. Raymond Lee Crook, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-458)	Denied
048P16	Jamie Lee Stephenson v. State of North Carolina; Thomas Locke, Superior Court Judge; Susan Doyle, District Attorney; Michelle Ball, Clerk of Court	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
049P16	State v. Ahking Kaliek Williams	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-551)	Denied
050P16	State *ex rel.* Rebecca Aguirre v. Courts of Wilmington, North Carolina	Petitioner's *Pro Se* Motion for Petition Requesting Supervisory Control Over the Inferior Courts of North Carolina by the North Carolina Supreme Court	Dismissed
051P16	State v. Kelvin W. Sellers	Def's *Pro Se* Motion for PDR (COAP16-65)	Dismissed **Ervin, J., recused**
053P16	Darryl B. Adkins v. North Carolina Department of Public Safety	Plt's *Pro Se* Motion for Request for Review (COA16-20)	Dismissed
056PA14-2	Kirby, et al. v. N.C. Department of Transportation	Attorney Tanoury's Motion to Withdraw	Allowed **02/01/2016**

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061P16	State v. Carlton Washington Tomlinson	1. Def's Motion for Temporary Stay (COA15-585) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/25/2016** 2. 3.
062P16	State v. Walter Lemley, Jr.	1. Def's *Pro Se* Motion for PDR (COAP16-47) 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
069P06-3	State v. Terraine Sanchez Byers	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-897)	Dismissed **Ervin, J., recused**
069P13-2	Albert C. Burgess, Jr. v. eBay, Inc., et al.	1. Plt's *Pro Se* Petition for *Writ of Mandamus* 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Ervin, J., recused**
070P16	State v. Nicolas Olivares Pineda	1. State's Motion for Temporary Stay (COA15-800) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/04/2016** 2. 3.
072P16	Christina D'Alessandro v. Adam D'Alessandro	1. Def's Motion for Temporary Stay (COA15-357) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed; Existing Bond Extended **03/07/2016** 2.
084P15-3	State v. Curtis Louis Sangster	1. Def's *Pro Se* Petition for *Writ of Mandamus* (9 November 2015) 2. Def's *Pro Se* Petition for *Writ of Mandamus* (16 November 2015) 3. Def's *Pro Se* Petition for *Writ of Mandamus* (23 November 2015) 4. Def's *Pro Se* Petition for *Writ of Mandamus* (3 December 2015) 5. Def's *Pro Se* Petition for Writ of Prohibition 6. Def's *Pro Se* Petition for *Writ of Mandamus* (28 January 2016)	1. Dismissed 2. Dismissed 3. Denied **11/25/2015** 4. Dismissed 5. Dismissed 6. Dismissed

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084A16	Sabra Faires, Bennett Cotton, and Diane P. Lahti v. State Board of Elections; A. Grant Whitney, Jr., Chair, and Rhonda K. Amoroso, Joshua D. Malcolm, Maja Kricker, and James L. Baker, Members of the State Board (in their official capacities only); and Kim Westbrook Strach, Executive Director of the State Board (in her official capacity only)	Plts' and Defs' Joint Motion for Expedited Hearing	Allowed by Special Order **03/10/2016** **Edmunds, J., recused**
093A93-4	State v. Jaime Duarte Sierra El-Bey	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-800)	Dismissed
124PA15	State v. Michael Scott Hamilton	1. State's Motion for Temporary Stay (COA14-1005) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/06/2015** Dissolved **02/26/2016** 2. Allowed **08/20/2015** 3. Special Order **08/20/2015**

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127P09-2	James E. Fulford Jr., Executor for the Estate of Mary Fulford v. Antonio Javon Jenkins; County of Duplin; Duplin County Department of Social Services; Millie I. Brown, Individually and in her Official Capacity as Director of Duplin County Department of Social Services; De Wana Kenan, Individually and in her Official Capacity as a Social Worker with the Duplin County Department of Social Services; Sherita Wright, Individually and in her Official Capacity as a Social Worker with the Duplin County Department of Social Services; Nanette Smith, Individually and in her Official Capacity as a Social Worker with the Duplin County Department of Social Services; and Elva Quinn, Individually and in her Official Capacity as a Social Worker with the Duplin County Department of Social Services	Plt's Petition for *Writ of Certiorari* to Review Order of COA (COA15-296)	Denied
131P04-3	State v. Shan Edward Carter	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-463)	Dismissed **Ervin, J., recused**

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132P11-9	Gregory Lynn Gordon v. Frank L. Perry, Secretary, Department of Public Safety; Susan R. White, Superintendent, Alexander Correctional Institution	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/08/2016** **Ervin, J., recused**
158P06-6	State v. Derrick D. Boger	Def's *Pro Se* Motion for *Mandamus*	Denied
181A93-4	State v. Rayford Lewis Burke (DEATH)	1. Def's Motion to Hold PWC in Abeyance 2. Def's PWC to Review Order of Superior Court of Iredell County 3. State's Motion for Extension of Time to File Responses	1. Dismissed as moot 2. Allowed 3. Allowed **10/09/2014** **Ervin, J., recused**
199PA15	State v. Brent Tyler Miller	1. Def's Motion to Supplement the Record on Appeal 2. Def's Motion to Dismiss Appeal 3. Court's Motion for Supplemental Briefing	1. Dismissed as moot **02/05/2016** 2. Denied per opinion 3. Special Order **03/17/2016**
201PA12-3	Dickson, *et al.* v. Rucho, *et al.*	Plts' Petition for Rehearing	Special Order **02/11/2016**
220P11-2	State v. Christopher Dennie Ellerbe	Def's *Pro Se* Motion for PDR (COAP15-830)	Dismissed **Beasley, J., recused**
232A95-5	State v. Timothy Richardson (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Nash County 2. State's Motion to Amend Response to Petition for *Writ of Certiorari* 3. Def's Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*	1. Denied 2. Allowed 3. Allowed

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254P08-3	State v. Michael Orlando Cook	1. Def's *Pro Se* Motion for PDR (COA15-963) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion for Subpoena *Duces Tecum* 4. Def's *Pro Se* Motion to Amend 5. Def's *Pro Se* Motion to Amend PDR	1. Dismissed 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed 5. Allowed
294PA14	Robert E. King and wife, Jo Ann O'Neal v. Michael S. Bryant, M.D., and Village Surgical Associates, P.A.	Court's Motion for Supplemental Briefing	Special Order **02/19/2016**
302A14	State v. Juan Carlos Rodriguez	Def's Motion to Amend Record on Appeal	Allowed **02/22/2016**
309P15	State v. Reginald Underwood Fullard	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-93) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied 2. Denied **01/13/2016**
321P15	Hannah Marie Johnson Kearney v. Bruce R. Bolling, M.D.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-671) 2. Plt's Motion to Amend PDR	1. Denied 2. Allowed
336P15	State v. Melissa Amber Dalton	1. State's Motion for Temporary Stay (COA14-1329) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/06/2015** 2. Allowed 3. Allowed
369A15	State v. John Joseph Carvalho, II	1. Def's Notice of Appeal Based Upon a Dissent under N.C.G.S. § 7A-30 (COA14-1251) 2. Def's Notice of Appeal Based Upon a Constitutional Question Under N.C.G.S. § 7A-30 3. Def's PDR as to Additional Issues Under N.C.G.S. § 7A-31 4. State's Motion to Dismiss Appeal	1. --- 2. --- 3. Allowed 4. Allowed
370P15	In the Matter of R.P.D.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-330)	Denied

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371P15	State v. Wayne Allen Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA15-220)	Denied
376A15	Paramount, Rx, Inc. v. Robert E. Duggan and Agelity, Inc.	Plt and Defs' Joint Motion to Stay the Appeal	Allowed **02/24/2016**
382P93-2	State v. Truman Calvin Boone	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Guilford 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
382P10-5	State v. John Lewis Wray, Jr.	Def's *Pro Se* Motion for Notice of Appeal	Dismissed **Beasley, J., recused**
386P15	John James Scheffer, Individually and as Administrator of the Estate of Jeremy Talbot Scheffer, Deceased v. Nathaniel Eugene Dalton	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-264) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. N.C. Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot 3. Dismissed as moot
388A10	State v. Andrew Darrin Ramseur (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Iredell County 2. Def's Motion to Maintain Stay of Direct Appeal	1. Allowed 2. Allowed **06/10/2015**
393P15	State v. James Preston Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA15-222)	Denied
394P15	Alan Savage v. Julie Anne Zelent a/k/a Julie Anne Phillips a/k/a Julie A. McSwain	Def's PDR Under N.C.G.S. § 7A-31 (COA15-282)	Denied
407P15	State v. Larry Ricardo Tart	Def's *Pro Se* Motion for Notice of Appeal	Dismissed
412P15	Gregory Allen Taylor v. Harnett County District Court Jacqualyn L. Lee	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied

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414P15	State v. James Edward Joyner	Def's PDR Under N.C.G.S. § 7A-31 (COA15-442)	Special Order
415P13-3	State v. Kelvin W. Sellars	Def's *Pro Se* Motion for PDR (COAP15-996)	Dismissed **Ervin, J., recused**
420P15	State v. Marlon E. Mendoza-Mejia	1. State's Motion for Temporary Stay (COA14-1261) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/21/2015** Dissolved **03/17/2016** 2. Denied 3. Denied
423P15	State v. Clyde Gary Whisenant	1. State's Motion for Temporary Stay (COA15-607) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss PDR 5. State's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Allowed **12/30/2015** Dissolved **03/17/2016** 2. Denied 3. Denied 4. Dismissed as moot 5. Dismissed as moot **Ervin, J., recused**
431P15	State v. William Charles Compton	Def's PDR Under N.C.G.S. § 7A-31 (COA15-567)	Denied
432P15	State v. April Jean Anderson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-269)	Allowed
433P15	Cheri Joyner Stallings v. Jeffrey Driver Stallings	Def's PDR Under N.C.G.S. § 7A-31 (COA15-327)	Denied
435P15-2	State v. Sulyaman Alisla Wasalaam	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Scotland County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion for Preparation of a Stenographic Transcript	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed as moot

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437P15-2	Herman V. Tate v. North Carolina Department of Public Safety	Plt's *Pro Se* Motion to Reconsider Dismissal of Discretionary Review	Dismissed
440P15	Lewis Junior Jenkins v. Harnett County District Court, Jacqualyn L. Lee, Judge Faircloth	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
446A13	State v. Mario Andrette McNeill	Def's Motion to Bypass the COA	Allowed **03/08/2016**
449P11-13	State v. Charles Everette Hinton	1. Petitioner's *Pro Se* Motion to Take Judicial Notice of Adjudicative Facts 2. Petitioner's *Pro Se* Motion for Necessary Joinder of Parties 3. Petitioner's *Pro Se* Motion for Joinder of Claims and Remedies 4. Petitioner's *Pro Se* Motion for Evidentiary Oral Hearing and Findings and Conclusions by the Court 5. Petitioner's *Pro Se* Motion for Inquiry into Restraint on Liberty; Petition for *Writ of Habeas Corpus*; Relief from Judgments 6. Petitioner's *Pro Se* Motion for Calendaring Cause	1. 2. 3. 4. 5. Denied **02/19/2016** 6.
470P14-2	N.C. Department of Public Safety v. Carrie J. Tucker	Petitioner's (Respondent Below) PDR Under N.C.G.S. § 7A-31 (COA14-1308)	Denied
471P14	John Price v. State of N.C. Office of the State Auditor	1. State's PDR Under N.C.G.S. § 7A-31 (COA14-375) 2. State's Motion for Consolidation 3. Petitioner's Motion to Dismiss PDR 4. Respondent's Motion for Leave to File Reply Brief to Response to Motion to Dismiss 5. Motion to Appear	1. Denied 2. Denied **04/09/2015** 3. Dismissed as moot 4. Dismissed as moot 5. Denied **08/20/2015** **Ervin, J., recused**

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514P13-4	State v. Raymond Dakim Harris Joiner	Def's *Pro Se* Motion for Order for Dismissal	Dismissed
606A05-3	State v. Eric Glenn Lane	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed 2. Allowed

ATLANTIC COAST PROPERTIES, INC., A DELAWARE CORPORATION, PETITIONER
v.
ANGERONA M. SAUNDERS AND HUSBAND, ALGUSTUS O. SAUNDERS, JR., LUCY M. TILLETT, PATRICIA W. MOORE–PLEDGER, GENEVIVE M. GOODMAN, LYNETTE C. WINSLOW, AND CARLTON RAY WINSLOW, RESPONDENTS

No. 365A15

Filed 15 April 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 292 (2015), reversing and remanding an order entered on 29 May 2014 by Judge J. Carlton Cole in Superior Court, Currituck County. Heard in the Supreme Court on 21 March 2016.

Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis, for petitioner-appellee.

Vandeventer Black LLP, by Norman W. Shearin, for respondent-appellants.

PER CURIAM.

AFFIRMED.

NORTH CAROLINA ASSOCIATION OF EDUCATORS, INC., RICHARD J. NIXON, RHONDA HOLMES, BRIAN LINK, ANNETTE BEATTY, STEPHANIE WALLACE, AND JOHN DEVILLE

v.

THE STATE OF NORTH CAROLINA

No. 228A15

Filed 15 April 2016

1. Schools and Education—Career Status Law—did not in itself create vested rights

A statute governing the employment of teachers, the Career Status Law (now repealed), did not itself create any vested contractual rights. That statute contemplated the creation of individual contracts between school boards and teachers but did not itself establish any benefit provided to teachers by the State nor create any relationship between them.

2. Schools and Education—Career Status Law—implied inclusion in local contracts

Although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied.

3. Schools and Education—repeal of Career Status Law—impairment of vested rights

Teachers' vested rights were substantially impaired by the repeal of the Career Status Law. Retroactively revoking this status from those whose career status rights had already vested deprived career teachers of the promise of continuing employment as well as the right to a hearing in circumstances in which their now-shortened contracts may not be renewed.

4. Schools and Education—teachers—impairment of contractual rights—no legitimate public purpose

Although a substantial impairment of teacher's contractual rights can still be upheld if the impairment was a reasonable and necessary means of serving a legitimate public purpose, there was not a legitimate public purpose for which it was necessary to impair substantially the vested contractual rights of career status teachers. Alleviating difficulties in dismissing ineffective teachers might be a

legitimate end justifying changes to the Career Status Law, but no evidence indicates that such a problem existed.

5. Schools and Education—impairment of teachers vested rights—method not reasonable and necessary

Even if a legitimate public purpose existed justifying an impairment of vested teachers' rights by repeal of the Career Status Law, the method adopted for alleviating that harm must be necessary and reasonable. Less sweeping alternatives were possible.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 776 S.E.2d 1 (2015), affirming orders entered on 6 June 2014 by Judge Robert H. Hobgood in Superior Court, Wake County. On 20 August 2015, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 15 February 2016.

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh; and National Education Association, by Philip Hostak, pro hac vice, for plaintiff-appellees.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General; Melissa L. Trippe, Special Deputy Attorney General; and Elizabeth A. Fisher, Assistant Solicitor General, for defendant-appellant.

Gray Layton Kersh Solomon Furr & Smith, PA, by Michael L. Carpenter, for North Carolina Retired Governmental Employees' Association, amicus curiae.

McGuinness Law Firm, by J. Michael McGuinness, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis, for State Employees Association of North Carolina, Inc., amicus curiae.

EDMUNDS, Justice.

The North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. Until 2013, North Carolina public school teachers were employed under a system usually

described generically as the "Career Status Law," through which teachers could earn career status after successfully completing a probationary period and receiving a favorable vote from their school board. N.C.G.S. § 115C-325 (2012). That process changed with passage of the Current Operations and Capital Improvements Appropriations Act of 2013, ch. 360, 2013 N.C. Sess. Laws 995 ("the Act"). Details of the Act are described below, but most pertinent to the case at bar, the Act retroactively revoked the career status of teachers who had already earned that designation by repealing the Career Status Law ("Career Status Repeal"), *id.*, sec. 9.6(a), at 1091, and created a new system of employment for public school teachers, *id.*, secs. 9.6(b) to 9.7(y), at 1091-1116 (hereinafter sections 9.6 and 9.7).

Plaintiffs allege that sections 9.6 and 9.7 of the Act violate Article I, Section 10 of the United States Constitution (forbidding passage of any "Law impairing the Obligation of Contracts") and Article I, Section 19 of the North Carolina Constitution (the Law of the Land Clause), as it applied to teachers who have previously earned career status. We conclude that repeal of the Career Status Law unlawfully infringes upon the contract rights of those teachers who had already achieved career status. As a result, we hold that sections 9.6 and 9.7 are unconstitutional, though only to the extent that the Act retroactively applies to teachers who had attained career status as of 26 July 2013.

We begin our analysis with an overview of the evolution of state statutes that have controlled career status of public school teachers. For over four decades, North Carolina public schools have operated under what was commonly called the Career Status Law, a statutory framework setting out a system for the employment, retention, and dismissal of public school teachers. However, little in this framework has remained static over the years.

Beginning in 1971, the General Assembly created a procedure through which teachers who were employed for at least three consecutive years as probationers would become "career teachers" if the school board voted to reemploy the teacher for the upcoming school year. *See* Act of July 16, 1971, ch. 883, 1971 N.C. Sess. Laws 1396 (codified at N.C.G.S. § 115-142 (1971)). In addition, any teacher who had been employed in the same public school system for four consecutive years or been employed by the State as a teacher for five consecutive years would automatically became a career teacher. N.C.G.S. § 115-142(c). These career teachers were no longer subject to an annual appointment process, *id.* § 115-142(d), and could only be dismissed for one of twelve grounds specified in the statute, *id.* § 115-142(e)(1). If a teacher

was to be dismissed, the act provided for notice and, if requested by the teacher, a review of the recommendation of dismissal by a panel of the Professional Review Committee prior to termination. *Id.* § 115-142(h). A local school board could choose not to renew its contract with a probationary teacher for any reason that was not "arbitrary, capricious, discriminatory or for personal or political reasons." *Id.* § 115-142(m)(2).

The system originally set up in 1971 has been subject to continual tinkering and revision by the General Assembly. In 1973, the General Assembly added a thirteenth statutory ground for dismissal of a teacher, *id.* § 115-142(e)(1)m (1975), and gave disappointed teachers the option of requesting either a review of a superintendent's dismissal recommendation by a panel of the Professional Review Committee or a hearing before the school board, *id.* § 115-142(h)(3) (1975). *See* Act of May 23, 1973, ch. 782, secs. 12, 20, 1973 N.C. Sess. Laws 1136, 1138, 1139 (codified at N.C.G.S. § 115-142 (1975)). In 1979, a fourteenth statutory ground for dismissal or demotion was added. *See* Act of June 8, 1979, ch. 864, sec. 2, 1979 N.C. Sess. Laws 1185, 1188 (codified at N.C.G.S. § 115-142(e)(1)n (1979)).

The next significant change came in the 1983 legislative session. The General Assembly amended the 1979 law to provide that, after a teacher had taught for three, four, or five consecutive years in a school system with more than 70,000 students, the local school board had authority to grant the teacher career status, reappoint the teacher to another probationary one-year contract, or decline to reappoint the teacher. *See* Act of May 26, 1983, ch. 394, 1983 N.C. Sess. Laws 301 (codified at N.C.G.S. § 115C-325(c)(1) (1985)). At the end of the probationary teacher's sixth year, the school board's choices were limited to appointment to career teacher status or nonrenewal of the appointment. N.C.G.S. § 115C-325(c)(1). However, the General Assembly did not extend this program, so after 1 July 1985 the process through which teachers received career status reverted to the 1981 system. *See* Ch. 394, sec. 6, 1983 N.C. Sess. Laws at 302. In 1992, a new statutory ground for dismissal was added, along with an amendment allowing a teacher who was being considered for dismissal to request a hearing either before the local school board or before a panel of the Professional Review Committee (instead of the previously provided investigation of the superintendent's recommendation by the Professional Review Committee). *See* Act of July 14, 1992, ch. 942, 1991 N.C. Sess. Laws (Reg. Sess. 1992) 730 (codified at N.C.G.S. § 115C-325(e)-(j) (1992)). Under either option, the hearing procedure was set out in subsection 115C-325(j). N.C.G.S. § 115C-325(e)(2), (h)(3), (i)(2) (1992).

In 1997, the General Assembly enacted a comprehensive set of statutes that included measures aimed at improving student academic achievement, enhancing teacher skills and knowledge, and implementing a system to review more rigorous teacher preparation, professional development, and certification standards. *See* The Excellent Schools Act, ch. 221, 1997 N.C. Sess. Laws 427. The new law enacted, amended, or repealed many provisions related to education and included significant changes to section 115C-325. For example, the act increased from three to four the number of years of consecutive service a teacher had to complete before becoming eligible for career status. *See* N.C.G.S. § 115C-325(c)(1) (1997). This act also expanded the definition of "demote" to include some circumstances under which a career teacher was suspended without pay and excluded circumstances where bonus payments were reduced or eliminated. *Id.* § 115C-325(a)(4) (1997). The Professional Review Committee system was eliminated and replaced with case managers who were certified mediators specially trained by the State Board of Education. *Id.* § 115C-325(h)-(h1) (1997). Career employees being recommended for dismissal or demotion had the option of choosing between a hearing in front of a case manager, governed by subsection 115C-325(j), or a hearing in front of the school board, conducted pursuant to subsection 115C-325(j2). *Id.* § 115C-325(h)(3) (1997). In 2009, the legislature amended the statute to add procedural protections for probationary teachers. *See* Act of July 13, 2009, ch. 326, 2009 N.C. Sess. Laws 528 (codified at N.C.G.S. § 115C-325(m)(3)-(4) (2009)).

In 2011, the legislature eliminated case managers and replaced them with hearing officers before whom career status teachers could request a hearing prior to dismissal or demotion. *See* Act of June 17, 2011, ch. 348, sec. 1, 2011 N.C. Sess. Laws 1464, 1464 (codified at N.C.G.S. § 115C-325(a)(4c), (h)(3), (h1) (2011)). The act also provided a definition for "inadequate performance," one of the original statutory grounds for dismissal or demotion of a career employee. N.C.G.S. § 115C-325(e)(3) (2011).

The employment system in place at the time of the passage of the Act was codified under N.C.G.S. § 115C-325 (2012) and established two classes of public school teachers. Probationary teachers were defined in N.C.G.S. § 115C-325(a)(5), while career teachers were defined in N.C.G.S. § 115C-325(a)(1c). Probationary teachers were employed through annual contracts with the local board of education. *Id.* § 115C-325(m)(2). These contracts were subject to nonrenewal for any reason that was not "arbitrary, capricious, discriminatory or for personal or political reasons." *Id.* The school board would vote on whether to grant career status to a probationary teacher who had been employed by that school

system for four consecutive years. *Id.* § 115C-325(c)(1). Probationary teachers eligible for such a vote had the right to notice and a hearing before the board's vote if the superintendent did not intend to recommend the teacher for career status. *Id.* § 115C-325(m)(3)-(4). Upon a vote to grant career status, probationary teachers would enter into a career contract with their employing local board of education.

Career status teachers could only be dismissed, demoted, or relegated to part-time status based on one or more of fifteen specified statutory grounds. *Id.* § 115C-325(e)(1). Prior to making a recommendation for dismissal, demotion, or relegation to part-time status of a career status teacher, the superintendent was required to give written notice of the grounds on which he or she believed the action to be justified. *Id.* § 115C-325(e)(2). Upon receipt of such written notice, a career teacher had a right to request a hearing before a hearing officer to contest the superintendent's recommendation, at which the career teacher was entitled "to be present and to be heard, to be represented by counsel and to present through witnesses any competent testimony relevant to the issue of whether grounds for dismissal or demotion exist." *Id.* § 115C-325(j)(3). The decision of the hearing officer could be further appealed to the full school board. *Id.* § 115C-325(j1)(1). The board could approve dismissal or demotion of a career teacher after undertaking a whole record review to determine whether the hearing officer's findings of fact were supported by substantial evidence. *Id.* § 115C-325(j2)(7).

This summary demonstrates that the General Assembly's treatment of career teacher status has changed significantly over the last forty years. Now the Career Status Law, N.C.G.S. § 115C-325 (2012), is no more. The changes under review here occurred in 2013, when the General Assembly passed the Act. Ch. 360, 2013 N.C. Sess. Laws at 995. The Act revokes career status for all teachers as of 1 July 2018. *Id.*, sec. 9.6(i), at 1103. Under the new system, teacher contracts are not open-ended, as was previously the case for career teachers, but instead extend "for a term of one, two, or four school years." N.C.G.S. § 115C-325.3(a) (2015). A decision not to renew a teacher's contract can be based on any reason not "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law." *Id.* § 115C-325.3(e) (2015). The superintendent must give the teacher written notice of a decision to recommend nonrenewal. *Id.* § 115C-325.3(d) (2015). Within ten days of receiving such notice, the teacher can petition the local school board for a hearing, but the school board has discretion whether to grant the request. *Id.* § 115C-325.3(e). Dismissal, demotion, or a change to part-time status during the term of the contract remains

based on the fifteen statutory grounds and procedure set forth previously in the Career Status Law. *Id.* § 115C-325.4(a) (2015). Any teacher who had not achieved career status "prior to the 2013-2014 school year" is no longer eligible to receive career status in the future and will instead be employed primarily by one-year contracts, "except for qualifying teachers offered a four-year contract as provided in subsection (g) of this section, until the 2018-2019 school year." Ch. 360, sec. 9.6(f), 2013 N.C. Sess. Laws at 1103.[1]

On 17 December 2013, the North Carolina Association of Educators, Inc. (NCAE), five tenured public school teachers, and one probationary public school teacher filed a complaint in Superior Court, Wake County, challenging the constitutionality of the repeal of the Career Status Law under both the North Carolina and United States Constitutions. In their first claim for relief, plaintiffs alleged that the repeal constituted a "taking of property without just compensation in violation of Article I, Section 19 of the North Carolina Constitution." Plaintiffs further contended the repeal was an "impairment of contracts in violation of Article I, Section 10 of the United States Constitution." Plaintiffs requested a declaration that sections 9.6 and 9.7 of the Act are unconstitutional under both constitutions as applied retroactively to revoke career status from teachers who had previously earned that designation, and also as applied prospectively to probationary teachers who were employed by the public schools before the repeal and had been on a track leading to eligibility for career status. Plaintiffs also sought "a permanent injunction against the implementation and enforcement" of both sections as to all tenured and probationary teachers who were employed by public schools as of 26 July 2013.

On 17 January 2014, the State filed its answer denying all of plaintiffs' allegations. The State also filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that plaintiffs failed to state a legal claim upon which relief may be granted. On 10 March 2014, plaintiffs filed a motion for summary judgment, along with supporting affidavits, and the State responded with affidavits opposing plaintiffs' motion. After a 12 May 2014 hearing, the trial court

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1. Subsections 9.6(g) and (h), which never went into effect, would have required superintendents to review the performance and evaluations of all teachers employed in their schools for at least three consecutive years and recommend one-quarter of those teachers to receive a four-year contract beginning in the 2014-15 school year. Ch. 360, sec. 9.6(f), 2013 N.C. Sess. Laws at 1103. The selected teachers would receive a five-hundred dollar annual pay raise for each year of the four-year contract in exchange for the relinquishing of career status. *Id.*, sec. 9.6(g)-(h), at 1103.

on 6 June 2014 entered an order granting in part plaintiffs' motion as to the retroactive revocation of career status from teachers who already held that status. As to the claims brought on behalf of teachers who had not yet earned career status, the trial court denied in part plaintiffs' motion for summary judgment and granted summary judgment in favor of the State. The trial court declared unconstitutional sections 9.6 and 9.7 of the Act as they apply to career status teachers as of 26 July 2013. The court further enjoined the State from implementing and enforcing those provisions as to teachers holding career status on 26 July 2013, and also denied the State's oral motion to stay the trial court's permanent injunction. Plaintiffs and defendant filed separate notices of appeal.

The Court of Appeals unanimously affirmed the trial court's decision to grant summary judgment in favor of the State as to plaintiffs' claims on behalf of probationary teachers. *NCAE*, ___ N.C. App. ___, ___, 776 S.E.2d 1, 23-24 (2015) (majority); *id.* at ___, 776 S.E.2d at 24 (Dillon, J., concurring in part and dissenting in part). That decision was not appealed to this Court and we do not address it further. However, the Court of Appeals was divided as to career status teachers. The majority rejected the State's argument that the trial court erred as a matter of law when it granted summary judgment in favor of plaintiffs on the issue of whether retroactive application of the Career Status Repeal violated the Contract Clause of the United States Constitution. *Id.* at ___, 776 S.E.2d at 9 (majority). The majority acknowledged that in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), this Court set out a three-part test for analyzing an alleged violation of the United States Constitution's Contract Clause. *NCAE*, ___ N.C. App. at ___, 776 S.E.2d at 9-10. Under that test, the reviewing court considers "(1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citing *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977)). Applying the *Bailey* test and analyzing cases from this Court and the United States Supreme Court, the majority found that, as to the existence of a contractual right, the Career Status Law was a "statutory promise" and that, upon satisfying its requirements and achieving career status, plaintiffs "earned a vested right to career status protections." *NCAE*, ___ N.C. App. at ___, 776 S.E.2d at 12. In considering next whether those statutory contractual rights were substantially impaired by the State's actions, the majority concluded that eliminating career contracts in favor of contracts for one, two, or four years substantially impaired the rights promised to plaintiffs. *Id.* at ___, 776 S.E.2d at 13. The majority also held that a school board's discretionary ability

to deny renewal of a contract for a term of years without a hearing was a substantial change from the previous law's requirement of a hearing prior to imposition of termination, demotion, or other discipline. *Id.* at ___, 776 S.E.2d at 13. Accordingly, the court had "no trouble concluding that the trial court was correct in its determination that the Career Status Repeal substantially impairs Plaintiffs' vested contractual rights." *Id.* at ___, 776 S.E.2d at 13.

Finally, the Court of Appeals was unpersuaded by the State's argument that the General Assembly repealed the Career Status Law in order to improve the public school systems by providing a method under which schools more easily could rid themselves of ineffective teachers. *Id.* at ___, 776 S.E.2d at 14. The court found the contention that these measures would improve the school system to be baseless and unsupported by the affidavits submitted by both parties. *Id.* at ___, 776 S.E.2d at 14. Even assuming the State's purpose was an important one, the majority was unconvinced that repealing the Career Status Law "was a reasonable and necessary means to advance that purpose." *Id.* at ___, 776 S.E.2d at 15. The majority found that no evidence suggested that the approach embodied in the Act served the purpose of removing incompetent teachers, particularly when less drastic alternatives exist for the reform of public education. *Id.* at ___, 776 S.E.2d at 15-16. The majority concluded that the trial court correctly found the repeal of the Career Status Law violated the United States Constitution's Contract Clause as to teachers who had already earned career status at the time of repeal. *Id.* at ___, 776 S.E.2d at 16. Based on this Contract Clause violation, the Court of Appeals further held that plaintiffs' contract right was a property interest that was being unjustly taken away by the repeal without compensation to plaintiffs, in violation of the Law of the Land Clause of the North Carolina Constitution. *Id.* at ___, 776 S.E.2d at 16-18.

The dissenting judge argued that the repeal is unconstitutional to the extent that it allows career status teachers to be stripped of a protected property interest without a hearing. *Id.* at ___, 776 S.E.2d at 25 (Dillon, J., concurring in part and dissenting in part). Nevertheless, the dissenting judge would not hold that the Career Status Law created any contractual rights, *id.* at ___, 776 S.E.2d at 28, and except for the portion giving local boards the discretion whether to hold a hearing before depriving a career teacher of his or her property interest in continued employment, would find the repeal of that law constitutional on its face, *id.* at ___, 776 S.E.2d at 29. The State appealed to this Court on the basis of the dissenting opinion and we granted the State's petition for discretionary review as to additional related issues.

This Court presumes that statutes passed by the General Assembly are constitutional, *State v. Packingham*, 368 N.C. 380, 382-83, 777 S.E.2d 738, 742 (2015) (citing *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 duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt, *Morris v. Holshouser*, 220 N.C. 293, 295, 17 S.E.2d 115, 117 (1941). Even so, we review de novo any challenges to a statute's constitutionality. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted).

[1] Plaintiffs first allege that the Career Status Repeal violated Article I, Section 10 of the Constitution of the United States by impairing the contract rights of teachers who had earned career status before the repeal. The Contract Clause, "one of the few express limitations on state power" in the Constitution, *U.S. Tr. Co.*, 431 U.S. at 14, 97 S. Ct. at 1514, 52 L. Ed. 2d at 104, provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts," U.S. Const. art. I, § 10. As the Court of Appeals correctly recognized, this Court uses the three-factor test set out in *Bailey* to determine whether a Contract Clause violation exists. *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citing *U.S. Tr. Co.*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92).

Accordingly, we first consider whether any contractual obligation arose from the statute making up the now-repealed Career Status Law. The United States Supreme Court has recognized a presumption that a state statute "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 58 S. Ct. 98, 100, 82 L. Ed. 57, 62 (1937). This presumption is rooted in the longstanding principle that the primary function of a legislature is to make policy rather than contracts. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S. Ct. 443, 446, 82 L. Ed. 685, 690 (1938). A party asserting that a legislature created a statutory contractual right bears the burden of overcoming that presumption, *Dodge*, 302 U.S. at 79, 58 S. Ct. at 100, 82 L. Ed. at 62, by demonstrating that the legislature manifested a clear intention to be contractually bound, *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 1451, 84 L. Ed. 2d 432, 446 (1985). Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals. *See Kornegay v. City of Goldsboro*, 180 N.C. 441, 451, 105 S.E.

187, 192 (1920). We are deeply reluctant to "limit drastically the essential powers of a legislative body" by finding a contract created by statute without compelling supporting evidence. *Nat'l R.R.*, 470 U.S. at 466, 105 S. Ct. at 1451, 84 L. Ed. 2d at 446; *see also Mial v. Ellington*, 134 N.C. 131, 153, 46 S.E. 961, 968 (1903) ("[M]any things done by the State may seem to hold out promises to individuals which, after all, cannot be treated as contracts without hampering the legislative power of the State in a manner that would soon leave it without the means of performing its essential functions.").

This requirement for explicit indications of legislative intent is shown in two United States Supreme Court cases in which the use or omission of the word "contract" in the statute was deemed critical. In *Phelps v. Board of Education*, 300 U.S. 319, 57 S. Ct. 483, 81 L. Ed. 674 (1937), that Court considered a New Jersey employment system where, after completing three years of service, teachers were hired for an ongoing open-ended period during which they could not be dismissed or subjected to a reduction in salary without notice and a hearing. *Id.* at 320-21, 57 S. Ct. at 484, 81 L. Ed. at 676. The Supreme Court found that this system did not set up a contract but instead "established a legislative status for teachers," *id.* at 322, 57 S. Ct. at 484, 81 L. Ed. at 676, and was a "regulation of the conduct of the board" that created no binding obligation, *id.* at 323, 57 S. Ct. at 485, 81 L. Ed. at 677. However, the Court shortly thereafter distinguished *Phelps* in *Brand*, 303 U.S. 95, 58 S. Ct. 443, 82 L. Ed. 685, when it held that Indiana's "Teachers' Tenure Act" created a statutory contractual right between the teachers and a local school district. In *Brand*, the Court looked specifically to the language of Indiana's Act, noting that the word "contract" was peppered throughout nearly every section of the statute. *Id.* at 105, 58 S. Ct. at 448, 82 L. Ed. at 693 ("The title of the Act is couched in terms of contract. It speaks of the making and cancelling of indefinite contracts. In the body the word 'contract' appears ten times in § 1, eleven times in § 2, and four times in § 4 . . . .").

These cases indicate that courts must consider the language used by the legislature to determine whether a statute "provides for the execution of a written contract on behalf of the state." *Dodge*, 302 U.S. at 78, 58 S. Ct. at 100, 82 L. Ed. at 61. North Carolina's Career Status Law does not present the type of unmistakable legislative intent found by the United States Supreme Court in the statute at issue in *Brand*. Nowhere in the portion of section 115C-325 establishing the promotion of a teacher to career status does the word "contract" appear. *Compare* N.C.G.S. § 115C-325(c)(1) (2012), *with Brand*, 303 U.S. at 101 n.14,

58 S. Ct. at 446 n.14, 82 L. Ed. at 691 n.14 (discussing the Indiana statute's frequent use of that term). The word "contract," as used in the remainder of our Career Status Law refers only to individual contracts with the local school boards and relationships between teachers and the local school system, with no mention of the State.

Turning next to cases from this Court, we considered an alleged Contract Clause violation in the context of retirement benefits in *Bailey*, 348 N.C. 130, 500 S.E.2d 54, and in the context of disability retirement payments in *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997). In both cases, this Court held that vested contractual rights were created by the statutes at issue because, at the moment the plaintiffs fulfilled the conditions set out in the two benefits programs, the plaintiffs earned those benefits. Though the benefits would be received at a later time, the plaintiffs' right to receive them accrued immediately, became vested, and a contract was formed between the plaintiffs and the State. *Bailey*, 348 N.C. at 138, 500 S.E.2d at 58 ("After employment for the set number of years, an employee is deemed to have 'vested' in the retirement system."); *Faulkenbury*, 345 N.C. at 692, 483 S.E.2d at 428 (stating that the plaintiffs fulfilled their condition of working for five years and "[a]t that time, the plaintiffs' rights to benefits in case they were disabled became vested"). In other words, neither the retirement benefits in *Bailey* nor the disability payments in *Faulkenbury* were based upon future actions by the plaintiffs. Instead, those benefits had been presently earned and became vested as the plaintiffs performed, even though payment of those benefits was deferred until a later time.

In contrast, a teacher has no vested career status rights at the end of the probationary period. Instead, after successfully meeting all the requirements, a teacher could enter a career contract with the school board. Thus, we see that the Career Status Act is a regulation of conduct through which local school boards can exercise their discretion to enter into contracts with teachers for whom they approve career status. The Career Status Law contemplates the creation of individual contracts between school boards and teachers but does not itself establish any benefit provided to teachers by the State nor create any relationship between them. As a result, plaintiffs have not overcome the strong presumption against finding a vested right created by the Career Status Law.

In addition, the oft-amended course of the Career Status Law over the decades is evidence that the State did not intend to create a contract with teachers by the terms of the statute. Each new version of the statute did not immediately create a vested contract between the State

and public school teachers. The amendments instead altered details of career status while leaving the overall career status system intact, thereby allowing the possibility of future modifications and amendments as needs arose. Accordingly, we conclude the Career Status Law did not itself create any vested contractual rights.

[2] However, our analysis does not end here. "[L]aws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30, 54 S. Ct. 231, 237, 78 L. Ed. 413, 424 (1934) (quoting *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550, 18 L. Ed. 403, 408 (1866)). Before receiving career status, plaintiffs entered individual contracts with the local school boards. Implied as a part of each of these contracts was the Career Status Law. As the State concedes in its brief, the "applicable statutory terms must be read into the contracts" and the contracts "[i]ncorporat[ed] the statutory body of 'school law' applicable to Plaintiffs as teachers." The statutory system that was in the background of the contract between the teacher and the board set out the mechanism through which the teachers could obtain career status. A teacher's career status rights under the Career Status Law become vested only upon completing several consecutive years as a probationary teacher and then receiving approval from the school board. Thus, vesting stems not from the Career Status Law, but from the teacher's entry into an individual contract with the local school system. At the time the parties made the contract, the right to career status vested. At that point, the General Assembly no longer could take away that vested right retroactively in a way that would substantially impair it.

The record demonstrates the importance of those protections to the parties and the teachers' reliance upon those benefits in deciding to take employment as a public school teacher. For instance, in his affidavit, Bruce W. Boyles, Cleveland County Superintendent of Schools, stated that "[t]eachers rely upon their career status rights in making employment decisions"; "[w]hen interviewing and hiring teachers, teachers frequently ask about career status rights"; and such protections have value to prospective teachers which "makes up for not having better monetary compensation." The affidavits of plaintiffs Annette Beatty, John deVille, Rhonda Holmes, Richard J. Nixon, and Stephanie Wallace establish that they were promised career status protections in exchange for meeting the requirements of the law, relied on this promise in exchange for accepting their teacher positions and continuing their employment with their school districts, and consider the benefits and protections of

career status to offset the low wages of public school teachers. Thus, we conclude that, although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied.

[3] We next move to the second part of a Contract Clause analysis in which we consider whether the vested rights found above were substantially impaired by the Career Status Repeal. *U.S. Tr. Co.*, 431 U.S. at 17, 97 S. Ct. at 1515, 52 L. Ed. 2d at 106. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 2d 569, 580 (1983) (citing *U.S. Tr. Co.*, 431 U.S. at 26-27, 97 S. Ct. at 1519-20, 52 L. Ed. 2d at 112). However, a showing that the change in the law results in an outcome different from that "reasonably expected from the contract" may be sufficient to show a substantial deprivation. *Id.* at 411, 103 S. Ct. at 704, 74 L. Ed. 2d at 580. Plaintiffs contend that the repeal of the Career Status Law and its protections substantially impairs the contractual rights for which they bargained.

The benefits enjoyed by career teachers have been described above, most of which boil down to enhanced job security. The Career Status Law establishing those benefits was replaced by a new system that eliminates career status entirely, allowing local school boards and teachers to enter into contracts in durations of only one, two, or four years. N.C.G.S. § 115C-325.3(a) (2015). Nonrenewal of these shortened contracts can be based on any reason not "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law." *Id.* § 115C-325.3(e) (2015). If the superintendent recommends that a teacher not be renewed, the teacher can petition for a hearing but the school board has unrestricted discretion whether to grant or deny that request. *Id.*

We hold that these changes are a substantial impairment of the bargained-for benefit promised to the teachers who have already achieved career status. Retroactively revoking this status from those whose career status rights had already vested deprives career teachers of the promise of continuing employment, as well as the right to a hearing in circumstances in which their now-shortened contracts may not be renewed. Plaintiffs' affidavits indicate they relied both on the promise of continued employment as a form of added compensation to supplement their lower salaries and on the benefits of career status when deciding to continue teaching in the public school systems. Elimination of these

benefits substantially deprives current career status teachers of the value of their vested contractual rights.

[4] Under the third prong of the *Bailey* test, a substantial impairment of contractual rights can still be upheld if the impairment was a reasonable and necessary means of serving a legitimate public purpose. *U.S. Tr. Co.*, 431 U.S. at 25, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112. The Contract Clause is not meant to bind the hands of the State absolutely. The Clause's "prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " *Energy Reserves Grp.*, 459 U.S. at 410, 103 S. Ct. at 704, 74 L. Ed. 2d at 580 (quoting *Blaisdell*, 290 U.S. at 434, 54 S. Ct. at 239, 78 L. Ed. at 426). Courts weigh a state's interest in exercising its police power against the impairment of individual contractual rights when determining whether the impairment is sufficiently justified. This portion of the inquiry involves a two-step process, first identifying the actual harm the state seeks to cure, then considering whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose. *See id.* at 412, 103 S. Ct. at 705, 74 L. Ed. 2d at 581.

Accordingly, we consider the interest the State argues is furthered by repealing the Career Status Law. The burden is upon the State when it seeks to justify an otherwise unconstitutional impairment of contract. *U.S. Tr. Co.*, 431 U.S. at 31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115. Relying on Article I, Section 15 of our constitution, which establishes the duty of the State to guard and maintain the people's right to the privilege of education, the State claims that improving public education is an essential constitutional responsibility. *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 614-15, 599 S.E.2d 365, 376 (2004) ("[T]he State and State Board of Education had constitutional obligations to provide the state's school children with an opportunity for a sound basic education, and that the state's school children had a fundamental right to such an opportunity." (citing *Leandro v. State*, 346 N.C. 336, 351, 488 S.E.2d 249, 257 (1997))). The State argues that "the goal of the Career Status Repeal was to address 'adequate' but marginal teachers with career status" as part of a series of reforms intended to improve the deficiencies in the State's public school system.

We fully agree that maintaining the quality of the public school system is an important purpose. Nevertheless, while alleviating difficulties in dismissing ineffective teachers might be a legitimate end justifying changes to the Career Status Law, no evidence indicates that such a problem existed. Instead, the record is replete with affidavits from teachers and administrators who relate that the Career Status Law

did not impede their ability to dismiss teachers who failed to meet the academic standards necessary properly to educate students in public schools. Instead, these affiants indicate that the Career Status Law was an important incentive in recruiting and retaining high-quality teachers. Inadequate teachers could be and were dismissed under the Career Status Law on the statutory grounds laid out in N.C.G.S. § 115C-325(e)(1) (2012), including dismissal for "[i]nadequate performance," defined in the Career Status Law as "(i) the failure to perform at a proficient level on any standard of the evaluation instrument or (ii) otherwise performing in a manner that is below standard," *id.* § 115C-325(e)(3) (2012). Accordingly, we fail to see a legitimate public purpose for which it was necessary substantially to impair the vested contractual rights of career status teachers.

[5] Moreover, even if we conclude that a legitimate public purpose did exist justifying such an impairment, the method adopted for alleviating that harm must be necessary and reasonable. *U.S. Tr. Co.*, 431 U.S. at 25, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112. While we acknowledge that the retroactive repeal was motivated by the General Assembly's valid concern for flexibility in dismissing low-performing teachers, we do not see how repealing career status from those for whom that right had already vested was necessary and reasonable. "[A] State is not free to impose a drastic impairment [of contract] when an evident and more moderate course would serve its purposes equally well." *Id.* at 31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115. In the record, plaintiffs suggest several alternatives to retroactive repeal of the Career Status Law that would allow school boards more flexibility in dismissing low-quality teachers. The legislature could add additional grounds for dismissal as it did in 1973, *see* Ch. 782, sec. 12, 1973 N.C. Sess. Laws at 1138, in 1979, *see* Ch. 864, sec. 2, 1979 N.C. Sess. Laws at 1188, and in 1992, *see* Ch. 942, sec. 1, 1991 N.C. Sess. Laws (Reg. Sess. 1992) at 730. Or the General Assembly could have refined the definition of "inadequate performance" as it did in 2011. *See* Ch. 348, sec. 1, 2011 N.C. Sess. Laws at 1464. Given the possibility of such less sweeping alternatives for improving teacher quality, "the State has failed to demonstrate" why the retroactive repeal was necessary and reasonable. *U.S. Tr. Co.*, 431 U.S. at 31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115.

Because we hold the repeal is unconstitutional in its retroactive application based on the Contract Clause of the United States Constitution, we need not address plaintiffs' alternative claim based on Article I, Section 19 of the North Carolina Constitution. Accordingly, we conclude that the retroactive repeal of career status from those teachers who had earned that designation prior to the Career Status Repeal is

unconstitutional. The vested contractual rights of those teachers were substantially impaired without adequate justification, in violation of the Contract Clause of the United States Constitution.

MODIFIED AND AFFIRMED.

DANA MARIE RIBELIN (F/K/A CREEL)
v.
PHILLIP RAY CREEL

No. 112A15

Filed 15 April 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 770 S.E.2d 389 (2015), affirming in part and remanding in part an order entered on 12 November 2013, and remanding an order entered on 24 January 2014, both by Judge Charlie Brown in District Court, Rowan County. On 20 August 2015, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 21 March 2016.

Arlaine Rockey for plaintiff-appellant.

Kip D. Nelson for defendant-appellee.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
RANDY CARTER DAVIS

No. 132PA15

Filed 15 April 2016

Evidence—expert opinion testimony—general characteristics of child sexual assault victims—possible reasons for delayed reporting of allegations—subject to disclosure in discovery in sexual offense prosecution

In defendant's prosecution for sexual offenses perpetrated against two minors, the State failed to satisfy its statutory obligations when it did not produce summaries of its expert witnesses' opinions and the basis for those opinions in response to defendant's discovery requests. Expert testimony about the general characteristics of child sexual assault victims and the possible reasons for delayed reporting of sexual assault allegations constitutes expert opinion testimony, subject to disclosure in discovery under N.C.G.S. § 15A-903(a)(2). The Supreme Court modified and affirmed the decision of the Court of Appeals upholding defendant's conviction because defendant failed to show that there was a reasonable possibility that the jury would have reached a different result absent the erroneously admitted expert opinion testimony.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 903 (2015), finding no error after appeal from judgments entered on 30 September 2013 by Judge Jeffrey P. Hunt in Superior Court, Cleveland County. Heard in the Supreme Court on 22 March 2016.

Roy Cooper, Attorney General, by Robert M. Curran, Special Deputy Attorney General, for the State.

Mark Montgomery for defendant-appellant.

HUDSON, Justice.

Here we are asked to determine whether expert testimony about general characteristics of child sexual assault victims and the possible reasons for delayed reporting of such allegations constitutes expert opinion testimony, subject to disclosure in discovery under N.C.G.S.

§ 15A-903(a)(2). We hold that it does, and thus, the State failed to satisfy its statutory obligations when it did not produce summaries of the experts' opinions and the basis for those opinions in response to defendant's discovery requests. However, because we conclude that defendant has failed to carry his burden of showing prejudice, we modify and affirm the decision of the Court of Appeals upholding his convictions.

In September 2013, defendant stood trial for various sexual offenses alleged to have been perpetrated on two minors, G.S. and L.W.[1] The State's evidence at trial tended to show the following: defendant was G.S.'s stepfather and he sexually abused her from the time she was around three-and-a-half years old until she was thirteen years old. At the time of trial, G.S. was thirty-six years old. As an adult, G.S. had nightmares and trouble sleeping, and she was hospitalized in 2006 for suicidal thoughts. She also had problems with alcohol dependency. G.S. never reported the alleged abuse to the authorities until October of 2011, when she was in her mid-thirties; she told her boyfriend when she was sixteen, and when she was in her early thirties, she told her pastor. She also reported the abuse to a psychiatrist, Vikram Shukla, M.D., when she was hospitalized in 2006 and to her therapist, Sandra Chrysler, in March 2013.

Dr. Shukla was tendered as an expert in child and adolescent psychiatry, and Ms. Chrysler as an expert in mental health counseling, both without objection. Both testified to their specific interactions with G.S., but then both also testified more generally regarding the characteristics of child sexual abuse victims and potential reasons for delayed reporting of allegations of abuse.[2] Once the questioning turned more generalized, defense counsel objected to each and every question, citing Evidence Rules 401 through 403, failure to provide discovery per N.C.G.S. § 15A-903(a)(2), and several provisions of the Constitutions of the United States and North Carolina.[3] Defendant had been provided a curriculum vitae for each expert and a medical records summary for G.S., but was not given a summary of any expert opinion testimony or

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1. As is our custom and per Appellate Rule 4(e), we use the initials G.S. and L.W. to protect the identity of the victims even though the trial proceedings occurred when they were both adults. N.C. R. App. P. 4(e).

2. The specific testimony about treatment here referred only to G.S.; however, the more general testimony about child abuse victims and delayed reporting could have pertained to both alleged victims.

3. In its order allowing review of this matter, this Court dismissed defendant's Notice of Appeal based on constitutional questions.

the basis for any such opinion. Initially, at the close of voir dire, the trial court ruled that these witnesses would not be allowed to give opinions; however, in front of the jury, defendant's objections were ultimately overruled and the trial court allowed the experts to testify to matters that they had "observed."

The State also presented evidence that L.W. was defendant's stepdaughter (by a different mother; G.S. and L.W. are not biologically related). L.W., who is six months older than G.S., testified that defendant engaged in improper sexual conversations with her and attempted to sexually abuse her from the time she was thirteen or fourteen until she moved out of the house at age seventeen. L.W. never reported the abuse until 2011 when she was contacted by a detective.

Additionally, the State elicited testimony from two other alleged victims under Rule 404(b) of the North Carolina Rules of Evidence. Both girls testified that when they were in their early teens, defendant discussed inappropriate sexual matters with them. The State also called to the stand defendant's pastor, who testified that because of "an accumulated amount" of complaints about defendant and teenage girls, defendant was banned from the church premises.

A jury convicted defendant on all charges and defendant appealed. The Court of Appeals determined that defendant received a fair trial free of reversible error. *State v. Davis*, ___ N.C. App. ___, ___, 768 S.E.2d 903, 913 (2015). While defendant argued that the State had failed to provide discovery as required by N.C.G.S. § 15A-903(a)(2), the court determined on appeal that the expert testimony in question (that of Dr. Shukla and Ms. Chrysler) was not opinion testimony "of the type that was required to be disclosed under N.C. Gen. Stat. § 15A-903." *Id.* at ___, 768 S.E.2d at 908. As to Dr. Shukla, the court concluded that he "did not testify that there is a specific constellation of characteristics of sexual abuse victims, did not opine on whether G.S. met such a profile, and did not offer an expert opinion of the type that was required to be disclosed under N.C. Gen. Stat. § 15A-903." *Id.* at ___, 768 S.E.2d at 908. Similarly, as to Ms. Chrysler, the court "conclude[d] that, because Ms. Chrysler's general testimony about sexual abuse victims was limited to her own observation and experience, it did not constitute an expert opinion that had to be disclosed in advance of trial." *Id.* at ___, 768 S.E.2d at 908.

In the Court of Appeals, defendant raised three issues on which that court declined to grant relief. *Id.* at ___, 768 S.E.2d at 905. He repeated all three in his petitions for discretionary review and for writ of certiorari before this Court:

> 1) whether the trial court erred in admitting the opinion testimony of witnesses Shukla and Chrysler; 2) whether the trial court erred in admitting the testimony of other witnesses who claimed that Mr. Davis made inappropriate comments to them; 3) whether the trial court erred in instructing the jury that the complaining witnesses were "victims."

We allowed review by special order to address only "whether the trial court erred in admitting the opinion testimony of witnesses Shukla and Chrysler."

The Court of Appeals reviewed the issue before us for abuse of discretion. *Id.* at ___, 768 S.E.2d at 907. In our consideration of the one issue on which we allowed review, we note that usually "[d]etermining whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court." *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995) (citation omitted). Here, however, the question is one of statutory interpretation which we review de novo:

> Had the trial court found the violation, in its discretion it could have imposed any or all of the statutory sanctions, including the sanction requested by defendant at trial . . . . In that case, our task would have been to determine whether the trial court properly exercised its discretion in the choice of a sanction. *Because the court failed to find the violation, however, and consequently failed to exercise its discretion, the ruling is reviewable. Cf. State v. Brogden*, 334 N.C. 39, 46, 430 S.E.2d 905, 909 (1993) (" 'When the exercise of a discretionary power of the court is refused on the ground that the matter is not one in which the court is permitted to act, the ruling of the court is reviewable.' ")

State v. Patterson, 335 N.C. 437, 455, 439 S.E.2d 578, 588-89 (1994) (emphasis added).

Pursuant to N.C.G.S. § 15A-903(a)(2), "[u]pon motion of the defendant, the [trial] court must order:"

> The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by

> the expert. *The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion.*

N.C.G.S. § 15A-903(a)(2) (2015) (emphasis added). It is well settled that "the purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) (citations omitted), *cert. denied*, 498 U.S. 1092 (1991).

The central question here is whether the State's expert witnesses gave opinion testimony so as to trigger the discovery requirements under section 15A-903(a)(2). The State contends that Dr. Shukla and Ms. Chrysler only testified to facts; defendant asserts that the testimony of both included a number of expert opinions and that he was entitled to receive via discovery summaries of these opinions and their underlying rationales. *Black's Law Dictionary* defines "opinion" as "[a] person's thought, belief, or inference, esp. a witness's view about [ ] facts in dispute, as opposed to personal knowledge of the facts themselves," and "opinion evidence" as "[a] witness's belief, thought, inference, or conclusion concerning a fact or facts." *Opinion*, *opinion evidence*, *Black's Law Dictionary* (10th ed. 2014). According to Evidence Rule 702(a), an expert may give an opinion "[i]f . . . technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," and if the other requirements of Rule 702 apply. N.C.G.S. § 8C-1, Rule 702(a) (2015). In other words, when an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment "to assist" the jury based on his "specialized knowledge," he is rendering an expert opinion.[4] *See id.* We recognize that determining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context. In doing so here, we conclude that both Dr. Shukla and Ms. Chrysler gave expert opinions that should have been disclosed in discovery.

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4. We note that in the lay opinion context, we consider "shorthand statements of fact" or "instantaneous conclusions of the mind" as fact, not opinion. *See, e.g.*, *State v. Lloyd*, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001) ("The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence."). Nothing in this opinion affects that precedent.

Specifically, both witnesses offered expert opinion testimony about the characteristics of child sexual abuse victims.[5] Dr. Shukla was asked, "[W]hat have you observed in the course of your practice as to some of the manifestations of childhood sexual abuse?" He responded, at length:

> In the course of my practice as a child, adolescent and adult psychiatrist I work with children who have been abused. Then immediately or later on, in months and years, they come back, at any age, and the manifestations of the abused children who are victimized with sexual abuse can go according to the developmental age of the child. If it's a small child who cannot speak and articulate what happened, this child may role play, role play the trauma, role play what was done to the child. They may role play and act like what happened, doing the actual victimization with a sexual motion that the child is not expected to know and it's a very common understanding of all of us.
>
> They may have terrible dreams but not be able to speak about the dreams. If it is a very young child, they may not have much to go with, what happened. The older the child, of understanding age, developmentally the child may be able to say, "Mommy, mommy, Uncle Tom did this to me," and mommy would say, "What happened?" But the patients says [sic], "Uncle Tommy put his wee-wee in me," the child's interpretation of what Uncle Tom did. And I'm not talking about any particular case; I'm not talking about a specific case.
>
> Older children may or may not be able to verbalize what happened, depending on the circumstances of the abuse. The child may be told this is what we're supposed to do, daddy loves you so daddy can do this, so that the child does not understand that it's wrong. The child may not be objecting to it; they may be okay with it and may not have understanding, and then at some point realizes that something is not really right.

5. In the transcript, one can see a clear turning point at which the testimony of each of these experts pivoted from case-specific testimony to more general views based on experience. In Dr. Shukla's testimony, this occurred at page 315 of the transcript; in Ms. Chrysler's, at page 678.

They have complaints about depression or problems that may be emerging, depending on how vulnerable the child is to the genetics of trauma. Some children withstand it and go through all right. They will say yeah, it happened, but I'm tough. It happened, I had bad dreams for a month and a day, and I got over it. Others, they are extremely traumatized. They have a mild dose of trauma, it happened one time, I told mom, and mom got rid of the boyfriend, no more problems.

The child will say I remember, I asked a forty-year old woman, she says, "I have not told anybody but you, doctor. Nobody really asked me if I was touched by Uncle Tom. It happened, and my mom, (unintelligible).["] Sometimes the trauma is larger and the genetic vulnerability of the person — it's genetic; we have no control. We have all these other genes, we have no control. Battered women, bad genes, boom.

We have trauma, depression, nightmares, insomnia, flashbacks. Other symptoms may include depression, suicide attempt. What happened, how was your childhood, did anybody touch you in the wrong places, any trauma, if I don't ask they might not tell me, so I have to be very careful with this initial meeting and the follow-up.

Ms. Chrysler testified:

Q. Ms. Chrysler, can you tell me what are some of your observations with respect to the child abuse victims that you have treated, both adults and children, as to some of the characteristics that they can and tend to exhibit?

. . . .

A. A lot of the characteristics of someone who has been sexually abused or traumatized, in my experience and education, is that this person has an overall lack of trust, views the world as a very scary and dangerous place. It's often seen that there is a lot of anxiety, a lot of anxiousness, sometimes they can slip into a depressed mood, isolating themselves because of that lack of trust and fearfulness of the world. That is something that I've seen in my work with victims of sexual abuse.

> Q. Does it tend to make a difference in what you see whether the person experiences that as an adult or a child?
>
> . . . .
>
> A. It's not different in my experience from what I've seen. My education and my experience tells me that both as a child, adolescent and adult the victims of sexual abuse that I have come in contact with exhibit a lot of the same characteristics, that feeling of guilt and shame about what has happened to them. Like I said a minute ago, just that lack of trust, viewing the world as a scary, dangerous place. You know, also just low mood, that is something that's across the board with victims of sexual abuse.

She further testified:

> Q Are there any certain – are there any – is there any series or cluster of mental health illnesses or symptoms that you have seen in your practice associated with your patients who have been sexually victimized as children?
>
> . . . .
>
> A. Sexual abuse can be the trigger for all sorts of mental illnesses. Some of the illnesses are hereditary, you know, they're in your genes, you know, you're predisposed to having something like bipolar disorder. Something that happens to you that's traumatizing can bring that out. Typically adults with mental illness, severe mental illness, it generally comes out at college age, you know, in their young twenties. Sometimes victims of sexual abuse, this will begin to manifest in the form of high anxiety, sleeplessness, lack of appetite, depressed mood, isolative (sic) behaviors, and based on that, somebody who is predisposed to mental illness, like bipolar disorder, yeah, the trauma could manifest. The trauma could perpetuate something like that.

This testimony goes beyond the facts of the case and relies on inferences by the experts to reach the conclusion that certain characteristics are common among child sexual assault victims. Although not elicited

by the typical "Doctor, do you have an opinion?" question, it is plainly expert opinion testimony that the witnesses were prepared to give.

Similarly, both experts also offered expert opinion testimony explaining why a child victim might delay reporting abuse. Dr. Shukla testified as follows:

> Q. What is your observation about whether [child sex abuse] is commonly reported immediately, when children experience sexual abuse or trauma, as opposed to later in life?
>
> . . . .
>
> A. The immediate effects of sexual trauma may be developmentally related, so a child of understanding age, — depending on the psycho-socio circumstances, three-year-old, four-year-old, five-year-old, older child, will be able to say something terrible happened, or something happened that makes a person uneasy. If the mother is not paying attention or unwilling to pay attention, then it goes on, and a child may be led to believe that it's normal. Or if you say something, I will kill the whole family, or I will hurt you, or mom will be dead, or some psychological guilt trip.
>
> So the signs and symptoms of immediate trauma can be depression, can be terrible sleep, acute trauma symptoms, psycho-physiological disturbances, anxiety attacks, panicky feelings, panic attacks, the mind goes in these directions, which is exactly where it will go. There is no linear prediction where the mind will function after a serious trauma, and for a child, sexual trauma is a serious trauma.
>
> It could be like serious traumas, life and death experiences, accidents, World War I, soldiers, bombs, everyone's dead, loses his leg, carried to the hospital, starts having nightmares, flashbacks, depression, alcohol, what have you. It will happen with a combination of these signs and symptoms that occur immediately. And sometimes it does not happen; symptoms of numbness can occur. A child may have a serious problem functioning, but that is one of the common things I see is functional loss, where a child is at school,

home, with family or friends, the child is not functioning well academically or be able to verbalize what is wrong. Oh, nothing, I'm fine, may not say anything.

They say years later, may say, only when asked, maybe re-traumatized after twenty years, then the symptoms can begin. When the child who grew us [sic] is a doctor, and the doctor get molested or has to go through a life or death trauma, symptoms can be reactivated. With the mind, we cannot predict what will happen next in this matter.

He continued:

Q. What have you observed about some of the reasons that children don't report child sexual abuse immediately?

. . . .

A. Children who do not report the sexual abuse are under the impression it's what they're supposed to do. They do not have any avenues, don't have the skills to complain about things because of development and age. The developmental age of a child — the younger the age, the child is unaware of something between right and wrong. A child is unaware of what is allowed and wrong. Spanking, normal. When does spanking become abuse and when does touching, changing diapers by a caregiver, turn into some form of improper handling of the genitals, because when you change diapers you . . . clean the diaper, you clean the genitals.

And so a child does not have the mental apparatus, and then in certain families, a child is told to say no and run, but in some families it may be a factor of childhood training when you should say no to some improper physical contact. So physical contact, the child is oblivious of what to say or whether there should be something said, or whether something wrong happened. If it's something the child fails to report, it's a common event, because of the child's development. If it happens to a grownup, that's a different matter. If it happens to a trained child, it's a

different matter. If it happens to a child who shows symptoms, somebody walks into it, the child may still think it was okay, why is mom so upset?

I had a case, an eleven-year-old girl, with uncle having performed improper sexual advances. It turned out that she still felt psychologically guilty, responsible, terrible, for having sexual contact with this uncle, family friend, and presently they're dealing with that case.

Q. What are some of the other reasons you've observed why children don't report when things like that happen, if they're old enough to understand that it's wrong?

. . . .

A. The other reasons where children who are understanding to report, it depends on the perpetrator and the person, the child, the victim. And that may be bribing or giving gifts, what the child wants to do, giving permission to be out late. A child, a teenager, usually it's a girl, but really sometimes boys are also sexually abused, and this abuse is not verbalized by these individuals because of shock, disbelief, or they're just understanding that this is a way of expressing love. The threat of killing the mom, killing the whole family, say this and it will be really bad, you'll never see your mom again.

These are some of the reasons why teenaged girls, for example, or older child, seven to eleven years, arbitrarily will think I'm not supposed to talk to mom, mom will be upset, and sometimes they try to talk and mom says you are a liar. Sometimes they talk to a primary care giver, which you only have two, your mom and your dad, nobody else, stepfather, boyfriend, mom, stepfather, foster families. I work with these families, victims coming from these families. There's nobody to listen to [sic]. Who are you going to turn to if your family does not help? It's like if you go to the police and the police do not help. It's a problem. Who are you going to talk to? So the child

does not have ways; that's the reason they don't talk. If they talk and they're discredited, their credibility is undermined.

Ms. Chrysler testified:

Q. What about reporting that abuse? What is your observation and your experience with whether abuse victims tend to report right away, and is there any difference between children and adults in that?

. . . .

A. There's extensive documentation, research, also in my experience, that sexual abuse is not typically reported right away for a lot of different reasons, being afraid that no one will believe them, being fearful of the repercussions after they've told on the person that's perpetrated the crime on them. In fact, I read recently that it's one-third of all sexually abused children in cases, only one-third of incidents were reported, which means that two-thirds of these children out there never feel comfortable, never feel safe enough to share what's happened to them. And so for a lot of reasons, — should I keep going? It's for a lot of reasons that they don't tell. The primary reason is the one I just mentioned earlier about the classic signs of someone who's been abused are, feeling as though the world is a dangerous place, that no one is going to believe them, the guilt and the shame that's been instilled in them for the length of time that they've been sexually victimized. Children oftentimes go through a grooming period with their perpetrator, will groom them to keep a secret, and not sharing the secret, and the consequences of the secret. And any kind of resistance that the child gives them is met with coercion or met with threats about their own safety, about the safety of their own family members. A lot of them are taught to keep the secret at all costs. And for children, it's fairly simple: they believe what adults tell them, especially the younger than six-year-olds, kids that I've seen, they're going to believe what's told them. Nobody's going to believe you if you say that; that's something that they will believe.

Q. What about teenagers?

. . . .

A. Teenagers as well. I don't remember what the exact statistics are, but generally it's over a year. I think it was something like seventy-eight percent of people tell --

. . . .

Typically children are going to be telling right away. Teenagers was the question; teenagers as well are conditioned by a perpetrator not to feel comfortable talking about what's happened to them. They're a little bit more difficult to predict, I think. They will, I think for teenagers in my experience and education, eventually come forward. Like I said, one-third of sexually victimized children and adolescents come forward.

. . . .

Basically what I'm trying to say is it just depends, and typically they don't come forward at all.

. . . .

Q. What are some of the reasons, in your experience, that people do not come forward?

. . . .

A. Typically children and adolescents don't come forward for very many different reasons. One of the most common, though, is the guilt and the shame that they feel. That's the primary reason why a lot of them come to therapy, because they're taught to believe that this is their fault. A lot of them have been groomed, conditioned by the sexual perpetrator, that they are not allowed, can't come forward because of a lot of different reasons. But the main reason is fear.

Again, like the testimony regarding general characteristics of child sexual abuse victims, the experts here drew inferences and gave opinions explaining that these other unnamed patients of theirs had been abuse victims and delayed reporting the abuse for various reasons. These views presuppose (*i.e.*, opine) that the other children the expert witnesses

observed had actually been abused. These are not factual observations; they are expert opinions.

The State would have us limit the definition of discoverable "opinion" to that which reaches an ultimate issue: Was the victim sexually assaulted or does she exhibit the "profile" or characteristics of someone who has been sexually assaulted? This definition is far narrower than contemplated by our evidence rules and discovery statutes. As noted above, an expert can, and did here, offer opinions about typical characteristics of child sexual abuse victims.

Early in the trial, after voir dire of Dr. Shukla, the trial court ruled that proposed testimony "about the general characteristics of child sexual abuse and delayed reporting" "should have been given to defendant [in discovery]" and that the witnesses should not offer such opinions. In response to the trial court's ruling, the State framed the questions as "observations." As shown below, it took the State three attempts to phrase such a question in a manner that the trial court would allow:

> Q. Dr. Shukla, what are some of the reasons that children don't report sexual abuse immediately?
>
> [DEFENSE COUNSEL]: Objection. Same basis.
>
> THE COURT: Sustained.
>
> Q. In your experience, –
>
> [DEFENSE COUNSEL]: Objection. Same basis.
>
> THE COURT: Sustained.
>
> Q. What have you observed about some of the reasons that children don't report sexual abuse immediately?
>
> [DEFENSE COUNSEL]: Objection. Same basis.
>
> THE COURT: Overruled.

The trial court overruled defendant's final objection to that line of questioning and permitted that testimony to proceed. We conclude that, regardless of phrasing, the questions posed by the State and Dr. Shukla's answers to these questions elicited opinions based on his expertise.

Later during the testimony of Dr. Shukla, after a number of such questions, the trial court appears to have ultimately found that the curriculum vitae of each witness was sufficient to satisfy the discovery statute:

> Please let the record show, in the absence of the jury, relative to Dr. Shukla's testimony, the Court finds that he was accepted without objection as an expert in the field of child, adolescent and adult psychiatry, and was the treating psychiatrist of [G.S.] in 2006, that Dr. Shukla has treated perhaps a thousand child patients that either were or reported that they were victims of sex abuse, that at least approximately thirty days ago the State provided discovery, including Dr. Shukla's medical records, relating to the complainant in this case, and that pursuant to 15A-903, the State provided, in the Court's opinion, adequate notice to the Defendant of its intent to offer Dr. Shukla's testimony as an expert by providing his extensive resume or curriculum vitae, I think is the language of the statute.
>
> Therefore, the Court concludes that the Defendant was not surprised within the meaning of the case law in North Carolina, and that the expert testimony of Dr. Shukla is clearly helpful in instructing to the jury, outweighing any potential for prejudice in that regard to the Defendant.

The Court of Appeals concluded that Dr. Shukla did not testify to "a specific constellation of characteristics of sexual abuse victims, did not opine on whether G.S. met such a profile, and did not offer an expert opinion of the type that was required to be disclosed [in discovery]." *Davis*, ___ N.C. App. at ___, 768 S.E.2d at 908. The Court of Appeals reached similar conclusions regarding Ms. Chrysler's testimony, finally holding that "neither [witness] offered an expert opinion that there exists a 'profile' " with which G.S.'s characteristics were consistent. *Id.* at ___, 768 S.E.2d at 908.

In essentially agreeing with the State that these witnesses' opinions need not have been disclosed in discovery unless they included an opinion that G.S. exhibited characteristics consistent with a "profile" of a child abuse victim, the Court of Appeals erred. *Id.* at ___, 768 S.E.2d at 908. We do not agree that an "opinion" is so narrowly defined. Instead, we hold that the testimony at issue did include expert opinions that should have been disclosed previously. Accordingly, we hold that the State failed to comply with N.C.G.S. § 15A-903(a)(2) when responding to defendant's motion for discovery by failing to turn over all the information required by that statute.

Moreover, we conclude that the curricula vitae were not sufficient to prevent "unfair surprise." *See Payne*, 327 N.C. at 202, 394 S.E.2d at 162. The curricula vitae and medical records made it clear to defendant that each witness was going to testify as an expert about his or her own treatment of the victim G.S. (and presumably, the allegations of abuse she reported to them), but there was nothing to alert defendant that the witnesses would give opinions about child sexual abuse victims in general and no preview of what those opinions would be. Had such information been turned over in discovery, defendant would have been able to prepare a possible defense or counterpoint to the expert opinion testimony offered by the State.

Having found error in our de novo review, we now must determine if the error was prejudicial to defendant. Because this was a statutory error, we apply the standard found in N.C.G.S. § 15A-1443(a) (2015):

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

After careful consideration of all the evidence here, we hold that defendant did not meet his burden of showing a reasonable possibility that, absent the expert opinion testimony, the jury would have reached a different result. First, the expert opinion testimony was elicited specifically in relation to G.S.'s reporting, symptoms, and care; L.W. was not the focus of the expert testimony. Second, as to G.S., although the main issue in this case was her credibility, and the expert opinion testimony could factor into a credibility determination, the record reveals overwhelming evidence corroborating her testimony.[6] During her testimony, G.S. reported being sexually abused by defendant when she was between the ages of three-and-a-half and thirteen. She testified that she was forced to

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6. To the extent that the expert opinion testimony related to the charges involving L.W. as well, defendant failed to meet his burden of showing prejudice under N.C.G.S. § 15A-1443(a) in these convictions as well. In light of the corroborating evidence, we do not see a reasonable possibility that the jury would have reached a different result regarding the alleged abuse of L.W.

perform oral sex on defendant, and that she had memories of him being in the bath with her as a young girl and touching her inappropriately and forcing her to touch his penis, and of him performing oral sex on her. She also testified that defendant vaginally raped her when she was twelve years old. She testified that she first told her then-boyfriend (now husband) about these events when she was sixteen. She further testified that she told Dr. Shukla about what happened when she was admitted to the hospital for suicidal thoughts in 2006 and that she reported the abuse to Ms. Chrysler when she started seeing her for counseling in 2013.

All of this testimony was corroborated in several ways. First, G.S.'s testimony matched the statement she gave to the police when she first reported the abuse in October 2011. Second, she consistently reported abuse by defendant to Dr. Shukla, her pastor, her husband, and Ms. Chrysler. Third, and importantly, the testimony of L.W., the testimony of the other two Rule 404(b) witnesses, and the testimony of the pastor painted similar pictures of defendant's practice of sexually abusing young girls with whom he had established a trusting relationship. A.J.,[7] one of the Rule 404(b) witnesses, testified that defendant, who was like a grandfather to her, talked to her about sex when she was thirteen years old and instructed her on how to perform certain sex acts. S.W., a second Rule 404(b) witness, testified that defendant was the youth director at her church when she was a teenager and that defendant would initiate sexual conversations and ask her about her sexual interactions with her boyfriend. S.W.'s testimony was corroborated by a friend to whom she had talked about some of defendant's behavior at the time it was happening, by her uncle to whom she had also spoken, and by the pastor at the church. The pastor testified that defendant was banned from church property because of a "gathering of things," including the allegations made by S.W.

Given all the above evidence, we conclude that defendant has failed to show that, absent the expert opinion testimony (as to the generalized characteristics of child sexual abuse victims and reasons for delayed reporting), there is a reasonable possibility that the jury would have reached a different result. We are mindful, though, of the wise words of the Court of Appeals in *State v. Moncree*: "Although we determine defendant was not prejudiced, we note the State should comply with statutory discovery requirements. District attorneys are elected public officials, and therefore North Carolina citizens trust the people who serve as district attorneys." 188 N.C. App. 221, 227, 655 S.E.2d 464, 468 (2008).

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7. Again, we use initials to protect the identity of the victims. N.C. R. App. P. 4(e).

Accordingly, for the reasons stated above the decision of the Court of Appeals upholding defendant's convictions is modified and affirmed. The remaining issues addressed by the Court of Appeals are not before this Court and its decision as to those matters remains undisturbed.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
DEMARIO LAMONT SNEAD

No. 90PA15

Filed 15 April 2016

1. Evidence—authentication—video surveillance

The Court of Appeals erred by reversing defendant's conviction for felony larceny based on a video showing defendant stealing shirts from a Belk Department Store. By presenting evidence that the video surveillance system was reliable and that the video presented at trial had not been altered, the State properly authenticated the video.

2. Appeal and Error—preservation of issues—failure to timely object

Defendant failed to make a timely objection in a felony larceny case to a witness's testimony regarding the video surveillance, and thus, he failed to preserve that issue for appellate review.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 344 (2015), finding no error in part, affirming in part, and vacating and remanding for entry of judgment and resentencing in part, judgments entered on 13 March 2014 by Judge Christopher W. Bragg in Superior Court, Cabarrus County. Heard in the Supreme Court on 15 February 2016.

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

C. Scott Holmes for defendant-appellee.

NEWBY, Justice.

This case is about whether the State properly authenticated a surveillance video showing defendant stealing shirts from a Belk Department Store (Belk) and whether a witness's lay opinion testimony based on that video was admissible. By presenting evidence that the video surveillance system was reliable and that the video presented at trial had not been altered, the State properly authenticated the video. Moreover, because defendant failed to make a timely objection to the witness's testimony, he failed to preserve that issue for appellate review. Accordingly, we reverse the decision of the Court of Appeals on those issues.

Defendant was indicted for felony larceny and conspiracy to commit felony larceny after he and another man stole shirts from Belk. The indictment alleged that on 1 February 2013, defendant stole and conspired to steal "clothing including but not limited to Ralph Lauren Polo shirts" worth more than one thousand dollars. *See* N.C.G.S. §§ 14-2.4, -72(a) (2015). Belk's surveillance system captured the theft on video, and defendant admitted that he committed the act depicted therein. The only contested issue at trial was the value and quantity of the stolen shirts. Specifically, the State argued that defendant stole twenty to thirty Ralph Lauren shirts worth more than one thousand dollars, while defendant claimed he only stole seven, non-brand-name shirts worth less than one thousand dollars.

At trial the State called Toby Steckler, a regional loss prevention manager for Belk, to authenticate the surveillance video for admission into evidence and to offer his opinion about the contents of the video. Steckler testified that he was familiar with how Belk's video surveillance system works. He testified that the Belk store in question operates surveillance cameras connected to a digital video recorder, which stores between thirty and sixty days of video. The video recorder is "industry standard" and has safeguards to prevent tampering, including a watermark and a time and date stamp. When an incident occurs in the store, such as a theft, it is "common business practice" for Belk to copy the video from the digital video recorder to a compact disc (CD). Steckler testified that on 1 February 2013, the digital video recorder captured a person later identified as defendant and another man stealing shirts from Belk. Steckler viewed the incident after the fact on the digital video recorder, and he later reviewed the incident after it was burned onto a CD. Steckler testified that the video copied to the CD and presented as evidence at trial was the same as that on the digital video recorder.

Defendant objected to introduction of the video into evidence, arguing the State failed to properly authenticate it. Outside the presence of the jury, defense counsel argued that because Steckler was not at

Belk on the date of the theft, he could not properly testify that the video "captured fairly and accurately what occurred on that date." The trial court overruled defendant's objection. Before the jury returned to the courtroom, however, the State played the video, which showed defendant grabbing stacks of shirts from a table while a second man grabbed sweatshirts hanging on a rack. The video also showed both men run out of the store with the merchandise and jump into a vehicle, driven by a third person. At the conclusion of the video, defendant stated that he had no further objections to admission of the video.

Before the jury returned to the courtroom, defendant objected to any testimony by Steckler regarding the value of the stolen shirts, arguing that this information had not been provided in discovery and was not based on Steckler's personal knowledge. During voire dire, Steckler testified that he knew defendant stole Ralph Lauren Polo shirts because the shirts were located in the Ralph Lauren section of the store and the table from which defendant took shirts was specifically designated for Ralph Lauren Polo shirts. Steckler further testified that although he did not know specifically what was on the table on 1 February 2013, or the exact quantity of shirts that were stolen, he estimated that defendant stole twenty to thirty shirts based on the fact that Ralph Lauren typically requires Belk to pile six to eight shirts per stack and defendant took multiple stacks of shirts.

The trial court ruled that Steckler could not testify that the shirts on the table were Ralph Lauren shirts, but he could testify that the shirts were located in the Ralph Lauren Polo section of the store, that if they were Ralph Lauren Polo shirts, they would have been stacked a certain way to meet Ralph Lauren's standards, and that Ralph Lauren Polo shirts were priced at "X number of dollars" on 1 February 2013.

The jury then returned to the courtroom and the State played the video. Steckler testified that "[y]ou can see [defendant] stacking shirts" while "the other gentleman grab[s] the armful of sweatshirts." Steckler testified that he is "familiar with the merchandise" in Belk stores and that both the table and the rack of sweatshirts were located in the Ralph Lauren Polo section. He explained that Ralph Lauren Polo shirts are uniformly folded in a specific fashion and are stacked six to eight shirts per pile. Based on the video, Steckler estimated that defendant stole twenty to thirty polo shirts and that the second man stole five to eight sweatshirts. According to Steckler's testimony, on 1 February 2013, the fair market value of one Ralph Lauren Polo shirt was between eighty-five and eighty-nine dollars and fifty cents, and the value of each sweatshirt was ninety-five dollars. Defendant did not object to Steckler's estimate

of the value or number of shirts stolen at the time the State elicited this testimony before the jury. The jury convicted defendant of felony larceny and conspiracy to commit felony larceny.

In a unanimous opinion, the Court of Appeals held, *inter alia*, that the trial court erred by admitting the video of defendant shoplifting because the video was not properly authenticated, *State v. Snead*, ___ N.C. App. ___, ___, 768 S.E.2d 344, 347 (2015), and abused its discretion by admitting Steckler's estimate of the value of the stolen shirts because the testimony was not based on Steckler's firsthand knowledge or perception, *id.* at ___, 768 S.E.2d at 349-50. The Court of Appeals concluded that these errors were prejudicial because the State presented no other evidence to establish that the value of the stolen property exceeded one thousand dollars. *Id.* at ___, 768 S.E.2d at 348-50.[1] Accordingly, the Court of Appeals vacated defendant's conviction for felony larceny and remanded for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny.[2] *Id.* at ___, 768 S.E.2d at 350. We allowed the State's petition for discretionary review.

[1] We agree with the State that Steckler's testimony was sufficient to authenticate the surveillance video under North Carolina Rule of Evidence 901. Rule 901(a) requires that evidence be authenticated by showing "that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (2015). Rule 901(b) lists ten examples of authentication that meet the requirements of subsection (a). *Id.*, Rule 901(b) (2015). "Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process" under Rule 901(b)(9). 2 Kenneth S. Broun et al., *McCormick on Evidence* § 216, at 39-40 (7th ed. 2013).[3] Evidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence. *See* N.C.G.S. § 8-97 (2015); *see also State v. Campbell*, 311 N.C.

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1. The Court of Appeals also found no error in defendant's conviction for conspiracy to commit felony larceny and affirmed his conviction of having attained habitual felon status. *Snead*, ___ N.C. App. at ___, 768 S.E.2d at 351. These matters are not before this Court.

2. The State and defendant agree that the Court of Appeals ordered the wrong remedy. Because we conclude that the trial court did not err in admitting the video or lay opinion testimony, however, we need not reach that issue.

3. *McCormick on Evidence* refers to Federal Rule of Evidence 901; however, North Carolina Rule of Evidence 901 "is identical to [the federal rule] except that in [subdivision (b)(10)] the word 'statute' is inserted in lieu of the phrase 'Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.' " N.C.G.S § 8C-1, Rule 901 cmt. (2015).

386, 388, 317 S.E.2d 391, 392 (1984) ("[R]eal evidence is properly received into evidence" if it is "identified as being the same object involved in the incident and it [is] shown that the object has undergone no material change."); *State v. Kistle*, 59 N.C. App. 724, 726, 297 S.E.2d 626, 627 (1982) ("If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition." (quoting Edward W. Cleary et al., *McCormick on Evidence* § 212 (2d ed. 1972))), *disc. rev. denied*, 307 N.C. 471, 298 S.E.2d 694 (1983); *United States v. Pinke*, 614 F. App'x 651, 653 (4th Cir. 2015) (per curiam) (concluding that a witness's explanation of "the manner in which the . . . video system operates, the means by which he obtained the video, and that he downloaded it onto the DVD that was played for the jury" was sufficient to authenticate the video).

"A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392; *Kistle*, 59 N.C. App. at 726, 297 S.E.2d at 627 ("[T]he State need not establish a complete chain of custody [when a] witness who had inspected the film immediately after processing testified that the photographs introduced at trial were the same as those he had inspected immediately after processing."); *accord United States v. Van Sach*, No. 1:09CR03, 2009 WL 3232989, at *3 (N.D. W. Va. Oct. 1, 2009) (unpublished order) ("Establishing a formal chain of custody of evidence is no longer required [to support a finding that evidence is authentic]. Rather, it is sufficient for the party offering the [videotape] simply to satisfy the trial court that the item is what it purports to be and has not been altered." (citation omitted)). "[A]ny weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392 (citations omitted).

Given that defendant freely admitted that he is one of the two people seen in the video stealing shirts and that he in fact stole the shirts, he offered the trial court no reason to doubt the reliability or accuracy of the footage contained in the video. Regardless, Steckler's testimony was sufficient to authenticate the video under Rule 901. Steckler established that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on 1 February 2013, and that the videos produced

by the surveillance system contain safeguards to prevent tampering. Moreover, Steckler established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. Steckler's testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

[2] Furthermore, we agree with the State that defendant failed to preserve the issue of whether Steckler's estimate of the value of the stolen shirts was admissible lay opinion testimony. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.' " *State v. Ray*, 364 N.C. 272, 277 & n.1, 697 S.E.2d 319, 322 & n.1 (2010) (quoting and discussing *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000) (emphasis omitted), *cert. denied*, 531 U.S. 1155 (2001)). An objection made "only during a hearing out of the jury's presence prior to the actual introduction of the testimony" is insufficient. *Id.* at 277, 697 S.E.2d at 322 (citing *Thibodeaux*, 352 N.C. at 581-82, 532 S.E.2d at 806); *State v. Brent*, 367 N.C. 73, 76, 743 S.E.2d 152, 154 (2013) (same); *accord State v. Gladden*, 315 N.C. 398, 414, 340 S.E.2d 673, 684 ("[A] defendant is not entitled to relief where there was no objection made *at the time the evidence was offered*." (citation omitted)), *cert. denied*, 479 U.S. 871 (1986).

Here defendant objected to testimony related to the value of the shirts only outside the presence of the jury. He did not subsequently object when the State elicited Steckler's testimony before the jury. Therefore, defendant failed to preserve the alleged error for appellate review, and "the Court of Appeals erred by reaching the merits of defendant's arguments on this issue." *Ray*, 364 N.C. at 278, 697 S.E.2d at 322.

Because the State properly authenticated the surveillance video under Rule 901 and defendant failed to make a timely objection to Steckler's lay opinion testimony, the trial court did not err in admitting either at trial. Accordingly, we reverse the decision of the Court of Appeals on those issues and instruct that court to reinstate defendant's conviction for felony larceny and the trial court's resulting judgment thereon. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to these matters remains undisturbed.

REVERSED.

[368 N.C. 817 (2016)]

RICHARD O'NEAL, EMPLOYEE v. INLINE FLUID POWER, INC. & AUTOMOTIVE PARTS CO., INC., EMPLOYER AND AUTO OWNERS INSURANCE COMPANY, CARRIER	)))))))))))))	N.C. INDUSTRIAL COMMISSION

No. 261PA15

ORDER

Upon consideration of the Plaintiff's Petition for Discretionary Review, the Plaintiff's Petition for Discretionary Review is allowed as to issue number two only. The petition is denied as to any remaining issues. Further, Plaintiff's Motion to Amend Petition for Discretionary Review is allowed; Plaintiff's Motion to Strike Response to Motion to Amend Petition for Discretionary Review is denied.

By order of this Court in Conference, this 13th day of April, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of April, 2016.

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

13 APRIL 2016

013P16	Landover Homeowners Association, Inc. v. Thomas B. Sanders; Anna B. Sanders; Sanders Equipment Company, Inc.; and Sanders Development	1. Defs' Motion for Temporary Stay (COA14-1337) 2. Defs' Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/15/2016** Dissolved **04/13/2016** 2. Denied 3. Denied
016P16	Maurice Antonio Burris v. Kelly J. Thomas, Commissioner of the North Carolina Division of Motor Vehicles	1. Petitioner's Motion for Temporary Stay (COA15-312) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion to Strike Appendix to PDR	1. Allowed **01/20/2016** Dissolved **04/13/2016** 2. Denied 3. Denied 4. Dismissed as moot
027P16	State v. Keyshawn Jones	1. State's Motion for Temporary Stay (COA15-804) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/26/2016** 2. Allowed 3. Allowed
030P16	State v. Ryan Patrick Hare	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-808)	Denied
032A16	Orban, et al. v. Pike Corporation, et al.	Def's (Pike Corporation) Consent Motion to Withdraw and Dismiss Appeals	Allowed **03/29/2016**
035PA12-2	Connie Chandler, Employee, by her Guardian ad Litem, Celeste M. Harris v. Atlantic Scrap & Processing, Employer and Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA14-1351) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/06/2016** Dissolved **04/13/2016** 2. Denied 3. Denied
036P16	State v. James Anthony Barnett, Jr.	1. State's Motion for Temporary Stay (COA15-200) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/05/2016** 2. Allowed 3. Allowed

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 April 2016

044P16	Jeffrey J. Johnson and wife, Donna N. Johnson, and Gary A. Proffitt and wife, Betty Jo Proffitt v. Starboard Association, Inc., A North Carolina non-profit Corporation, John McGuirt, Charles Adams, Eric O'Brian, William Carter, Helen Bunch, Syd Schenk, Cathy Moss, Bud Ayers, Betty Graham, Darryl Rice, individually and as Members of the Board of Directors of Starboard Association, Inc., and Abbot Enterprises, Inc., A North Carolina corporation	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-457)	Denied
056P16	State v. Willie Hubert DuBoise	Def's PDR Under N.C.G.S. § 7A-31 (COA15-852)	Denied
059P16	State v. Gary Roger Thomson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-390)	Denied
060P16	North Carolina Department of Public Safety v. Kenneth Shields	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-154)	Denied
061P16	State v. Carlton Washington Tomlinson	1. Def's Motion for Temporary Stay (COA15-585) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/25/2016** Dissolved **04/13/2016** 2. Denied 3. Denied
065P16	State v. Jerome Shaw, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-573)	Denied

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

13 APRIL 2016

073P16 074P16 075P16	American Mechanical, Inc. v. Jeffrey L. Bostic, Michael Hartnett, and Joseph E. Bostic, Jr. Yates Construction Company, Inc. v. Jeffrey L. Bostic, Michael Hartnett, and Joseph E. Bostic, Jr. Phillips and Jordan, Inc. v. Jeffrey L. Bostic, Michael Hartnett, and Joseph E. Bostic, Jr.	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-385; COA15-422; COA15-525)	Denied
076A16	Daniel and Lisa Holt, Administrators of the Estate of Hunter Daniel Holt; Steven Grier Price, Individually; Steven Grier Price, Administrator of the Estate of McAllister Grier Furr Price; Steven Grier Price, Administrator of the Estate of Cynthia Jean Furr v. North Carolina Department of Transportation	1. Plts' Motion to Dismiss Appeal 2. Plts' Motion to Withdraw Motion to Dismiss Appeal	1. --- 2. Allowed
080P16	State v. Raul Oliveros	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA15-411) 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
082P16	State v. Larry J. Edwards	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Orange County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**

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

13 APRIL 2016

083P04-2	State v. Philip Ray Dawkins	1. Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP14-945) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court Stanly County 3. Def's Motion to Hold Petition for *Writ of Certiorari* in Abeyance	1. Dismissed 2. Dismissed 3. Dismissed as moot
084A16	Faires, et al. v. State Board of Elections, et al.	John V. Orth's Motion for Leave to File Amicus Brief	Allowed **03/30/2016** **Edmunds, J. recused**
092P16	State v. Ray Charles Strickland	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
102P13-3	State v. Charles Anthony Ball	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
109P16	State v. Curtis Joel Smith	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-545)	Denied **03/30/2016**
113P16	State v. Austin Lynn Miller	1. State's Motion for Temporary Stay (COA15-636) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/31/2016** 2. 3. 4.
125P16	State v. Mark Wayne Ballard	1. Def's *Pro Se* Motion for Leave of the Court to File Notice of Appeal (COAP15-832) 2. Def's *Pro Se* Motion for Extension of Time to File Notice of Appeal 3. Def's *Pro Se* Motion for Equitable Tolling 4. Def's *Pro Se* Motion to Stay 5. Def's *Pro Se* Motion for Appointment of Counsel	1. 2. 3. 4. Dismissed **04/06/2016** 5.
131P16	State v. Somchoi Noonsob	1. Def's *Pro Se* Motion for Appropriate Relief/Release (COAP16-103) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **04/13/2016** 2. Allowed **04/13/2016**

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

13 APRIL 2016

132A16	State v. Calvin Sherwood Watts	1. State's Motion for Temporary Stay (COA15-358) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **04/13/2016** 2. Allowed **04/13/2016**
234P05-3	State v. Gregory Allen Gant	Petitioner's *Pro Se* Motion for PDR (COAP16-157)	Denied **03/31/2016**
241P11-5	State v. Delton Maynor	Def's *Pro Se* Motion for PDR of *Writ of Certiorari* (COAP15-396)	Dismissed
261P15	Richard O'Neal, Employee v. Inline Fluid Power, Inc. & Automotive Parts Co., Inc., Employer and Auto Owners Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1144) 2. Plt's Motion to Amend PDR 3. Plt's Motion to Strike Response to Motion to Amend PDR	1. Special Order 2. Special Order 3. Special Order
272A14	State v. Jonathan Douglas Richardson (DEATH)	Def's Motion Regarding Sealed Transcript	Allowed
276P15	In the Matter of the Foreclosure by Rogers Townsend & Thomas, PC, Substitute Trustee of a Deed of Trust Executed by Julia Weskett Beasley, dated February 12, 2007 and recorded on February 16, 2007 in Book No. 1211 at Page 169 of the Carteret County Registry, North Carolina	Respondent's (Julia Weskett Beasley) PDR Under N.C.G.S. § 7A-31 (COA14-387)	Allowed
300P15	Edward Battle, Jr., Employee v. Meadowbrook Meat Company, Inc., Employer, Self-Insured (Sedgwick Claims Management Services, Inc., Third-Party Administrator)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1059) 2. Plt's Motion to Withdraw Petition for Discretionary Review	1. --- 2. Allowed

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 April 2016

311P15	State v. Thedford Roy Rorie, Jr.	1. State's Motion for Temporary Stay (COA14-886) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/08/2015** Dissolved **04/13/2016** 2. Denied 3. Denied
354P15-2	Christopher Mosby v. John Ingram, Sheriff, et al.	1. Petitioner's *Pro Se* Motion for Notice of Appeal of Civil Contempt 2. Petitioner's *Pro Se* Motion for Petition for Appellate Review (COAP15-597)	1. Denied 2. Denied
368P15	Johnnie Wilkes, Employee v. City of Greenville, Employer, Self-Insured (PMA Management Group, Third-Party Administrator)	1. Def's Motion for Temporary Stay (COA14-1193) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. N.C. Association of Self-Insurers, N.C. Association of County Commissioners, N.C. League of Municipalities, and N.C. School Boards Association's Motion for Leave to File *Amicus* Brief 5. N.C. Association of Defense Attorneys, N.C. Chamber, N.C. Retail Merchants Association, and N.C. Home Builders Association's Conditional Motion for Leave to File *Amicus*	1. Allowed **11/12/2015** 2. Allowed 3. Allowed 4. Allowed 5. Allowed
376A15	Paramount Rx, Inc. v. Robert E. Duggan and Agelity, Inc.	1. Plt's Joint Motion to Lift Stay 2. Plt's Joint Motion to Dismiss Appeal	1. Allowed **04/01/2016** 2. Allowed **04/01/2016**
390P15	The Residences at Biltmore Condominium Owners' Association, Inc. v. Power Development, LLC and Mountain Mortgage, Inc.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA14-1222) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
402P11-7	State v. Sylvester Eugene Harding, III	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Petition for *Writ of Mandamus* and/or Prohibition	1. Denied **04/01/2016** 2. Denied **04/01/2016**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 April 2016

402P11-8	State v. Sylvester Eugene Harding, III	1. Def's *Pro Se* Motion for Petition for Extraordinary Writ as to the All Writ Act of 1789 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed **04/13/2016** 2. Denied **04/13/2016** 3. Dismissed **04/13/2016**
402P15	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414) 2. State's Motion to Strike Def's Reply to State's Response 3. Def's Motion to Hold PDR in Abeyance 4. Def's Motion for Temporary Stay 5. Def's Petition for *Writ of Supersedeas*	1. 2. 3. Allowed **04/13/2016** 4. Allowed **12/17/2015** 5.
409P15	Gregory P. Nies and Diane S. Nies v. Town of Emerald Isle, a North Carolina Municipality	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA15-169) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Plts' Motion to Admit J. David Breemer *Pro Hac Vice* 4. Def's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed 4. Allowed
415P15	State v. Jamie Rieson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Rockingham County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
426P15	State v. Andrew Clayton Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-322) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
465A06-3	State v. Ryan Gabriel Garcell (DEATH)	1. Def's Motion to Hold in Abeyance the Time in Which to File Petition for *Writ of Certiorari* 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Rutherford County	1. Dismissed as moot **04/13/2016** 2.

SABRA FAIRES, BENNETT LITTLE COTTEN, AND DIANE P. LAHTI
v.
STATE BOARD OF ELECTIONS; A. GRANT WHITNEY, JR., CHAIR, AND RHONDA K. AMOROSO, JOSHUA D. MALCOLM, MAJA KRICKER, AND JAMES L. BAKER, MEMBERS OF THE STATE BOARD, IN THEIR OFFICIAL CAPACITIES ONLY; AND KIM WESTBROOK STRACH, EXECUTIVE DIRECTOR OF THE STATE BOARD, IN HER OFFICIAL CAPACITY ONLY

No. 84A16

Filed 6 May 2016

Appeal pursuant to N.C.G.S. § 7A-27(a1) from a judgment entered on 4 March 2016 by a three-judge panel of the Superior Court, Wake County, appointed by the Chief Justice under N.C.G.S. § 1-267.1. Heard in the Supreme Court on 13 April 2016.

Tharrington Smith, LLP, by Michael Crowell, Deborah Stagner, Stephen Rawson, and Neal Ramee, for plaintiff-appellees.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General; Elizabeth A. Fisher, Assistant Solicitor General; Alexander McC. Peters, Senior Deputy Attorney General; and Melissa L. Trippe, Special Deputy Attorney General, for defendant-appellants.

Graebe, Hanna & Sullivan PLLC, by Mark R. Sigmon; American Civil Liberties Union of North Carolina Legal Foundation, by Christopher Brook and Jenifer Wolfe; and Civitas Institute, Center for Law and Freedom, by Elliot Engstrom, for American Civil Liberties Union of North Carolina Legal Foundation and Civitas Institute, Center for Law and Freedom, amici curiae.

John V. Orth, pro se, amicus curiae.

PER CURIAM.

Justice EDMUNDS 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 judgment of the three-judge panel of the Superior Court, Wake County. Accordingly, the judgment of the three-judge panel of the Superior Court, Wake County is left undisturbed and stands without precedential value. *See, e.g., State v. Long*, 365 N.C. 5, 705 S.E.2d 735 (2011) (per curiam); *State v. Greene*, 298 N.C. 268, 258 S.E.2d 71 (1979) (per curiam).

AFFIRMED.

HERNDON v. HERNDON

[368 N.C. 826 (2016)]

STEVEN CRAIG HERNDON
v.
ALISON KINGREY HERNDON

No. 363A15

Filed 10 June 2016

1. Constitutional Law—right against self-incrimination—not invoked—voluntary witness

The trial court did not infringe upon defendant's Fifth Amendment right against self-incrimination in a Domestic Violence Protective Order proceeding where defendant did not invoke the privilege against self-incrimination and defendant was in control of her testimony by virtue of her decision to take the stand. The right against self-incrimination operates differently depending on whether a witness is compelled to testify or testifies voluntarily. A voluntary witness cannot claim an immunity from cross-examination on the matters he has himself put in dispute.

2. Appeal and Error—preservation of issues—no objections—compelled self-incrimination

North Carolina Rules of Evidence Rule 614(c) provides that "[n]o objections are necessary with respect to . . . questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." This rule operates to preserve for appellate review the impropriety of a trial court's interrogation of a witness even if a party does not object. It does not apply when, as here, a party argues that the trial court's inquiry infringed upon a litigant's privilege against compelled self-incrimination.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 141 (2015), vacating an order entered on 10 September 2014 by Judge Doretta L. Walker in District Court, Durham County, and remanding for further proceedings. Heard in the Supreme Court on 17 February 2016.

Foil Law Offices, by N. Joanne Foil and Laura E. Windley, for plaintiff-appellant.

Tharrington Smith, LLP, by Jill Schnabel Jackson and Evan B. Horwitz, for defendant-appellee.

BEASLEY, Justice.

We consider whether the Court of Appeals erred by granting defendant a new hearing based upon the conclusion that the trial court violated defendant's Fifth Amendment rights. For the reasons stated herein, we reverse the decision of the Court of Appeals.

On 21 May 2014, Steven Craig Herndon (plaintiff) filed a Complaint and Motion for Domestic Violence Protective Order (DVPO) against his wife, Alison Kingrey Herndon (defendant). Plaintiff also sought temporary custody of their four minor children. The complaint alleged that on several occasions, defendant placed in plaintiff's food and drink unknown substances that caused him to become incapacitated, and that during those periods of incapacitation, defendant would leave the home occupied by plaintiff and their children to visit the home of her paramour. The district court judge entered an ex parte DVPO against defendant, ordering that there be no contact between plaintiff and defendant and awarding temporary custody of the children to plaintiff. On 27 May 2014, in a separate action, defendant filed a complaint seeking temporary and permanent custody of the minor children. On 23 July 2014, plaintiff filed an answer and counterclaim seeking child custody.

On 10 September 2014, plaintiff's motion for DVPO and defendant's custody complaint came on for hearing before the Honorable Doretta L. Walker in District Court, Durham County. Several witnesses took the stand, including a computer forensics expert, a private investigator, plaintiff, defendant's paramour, defendant's friend, and defendant. After plaintiff rested his case-in-chief and before defendant took the stand, the following exchange occurred:

> [DEFENSE COUNSEL]: Call Alison Herndon.
>
> THE COURT: All right. Before we do that, let me make a statement. You're calling her. She ain't going to get up there and plead no Fifth Amendment?
>
> [DEFENSE COUNSEL]: No, she's not.
>
> THE COURT: I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: Okay. Call your witness.

[DEFENSE COUNSEL]: Alison Herndon.

Defendant testified on direct examination about her work schedule, her relationship with plaintiff and the children, and her affair. Defendant also discussed plaintiff's allegation that on 11 April 2014, defendant put an incapacitating substance in his mashed potatoes during one of their daughter's birthday party. When defense counsel concluded her examination of defendant, the trial court denied plaintiff's counsel the opportunity to cross-examine defendant because the time allotted for the hearing had almost expired. Instead, the trial court asked defendant questions related to the events of 11 April 2014 and certain exhibits that had been admitted into evidence by plaintiff related both to text messages and photographs exchanged between defendant and her paramour. After hearing the evidence, the trial court entered a DVPO and temporary custody order in favor of plaintiff, granting defendant supervised visitation. The trial court did not make any ruling on defendant's separate permanent custody action.

On appeal to the COA, defendant argued that the trial court's comments preceding her testimony "had a chilling effect on the defense," thereby depriving defendant of her right against self-incrimination.[1] Defendant cited the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 23 of the North Carolina Constitution, and *Malloy v. Hogan*, 378 U.S. 1, 6, 12 L. Ed. 2d 653, 658 (1964), in support of her argument.

A divided panel of the COA held that the trial court infringed upon defendant's right against self-incrimination, relying principally on the United States Supreme Court's decision in *Brown v. United States*, 356 U.S. 148, 2 L. Ed. 2d 589 (1958). *Herndon v. Herndon*, ___ N.C. App. ___, ___, ___, 777 S.E.2d 141, 143, 145 (2015). First, the Court of Appeals acknowledged that a witness, by taking the stand, waives the Fifth Amendment privilege on cross-examination "with regard to 'matters raised by [the witness's] own testimony on direct examination.' " *Id.* at ___, 777 S.E.2d at 144 (alteration in original) (quoting *Brown*, 356 U.S. at 156, 2 L. Ed. 2d at 597). Second, the Court of Appeals observed that a trial court cannot determine whether a witness may invoke the privilege based solely upon the witness's physical act of taking the stand. *Id.* at ___, 777 S.E.2d at 144 (citing *Brown*, 356 U.S. at 157, 2 L. Ed. 2d at 598).

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1. Defendant also argued that the trial court erred by admitting into evidence certain electronic communications, and that, consequently, there was insufficient evidence to support the trial court's findings that defendant had committed domestic violence against plaintiff.

The Court of Appeals majority reasoned that the trial court erred by requiring defendant to choose between "forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination." *Id.* at ___, 777 S.E.2d at 144. Moreover, the Court of Appeals majority concluded that the trial court's line of questioning was outside the scope of defendant's direct examination, in violation of the rule articulated in *Brown*. *Id.* at ___, 777 S.E.2d at 144. For those reasons, the Court of Appeals vacated the trial court's order and remanded the case for a new hearing with instructions that the trial court disregard defendant's previous testimony and "assess any invocation of the Fifth Amendment under the test established by the Supreme Court in *Brown*." *Id.* at ___, 777 S.E.2d at 145.

The dissenting judge would have found that defendant waived her Fifth Amendment privilege. *Id.* at ___, 777 S.E.2d at 147 (Bryant, J., dissenting). The dissent criticized the majority's reading of *Brown* as "overly technical" and reasoned that *Brown* stands for the proposition that when a witness voluntarily testifies, she cannot "invoke the privilege against self-incrimination as to relevant matters." *Id.* at ___, 777 S.E.2d at 148 (citing *McKillop v. Onslow County*, 139 N.C. App. 53, 64-65, 532 S.E.2d 594, 601 (2000)). The dissent concluded that "it was within the inherent power of the trial court to ascertain from defendant that she chose to testify voluntarily and waive her privilege against self-incrimination," and added that, despite "the less than artful phraseology," the trial court's statements put defendant on notice of her duty to testify truthfully. *Id.* at ___, 777 S.E.2d at 149 (citing *Brown*, 356 U.S. at 156, 2 L. Ed. 2d at 597).

Plaintiff gave timely notice of appeal based upon the dissent. We review alleged violations of constitutional rights de novo. *E.g.*, *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

[1] Before this Court, plaintiff argues that the trial court did not violate defendant's right against self-incrimination because the trial court's inquiry was entirely within the scope of the testimony elicited on direct examination. We agree.

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, *Malloy*, 378 U.S. at 6, 12 L. Ed. 2d at 658, provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Fifth Amendment protection extends to civil proceedings. *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964) (citation omitted),

superseded in part by statute, Act of June 21, 1977, ch. 649, sec. 1, 1977 N.C. Sess. Laws, 761, 761-62. "[T]he claim of privilege 'should be liberally construed.' " *State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 167 (1997) (quoting *Allred*, 261 N.C. at 35, 134 S.E.2d at 189). Moreover, the privilege "protects against real, not remote and speculative dangers." *State v. Ballard*, 333 N.C. 515, 520, 428 S.E.2d 178, 181 (citing *Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972)), *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993). "The privilege, to be sustained, need be evident only from the implications of the question and in the setting in which it is asked. These must show only that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 520, 428 S.E.2d at 181 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87, 95 L. Ed. 1118, 1124 (1951)).

Depending on whether a witness is compelled to testify or testifies voluntarily, the right against self-incrimination operates differently. This distinction, explored by the Supreme Court in *Brown*, arises from a need to balance the constitutional right to protect against self-incrimination with a party's interest in attacking the credibility of a witness and the interest of the court in ascertaining the truth. *Brown*, 356 U.S. at 155-56, 2 L. Ed. 2d at 597. A compelled witness "has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate." *Id.* at 155, 2 L. Ed. 2d at 597. When the compelled witness's privilege is triggered, the normal right of cross-examination becomes secondary to the constitutional protection against compulsory self-incrimination. *Id.* at 155, 2 L. Ed. 2d at 597. By contrast, a voluntary witness has the benefit of choosing whether to testify and "determines the area of disclosure and therefore of inquiry." *Id.* at 155, 2 L. Ed. 2d at 597. For that reason, a voluntary witness cannot claim "an immunity from cross-examination on the matters he has himself put in dispute." *Id.* at 156, 2 L. Ed. 2d at 597.

The Court of Appeals majority identified the trial court's error as follows:

> In *Brown*, the Supreme Court held that the decision whether to permit invocation of the Fifth Amendment in a civil proceeding is one that can be made only after the trial court considers what the witness "said on the stand." [*Brown*, 356 U.S.] at 157. In other words, the determination that a witness may not invoke the Fifth Amendment

> cannot be made simply because the witness "physically took the stand." *Id.*
>
> That is precisely what happened here.

Herndon, ___ N.C. App. at ___, 777 S.E.2d at 144 (majority).

In *Brown* the petitioner was subjected to a denaturalization hearing after being charged with fraudulently procuring citizenship by falsely swearing, *inter alia*, that she had not been a member of the Communist Party. 356 U.S. at 149, 2 L. Ed. 2d at 593-94. In the proceeding, during the Government's case-in-chief, the petitioner refused to answer the Government's questions related to her participation in Communist activities and successfully asserted her Fifth Amendment privilege. *Id.* at 150, 2 L. Ed. 2d at 594. Subsequently, during the petitioner's case-in-chief, the petitioner took the stand as a witness on her own behalf and answered the questions posed by her attorney related to Communist activities, but refused to answer the questions posed by the Government on cross-examination, claiming a Fifth Amendment privilege. *Id.* at 150-52, 2 L. Ed. 2d at 594-95. The trial court overruled the petitioner's claim of privilege, reasoning that "by taking the stand in her own defense petitioner had abandoned the privilege." *Id.* at 152, 2 L. Ed. 2d at 595. The trial court ultimately held the petitioner in contempt for continuing to refuse to answer questions on cross-examination. *Id.* at 152, 2 L. Ed.2d at 595. On appeal from her conviction for contempt of court, the petitioner argued that she did not waive her privilege against self-incrimination by taking the stand. *Id.* at 154, 2 L. Ed. 2d at 596. The Supreme Court affirmed the trial court's ruling, explaining that

> [i]n view of the circumstances surrounding this ruling and the testimony that preceded it, it is reasonably clear that the court meant to convey by "having taken the stand in her own defense" what she said on the stand, not merely that she physically took the stand. . . . Taken in context, the ruling of the District Court conveyed a correct statement of the law, and adequately informed petitioner that by her direct testimony she had opened herself to cross-examination on the matters relevantly raised by that testimony.

Id. at 157, 2 L. Ed. 2d at 598.

Like in *Brown*, the context in which the Fifth Amendment issue arose here is important. During plaintiff's case-in-chief plaintiff called defendant's paramour, a compelled witness, to the stand. The paramour invoked his Fifth Amendment right against self-incrimination

concerning questions related to his relationship with defendant and the text messages that had been exchanged between them. Thereafter, during defendant's case-in-chief but before defendant took the stand, the trial court asked defense counsel whether defendant intended to invoke the Fifth Amendment, to which counsel twice responded in the negative. At no point during direct examination or the trial court's questioning did defendant, a voluntary witness, give any indication that answering any question posed to her would tend to incriminate her. Put simply, defendant never attempted to invoke the privilege against self-incrimination, which distinguishes this case from *Brown*. We are not aware of, and the parties do not cite to, any case holding that a trial court infringes upon a witness's Fifth Amendment rights when the witness does not invoke the privilege.

In addition, the Court of Appeals majority concluded that the trial court's inquiry was improper because defendant's "direct testimony did not address her alleged drugging of her husband" or the "text messages that corroborated this allegation." *Herndon*, ___ N.C. App. at ___, 777 S.E.2d at 144. Yet, the record reveals otherwise. During defense counsel's direct examination of defendant, the following exchange occurred:

> Q. Did he ever say anything to you at all about being fearful?
>
> A. No, ma'am.
>
> Q. Or believing that you poisoned him?
>
> A. No, ma'am.
>
> . . . .
>
> Q. Did you drug him?
>
> A. No, ma'am.
>
> . . . .
>
> Q. And [the computer forensics expert] read text messages -- excuse me. He read text messages and I'm going [sic] summarize where it appeared to make reference to drugging Craig or giving him an Ambien and do you -- what do you know about those text messages?
>
> A. I mean, I only know what [plaintiff's counsel] has given me, text message-wise, or what I've read that they had printed out.

Q. Did you send the text messages?

A. I sent some text messages. Did I send text messages about drugging Craig? No.

Q. Do you recall ever making a joke about -- about drugging him to anyone?

A. I don't remember -- I don't recall making jokes about drugging him. I -- I remember joking about -- I don't -- I mean, I don't know exactly what it said, but I -- I would -- I very likely said -- I don't -- I really don't know.

At the completion of defendant's direct examination, the trial court asked defendant whether she sent the text messages referenced in plaintiff's exhibit number four,[2] to which defendant replied, "I don't recall, Your Honor." The trial court also asked defendant whether she sent the photographs in plaintiff's exhibit number twenty-three,[3] to which defendant replied, "Well, the ones on April 11th are the ones with my bathing suit on. Yes, ma'am. I probably did." It is clear that defendant's direct testimony did, in fact, address the allegation that defendant drugged plaintiff and the text messages that tended to corroborate the allegation. The trial court, in its questioning of defendant, inquired into matters within the scope of that which was put into dispute on direct examination by defendant. Therefore, even if defendant had attempted to invoke the Fifth Amendment, under the rule in *Brown* the privilege was not available to defendant during the trial court's inquiry.

Defendant contends that the Court of Appeals decision in *Qurneh v. Colie*, 122 N.C. App. 553, 471 S.E.2d 433 (1996), controls the outcome in this case. Specifically, defendant argues that in *Qurneh* the plaintiff was given the opportunity to invoke the Fifth Amendment privilege and still pursue his custody claim, whereas defendant was required to choose between invoking the privilege and going to jail, or pursuing her temporary custody claim. We are not persuaded.

In *Qurneh* the plaintiff-father invoked the Fifth Amendment to avoid responding to questions posed during a custody hearing about his

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2. Plaintiff's exhibit number four contained text messages allegedly sent by defendant to her paramour indicating that on 11 April 2014, she intentionally put pills in plaintiff's food so that he would "pass out," giving her the opportunity to leave the house and meet with the paramour.

3. Plaintiff's exhibit number twenty-three contained photographs extracted from text messages allegedly sent from defendant to her paramour.

involvement with illicit drugs. 122 N.C. App. at 556, 471 S.E.2d at 434-35. Balancing the interests of the parties, the trial court concluded that the plaintiff used the privilege as both a shield and a sword by introducing evidence of his fitness and then prohibiting the defendant from rebutting that evidence with proof of his unfitness. *Id.* at 558, 471 S.E.2d at 436. As a result, the Court of Appeals affirmed the trial court's dismissal of the plaintiff's custody claim, reasoning that "the trial court was unable to consider pertinent information in determining plaintiff's fitness," *id.* at 559, 471 S.E.2d at 436, which was an element of the plaintiff's prima facie case, *id.* at 558-60, 471 S.E.2d at 436-37. The present case is factually distinguishable from *Qurneh*. Unlike in *Qurneh*, the trial court here was able to consider all the pertinent evidence because defendant did not invoke the Fifth Amendment privilege. Instead, defendant voluntarily took the stand and testified about the domestic violence allegations against her, her marriage, her relationship with her children, and her ability to care for them. The Court of Appeals decision in *Qurneh* does not support a conclusion that the trial court in this case violated defendant's Fifth Amendment rights.

We hold, therefore, that the Court of Appeals erred by granting defendant a new hearing. We acknowledge that the trial court's conduct was inappropriate and that the trial judge should not have threatened defendant with jail; however, we do not believe the trial judge's actions amounted to a constitutional violation. Defendant did not invoke the privilege against self-incrimination. Defense counsel did not make an offer of proof, object, or otherwise demonstrate a concern for defendant's constitutional rights.[4] Defendant was in control of her testimony by virtue of her decision to take the stand. Defense counsel asked defendant plainly whether she drugged plaintiff and the trial court asked questions tending to corroborate plaintiff's domestic violence allegations. We cannot say, in view of these circumstances, that the trial court infringed upon defendant's Fifth Amendment right against self-incrimination.

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4. **[2]** We recognize that North Carolina Rules of Evidence Rule 614(c) provides that "[n]o objections are necessary with respect to . . . questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." This rule operates to preserve for appellate review the impropriety of a trial court's interrogation of a witness even if a party does not object. It does not apply when, as here, a party argues that the trial court's inquiry infringed upon a litigant's privilege against compelled self-incrimination. *Cf. State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." (citations omitted)), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's alternative bases for appeal.

REVERSED AND REMANDED.

IN THE MATTER OF D.L.W., D.L.N.W., AND V.A.W.

No. 252PA15

Filed 10 June 2016

1. Termination of Parental Rights—neglect—domestic violence between parents—placed children at risk

The trial court did not err by terminating respondent-mother's parental rights on the basis of neglect due to domestic violence between the parents. In its order terminating respondent's parental rights, the trial court found that the domestic violence between the parents put the children at risk and that one of the children had intervened in an argument between the parents; that there were further incidents of domestic violence after the adjudication order; and that respondent could not articulate what she had learned in her domestic violence counseling sessions. The trial court's findings were sufficient to support its conclusion that there would be a repetition of neglect based upon the juveniles "liv[ing] in an environment injurious to [their] welfare." The Court of Appeals erred by concluding that the ongoing domestic violence was irrelevant to a determination of whether the juveniles were neglected.

2. Termination of Parental Rights—failure to make reasonable progress—budgeting, housing, transportation, domestic violence

The trial court did not err by terminating respondent-mother's parental rights for failure to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of her children. The trial court found that respondent had failed to budget her funds, resulting in continuing failure to use incoming funds to meet her children's needs; that she had not maintained consistent housing and had been evicted from several residences for failure to pay rent; that she had lost employment due to incarceration as a result of a domestic violence incident with

the father; and that she continued to drive without a valid North Carolina driver's license. These findings demonstrated that respondent's failure to correct the conditions that led to the removal of her children was not simply a result of poverty, and the Court of Appeals erred by holding that the trial court did not have the authority to order respondent to comply with the corresponding requirements of her case plan.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 504 (2015), affirming in part and reversing in part an order entered on 29 September 2014 by Judge Kathryn Overby in District Court, Alamance County. Heard in the Supreme Court on 21 March 2016.

Jamie L. Hamlett for Alamance County Department of Social Services, and Derrick J. Hensley, Guardian ad Litem Program Attorney, for the minor children, petitioner-appellants.

Jeffrey William Gillette for respondent-appellee mother.

Kathleen Arundell Jackson and Rachael Hawes for North Carolina Association of Department of Social Services Attorneys, amicus curiae.

JACKSON, Justice.

In this case we consider whether the trial court erred by terminating respondent's parental rights on the basis of neglect and failure to correct conditions that led to the removal of her children. We hold that the findings in the trial court's order were sufficient to support termination of parental rights based upon both of these grounds. Therefore, we reverse the decision of the Court of Appeals to the contrary.

On 1 March 2013, the Alamance County Department of Social Services (DSS) filed a petition alleging that minor children D.L.W., D.L.N.W., and V.A.W. were neglected and dependent juveniles. The petition alleged that DSS had received information that the three juveniles were residing with their mother, Marisha Wade (respondent), and their father "in a van located in the woods that is heated by a kerosene heater," that the parents refused to disclose the van's location or cooperate with DSS's investigation into safety and risk issues, and that the juveniles did not bathe, brush their teeth, or receive adequate nutrition. The petition

also alleged “significant domestic violence between the parents that places the juveniles at risk.” Around this same time, the juveniles were placed in the custody of DSS.

At the 1 May 2013 adjudication hearing, based upon stipulations entered into by the parties, the trial court made the following findings relevant to its determination that the juveniles were neglected:

> [9.]e. At the time of the filing of the petition the Respondent Mother and Father were residing at times with their three children in a van located in the woods.
>
> f. The Respondent Mother denies the van is heated with a kerosene heater but states the van is run during the night to keep warm, but also states the van is cool enough to store milk.
>
> g. The Respondent Parents refused to disclose the location of the van so that the Alamance County Department of Social Services can assess safety and risk issues.
>
> h. It is reported there was domestic violence between the parents that places the juveniles at risk. For example, [V.A.W.] has intervened when the parents are arguing.
>
> . . . .
>
> j. At times, the family has difficulty providing for basic necessities such as housing, baths and so forth. Their skin is very pale and dry, needing lotion.
>
> . . . .
>
> l. The Respondent Father is not employed.
>
> m. The Respondent Mother is employed at AW-NC as a factory worker. She works from 6:00 a.m. until [between] 2:30 p.m. [and] 6:00 p.m. She has been employed for approximately ten months.
>
> n. The Respondent Mother reports she made the van payment for the first time in several months a few weeks ago. She reports the van is not drivable because the finance company turned the car off. [sic]

o. The Respondent Mother reports she did not have enough money to maintain a household since becoming a permanent employee on February 18, 2013.

Based upon these and other findings, the trial court concluded as a matter of law that the juveniles were "neglected" as defined by N.C.G.S. § 7B-101(15) and that removal of the children from parental custody was in the children's best interests. The parents were ordered to cooperate with their out-of-home family service case plans, attend and participate in mental health assessments, submit to and comply with random drug screenings, pay child support, obtain or maintain employment, participate in visitation, maintain weekly contact with a social worker, and enroll in domestic violence counseling. In addition, the trial court approved placement of the children with their maternal grandmother.

Following subsequent review and permanency planning hearings, the trial court filed an order on 18 November 2013 reporting the parents' general lack of progress in meeting the goals outlined in their case plans, including that they were living in motels, maintaining only sporadic contact with social workers, and not participating consistently in visitation with the children. The order also reported that although respondent had maintained a full-time job, she could not account for how her money was being spent and had not "provide[d] the agency with a budgeting plan that can account for where the funds coming into the household go," as the trial court had ordered. The trial court endorsed reunification as the primary plan, ordered continued placement with the maternal grandmother, and again ordered that the parents address the problems that were preventing reunification.

After further proceedings on 18 December 2013, the trial court changed its recommendation for the primary plan for the juveniles to adoption, noting the parents' continued failure to comply with their case plans. Specifically, the trial court found that respondent had failed to create a budgeting plan, obtain appropriate housing, or follow the recommendation for treatment of her "social phobia," as diagnosed in her mental health assessment. In addition, the trial court found the status of respondent's required participation in domestic violence courses to be "[u]nknown," stating that although respondent-mother "has indicated in the past that she is taking part," she had "not provided documentation or the location" where the courses were taking place. The trial court concluded as a matter of law that "the parents have acted inconsistently with their constitutionally protected rights" by previously allowing "the children to reside in an injurious environment" and thereafter failing to take prescribed measures to allow the juveniles to safely "return to or be

in their care." The order contained a further conclusion that termination of parental rights was in the children's best interest.

DSS filed a motion for termination of parental rights on 11 March 2014, and the hearing took place over the course of four days in August and September 2014. On 29 September 2014 the trial court filed an order terminating both parents' parental rights based upon neglect pursuant to N.C.G.S. § 7B-1111(a)(1), and based upon a finding that they willfully left the juveniles in foster care for more than twelve months without making sufficient progress in correcting the conditions that led to removal, in accordance with N.C.G.S. § 7B-1111(a)(2).[1] The findings in the order summarized the procedural history of the case and some information contained in previous orders, including the findings in the May 2013 adjudication order based upon the stipulations of the parties. The trial court also made a number of findings regarding its ongoing concerns:

> 38. Since the removal of the juveniles, the parents have resided at three different addresses in Alamance County, North Carolina. They were evicted from all three residence[s] for nonpayment of rent.
>
> 39. The evictions took place for nonpayment of rent despite the fact that, at times during residing at the residences, the parents were employed making between $11.00 and $13.00 an hour for 40-60 hours a week. The employment of the parents was not consistent.
>
> . . . .
>
> 45. The Respondent Mother entered into and was court ordered to comply with [an] out-of-home family services agreement. She was to obtain a mental health assessment. She did an initial assessment which indicated diagnoses of social phobia and cannabis dependency full remission. She did not seek out services to address social phobia.
>
> 46. The Respondent Mother obtained a second mental health assessment and did answer questions but was not completely truthful reporting stressors in her life. At

1. In addition to terminating the father's parental rights pursuant to subdivisions 7B-1111(a)(1) and (a)(2), the court found an additional statutory ground for terminating his parental rights.

no point did she get treatment for social phobia. Initially, she was asked to sign releases and did not, but later did.

. . . .

48. The Respondent Mother was to obtain and maintain appropriate housing. She did obtain three different homes, and, at times, resided with friends in Durham. She was not stable, would pay rent for one month but not subsequently without good reason and she does not currently have appropriate housing as she is residing at Allied Churches emergency shelter.

49. The Respondent Mother was to obtain and maintain employment. She was employed at AW working 65 hours a week earning between $11.00 and $13.00 an hour. The money was direct deposited in [her] account. She could not figure out why she could not pay bills or where the money went. In March of 2014, she lost her employment due to incarceration. Initially she lied about the loss of employment, saying she resigned, then that she lost employment due to snow days and then due to incarceration.

50. The Respondent Mother was to develop a reliable means of transportation. She does not have a valid North Carolina driver's license. She continued to drive without a valid driver's license. In December of 2013, she was charged with careless and reckless and fleeing to elude still [sic]. She drove a vehicle registered in the Respondent Father's name with his knowledge that she did not have a license.

. . . .

52. The Respondent Mother was to attend counseling for victims of domestic violence and be able to articulate what she has learned. She attended seven sessions of the support group at Family Abuse Services in 2013. She attended several meetings since losing her job in March of 2014 but has not consistently attended and has not articulated an[ ] understanding of what she has learned. She continued in a relationship with the Respondent Father and there were significant issues regarding ongoing domestic violence.

. . . .

62. The Respondent Parents were required to do a budgeting plan but failed to do so despite being employed for periods of more than one month. Their failure to appropriately budget their funds has continued to result in instability.

. . . .

65. On two differen[t] occasions in 2014, law enforcement has been called to the home of the parents due to domestic violence between the parents.

66. At one point the mirror on the car was broken off and on another occasion[ ] the Respondent Father was scratched and bleeding. During the same incident the Respondent-Mother's belongings were destroyed and damaged.

67. The Respondent Mother indicated that she paid, at some point, $60.00 a month for storage of items and would take half days from work [to] get business done, obtain copies of court documents and get her hair done. However, she could not attend visitation due to her work schedule.

. . . .

73. There is a likelihood of repetition of neglect of the minor child[ren] in that neither the mother nor the father have made reasonable progress given their individual circumstance[s] in the twelve months preceding the filing of the motion for termination of parental rights.

Both respondent and the father appealed.

In a unanimous opinion filed on 19 May 2015, the North Carolina Court of Appeals reversed the order terminating respondent's parental rights. *In re D.L.W.*, ___ N.C. App. ___, ___, ___, ___, 773 S.E.2d 504, 505, 510, 511 (2015). The Court of Appeals determined that the findings regarding respondent did not support a conclusion that she neglected the juveniles pursuant to N.C.G.S. § 7B-1111(a)(1) because none of the findings addressed respondent's relationship, care, visitation, or support of her children; "[r]ather, they address[ed] [her] interactions and relationship with DSS and respondent-father." *Id.* at ___, 773 S.E.2d at 509.

In addition, the Court of Appeals concluded that the trial court had no authority pursuant to N.C.G.S. § 7B-904 to order respondent to make reasonable progress to comply with several aspects of her case plan, including creating a budgeting plan and obtaining treatment for social phobia, because there was no evidence that the social phobia or lack of a budgeting plan were causes of neglect or removal of the juveniles. *Id.* at ___, 773 S.E.2d at 509-10. Thus, the Court of Appeals determined that the trial court failed to make findings establishing either respondent's willfulness or her lack of reasonable progress to remedy the conditions that led to removal of the juveniles, pursuant to subdivision 7B-1111(a)(2). *Id.* at ___, 773 S.E.2d at 509-10. The Court of Appeals affirmed the portion of the trial court's order terminating father's parental rights. *Id.* at ___, 773 S.E.2d at 510-11. We allowed a petition for discretionary review filed by DSS and the juveniles' guardian ad litem.[2]

[1] In their appeal petitioners contend that the Court of Appeals incorrectly determined that the trial court's findings failed to support a disposition of termination on the basis of neglect. Specifically, petitioners argue that the Court of Appeals erred when it concluded that the trial court's findings regarding domestic violence solely concerned respondent's relationship with the father and were not linked sufficiently to the care of the juveniles. We agree.

The procedure for termination of parental rights involves a two-step process. N.C.G.S. §§ 7B-1109, -1110 (2015). In the initial adjudication stage, the trial court must determine whether grounds exist pursuant to N.C.G.S. § 7B-1111 to terminate parental rights. *Id.*, § 7B-1109(e). If it determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614-15 (1997); N.C.G.S. § 7B-1110.

"At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. at 247, 485 S.E.2d at 614; *see also* N.C.G.S. § 7B-1109(f). An appellate court then considers whether the trial court abused its discretion in determining that termination of parental rights was in the best interests of the child. *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984).

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2. The father is not a party to this appeal.

Subdivision 7B-1111(a)(1) authorizes the trial court to terminate parental rights if "[t]he parent has abused or neglected the juvenile" as defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1)(2015). Pursuant to section 7B-101, a neglected juvenile is one who "does not receive proper care, supervision, or discipline" from a parent or guardian, or one who "lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2015). Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent. *In re Ballard*, 311 N.C. 708, 713-15, 319 S.E.2d 227, 231-32 (1984).

Here the trial court stated its concerns about domestic violence between the parents when it first adjudicated the juveniles as neglected in May 2013. In the adjudication order, the court found that there were reports of "domestic violence between the parents that places the juveniles at risk. For example, [V.A.W.] has intervened when the parents are arguing." As a result, respondent was ordered by the court to "participate in a domestic violence counseling course."

Subsequently, at the termination hearing, the trial court received police reports and heard testimony regarding respondent's participation in multiple incidents involving domestic violence since the 2013 adjudication and removal of the juveniles. For example, the father testified that the bloody scratch on his face observed by law enforcement following an altercation at the home in March 2014 was inflicted by respondent. Although there was conflicting testimony regarding the details of these encounters,[3] the trial judge had the responsibility to "pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citation omitted).

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3. As the Court of Appeals recognized in its opinion, respondent's testimony changed during the course of the termination hearing:

> She acknowledged having told police on 16 March 2014 that respondent-father "beat [her] up all the time," but claimed she had lied to the police in an attempt to get them to leave her residence. . . .
>
> After respondent father testified, the tenor of respondent-mother's testimony changed the following day. She disavowed her previous testimony as untrue and proceeded to describe a longstanding pattern of abusive, controlling behavior by respondent-father toward her.

In re D.L.W., ___ N.C. App. at ___, 773 S.E.2d at 508 (alteration in original).

In the order terminating respondent's parental rights, the trial court recited its previous findings from the adjudication order, made new findings regarding further incidents of domestic violence, and found that respondent had not articulated an understanding of what she learned in her domestic violence counseling sessions. The court found that respondent "continued in a relationship with the Respondent Father and there were significant issues regarding ongoing domestic violence." Ultimately, the court concluded as a matter of law that "[t]he parent has neglected the juveniles [within] the meaning of G.S. 7B-101 and there is a likelihood of repetition of such neglect if the juveniles are returned to her care."

Although the Court of Appeals concluded that the ongoing domestic violence was irrelevant to a determination of whether the juveniles were neglected, the trial court found that the violence in the home put the children at risk and that one of the juveniles had intervened in an argument between the parents. The trial court's findings support the conclusion that there would be a repetition of neglect based upon the juveniles' "liv[ing] in an environment injurious to [their] welfare." N.C.G.S. § 7B-101(15). Accordingly, we hold that the Court of Appeals erred by concluding that insufficient findings supported termination of respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

[2] Next, petitioners argue that termination of parental rights also was warranted pursuant to N.C.G.S. § 7B-1111(a)(2). Petitioners contend that the Court of Appeals erred by holding that the trial court did not have authority to order respondent to comply with several specific requirements in her case plan, such as creating a budgeting plan. As a result, petitioners contend that the Court of Appeals incorrectly concluded that respondent's failure to comply with these requirements could not justify the termination of her parental rights. We agree.

Subdivision 7B-1111(a)(2) allows a court to terminate parental rights if the parent

> has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

Id. § 7B-1111(a)(2) (2015). Subdivision 7B-904(d1)(3) authorizes the trial court to order that a parent "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." *Id.* § 7B-904(d1)(3) (2015).

The findings in the adjudication order indicate that domestic violence, as well as a lack of consistent and adequate housing and the parents' inability to meet the minimal needs of the juveniles, were reasons for their removal and their adjudication as neglected. In one finding the trial court noted that respondent "has two other children who are not in her placement due to her inability to provide stability." Following this statement, the trial court made findings describing how respondent had been employed for ten months, but reported that she "did not have enough money to maintain a household since becoming a permanent employee on February 18, 2013." The trial court further found that respondent had trouble providing basic necessities for the three juveniles and was residing with them "at times in a van in the woods."

At the termination hearing, the trial court heard testimony that respondent did not know why she could not pay bills and could not account for where her money was going, yet she would buy "figurines on lay-a-way," and take half days off from work to get her hair done, and the father would take "hundreds and hundreds of dollars from [her]." Respondent did not know what the father did with the money but believed he used much of it to play "a lot of lottery." The trial court found that the parents' "failure to appropriately budget their funds . . . continued to result in instability." Because the conditions and instability described in the findings appeared to be worsened by the parents' failure to make appropriate use of incoming funds to meet the needs of the juveniles, it was entirely appropriate for the court to have ordered respondent to create a budgeting plan. Respondent's failure to meet this requirement "despite being employed for periods of more than one month" was among the findings in the termination order and was a proper basis for terminating her parental rights for failing to make progress in correcting a condition that led to the removal of the juveniles.

In the termination order, the court also found that respondent had not maintained consistent housing since the juveniles were removed and adjudicated as neglected, noting that respondent had been evicted from multiple residences "for nonpayment of rent despite the fact that, at times during residing at the residences, the parents were employed making between $11.00 and $13.00 an hour for 40-60 hours a week." The court found that respondent "was not stable, would pay rent for one

month but not subsequently without good reason and she does not currently have appropriate housing" in that she was residing in an emergency shelter. Further, the court noted that respondent lost employment because of incarceration, which respondent testified was a result of a domestic violence "incident that happened." The court also found that respondent had not sought treatment for a "social phobia" diagnosis following her court-ordered mental health assessment, that she continued to drive without a valid North Carolina driver's license, and that she "was charged with careless and reckless and fleeing to elude still [sic]."

Respondent argues that the trial court's findings are not sufficiently linked to conditions that led to removal of the juveniles or indicate a likelihood of future neglect, and instead are more related to poverty. We disagree. These findings demonstrate that respondent's failure to correct the conditions that led to the removal of the juveniles was not simply the result of poverty. Respondent had income and did not know why she could not pay her bills, but she refused to comply with the trial court's order that she create a budgeting plan. Respondent continued in a relationship fraught with domestic violence, repeatedly participated in additional acts of domestic violence, caused injury to the father and damage to personal property, and was incarcerated as a result of her conduct.[4] We conclude that the trial court's findings supported its conclusion that respondent failed to make reasonable progress under the circumstances toward correcting conditions that led to the removal of the juveniles.

For these reasons, we hold that sufficient findings supported termination of respondent's parental rights pursuant to subdivisions 7B-1111(a)(1) and (a)(2). Having properly found that these grounds existed, we cannot conclude, based upon these circumstances, that the trial court abused its discretion when it determined that termination of respondent's parental rights was in the best interest of the juveniles.

4. We note that the Court of Appeals concluded that respondent's failure to obtain treatment for her "social phobia" could not be considered as a factor in determining whether respondent failed to make progress toward correcting the conditions that led to removal of the juveniles. The trial court did not state that there was any link between respondent's "social phobia" and the conditions that led to removal and there is no indication in the trial court's order that it weighed respondent's failure to treat her "social phobia" as a factor in its decision. Instead, the trial court simply mentioned the issue of "social phobia" in passing before basing its ultimate determination on respondent's failure to obtain housing, failure to obtain transportation, failure to create a budgeting plan, driving without a valid license, and continuing involvement in domestic violence.

Accordingly, the judgment of the Court of Appeals is reversed as to the issue before this Court on appeal, and the trial court's order terminating respondent's parental rights is reinstated.

REVERSED.

EVERETTE E. KIRBY AND WIFE, MARTHA KIRBY; HARRIS TRIAD HOMES, INC.; MICHAEL HENDRIX, AS EXECUTOR OF THE ESTATE OF FRANCES HENDRIX; DARREN ENGELKEMIER; IAN HUTAGALUNG; SYLVIA MAENDL; STEVEN DAVID STEPT; JAMES W. NELSON AND WIFE, PHYLLIS H. NELSON; AND REPUBLIC PROPERTIES, LLC, A NORTH CAROLINA COMPANY (GROUP 1 PLAINTIFFS)
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 56PA14-2

Filed 10 June 2016

Eminent Domain—inverse condemnation—Map Act—recordation of highway corridor map—taking without just compensation

The Court of Appeals did not err by reversing the dismissal of plaintiffs' inverse condemnation claim. The use of the Map Act by defendant Department of Transportation to record the pertinent highway corridor map resulted in a taking of plaintiffs' property rights without just compensation. On remand, the trier of fact must determine the value of the loss of these fundamental rights by calculating the value of the land before and after the corridor map was recorded, taking into account all pertinent factors including the restriction on each plaintiff's fundamental rights as well as any effect of the reduced ad valorem taxes.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 218 (2015), reversing orders entered on 8 January 2013 and 20 June 2013 by Judge John O. Craig, III in Superior Court, Forsyth County, and remanding for further proceedings. Heard in the Supreme Court on 16 February 2016.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant, T. Paul Hendrick, Timothy Nerhood, Kenneth C. Otis III, and W. Kirk Sanders, for plaintiff-appellees.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General, for defendant-appellant.

Jonathan D. Guze for John Locke Foundation, amicus curiae.

Hansen Law Firm, PLLC, by Jessica O. Wilkie and Joshua D. Hansen; and Van Winkle Law Firm, by Jones P. Byrd, for North Carolina Advocates for Justice, amicus curiae.

Martin & Gifford, PLLC, by G. Wilson Martin, Jr.; and Wait Law, P.L.L.C., by John L. Wait, for North Carolina Association of Realtors, Inc., amicus curiae.

Carlene McNulty for North Carolina Justice Center, amicus curiae.

Elliot Engstrom for Civitas Institute, Center for Law and Freedom; and Mark Miller, pro hac vice, for Pacific Legal Foundation, amici curiae.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for Wilmington Urban Area Metropolitan Planning Organization, amicus curiae.

NEWBY, Justice.

In this case we consider whether the use of the Map Act by the North Carolina Department of Transportation (NCDOT) resulted in a taking of certain property rights of plaintiffs without just compensation. Upon NCDOT's recording of the highway corridor maps at issue here, the Map Act restricted plaintiffs' fundamental rights to improve, develop, and subdivide their property for an unlimited period of time. These restraints, coupled with their indefinite nature, constitute a taking of plaintiffs' elemental property rights by eminent domain. The extent to which plaintiffs may be entitled to just compensation, however, depends upon market valuation of the property before and after the taking. Such determinations must be made on an individual, property-by-property basis. We therefore affirm the decision of the Court of Appeals.

In 1987 the General Assembly adopted the Roadway Corridor Official Map Act (Map Act). Act of Aug. 7, 1987, ch. 747, sec. 19, 1987 N.C. Sess. Laws 1520, 1538-43 (codified as amended at N.C.G.S. §§ 136-44.50

to -44.54 (2015)); *see also* N.C.G.S. §§ 105-277.9 to -277.9A, 160A-458.4 (2015). Under the Map Act, once NCDOT files a highway corridor map with the county register of deeds, the Act imposes certain restrictions upon property located within the corridor for an indefinite period of time. N.C.G.S. § 136-44.51. After a corridor map is filed, "no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor." *Id.* § 136-44.51(a); *see also id.* § 153A-335(a) (2015) (" '[S]ubdivision' means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions when any one or more of those divisions are created for the purpose of sale or building development (whether immediate or future) and includes all division of land involving the dedication of a new street or a change in existing streets . . . ."); *id.* § 160A-376(a) (2015) (same). Recognizing the impact of these restrictions, the General Assembly also designated the property as a "special class" for *ad valorem* tax purposes, assessed at reduced rates of "twenty percent (20%) of the appraised value" for unimproved property, *id.* § 105-277.9, and* "fifty percent (50%) of the appraised value" for improved property, *id.* § 105-277.9A. Despite the restrictions on improvement, development, and subdivision of the affected property, or the tax benefits provided, NCDOT is not obligated to build or complete the highway project.

Owners whose properties are located within the highway corridor may seek administrative relief from these restrictions by applying for a building permit or subdivision plat approval, *id.* § 136-44.51(a)-(c), a variance, *id.* § 136-44.52, or an "advanced acquisition" of the property "due to an imposed hardship," *id.* § 136-44.53. In the first instance, if after three years a property owner's application for a building permit or subdivision plat has not been approved, the "entity that adopted the transportation corridor official map" must either approve the application or initiate acquisition proceedings, or else the applicant "may treat the real property as unencumbered." *Id.* § 136-44.51(b). In the second instance, "[a] variance may be granted upon a showing that: (1) Even with the tax benefits authorized by this Article, no reasonable return may be earned from the land; and (2) The requirements of G.S. 136-44.51 result in practical difficulties or unnecessary hardships." *Id.* § 136-44.52(d). In the third instance, an "advanced acquisition" may be made upon establishing "an undue hardship on the affected property owner." *Id.* § 136-44.53(a). Property approved under the hardship category must be acquired within three years or "the restrictions of the

map shall be removed from the property." *Id.* In all instances, however, the restrictions imposed upon the property remain indefinitely, absent affirmative action by the owner and either approval from the State or a certain lapse of time.

Plaintiffs are landowners whose properties are located within either the Western or Eastern Loops of the Northern Beltway, a highway project planned around Winston-Salem. Plaintiffs allege that the project "has been planned since 1965, and shown on planning maps since at least 1987 with the route determined by the early 1990s."

On 6 October 1997, in accordance with the Map Act, NCDOT recorded a highway transportation corridor map with the Forsyth County Register of Deeds that plotted the Western Loop of the Northern Beltway. Plaintiffs whose properties are located within the Western Loop had all acquired their properties before NCDOT recorded the pertinent corridor map. On 26 November 2008, NCDOT recorded a second map that plotted the Eastern Loop. Plaintiffs whose properties are located within the Eastern Loop had also purchased their properties before NCDOT recorded that corridor map, some as recently as 2006. The parties do not dispute that the Map Act imposed restrictions on property development and division as soon as NCDOT recorded the corridor maps.

The NCDOT has voluntarily purchased at least 454 properties within the beltway through condemnation proceedings, and since July 2010, has continued to purchase property located in the Western and Eastern Loops. In June 2013, NCDOT announced a public hearing regarding modification of the Western Loop boundaries, noting that "[a] 'Protected Corridor' has been identified that includes the areas of the beltway that the Department expects to purchase to build the proposed road." At the hearing an NCDOT official advised that "no funding for the proposed Western Section of the Northern Beltway had been included in the current" budget through 2020 and that there was "no schedule" establishing when construction would start.

From October 2011 to April 2012, following denial of their motion for class certification, *Beroth Oil Co. v. NCDOT (Beroth II)*, 367 N.C. 333, 347, 757 S.E.2d 466, 477 (2014), *aff'g in part and vacating in part Beroth Oil Co. v. NCDOT (Beroth I)*, 220 N.C. App. 419, 725 S.E.2d 651 (2012), plaintiffs filed separate complaints against NCDOT, asserting various, similar constitutional claims related to takings without just compensation, including inverse condemnation. On 31 July 2012, the Chief Justice certified plaintiffs' cases as "exceptional" under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and

the trial court subsequently consolidated plaintiffs into the same group for case management purposes.[1]

The NCDOT timely answered, asserted various affirmative defenses, including, *inter alia*, lack of standing, and moved to dismiss plaintiffs' claims under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 8 January 2013, the trial court entered an order denying NCDOT's motion to dismiss the claim for inverse condemnation.

All parties moved for summary judgment. The trial court first determined that plaintiffs failed to establish a taking, reasoning that "a regulatory taking" by police power only occurs when the legislation "deprive[s] the property of *all* practical use, or of *all* reasonable value" (citing and quoting *Beroth I*, 220 N.C. App. at 436-39, 725 S.E.2d at 661-63), and that the "mere recording of project maps do[es] not constitute a taking" (citing, *inter alia*, *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130, 135-36, 139 S.E.2d 227, 230-31 (1964)). Therefore, the trial court concluded the inverse condemnation claim was "not yet ripe" and granted summary judgment for NCDOT, dismissing the claim without prejudice.[2] Plaintiffs appealed the dismissal and summary judgment orders to the Court of Appeals, and NCDOT cross-appealed the same, arguing for dismissal "with prejudice."

The Court of Appeals reversed the dismissal of plaintiffs' inverse condemnation claim. *Kirby v. NCDOT*, ___ N.C. App. ___, ___, 769 S.E.2d 218, 236 (2015).[3] The Court of Appeals concluded that, unlike

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1. For clarity we will refer to plaintiffs' similar collective "claims" in the singular—for example, plaintiffs' inverse condemnation claim. Other plaintiffs were consolidated into other groups; however, those claims are not before this Court on appeal here.

2. Plaintiffs alleged the taking occurred solely on the dates "the maps were published" and not "on any other dates." The trial court noted that "in the future, the police powers granted by the Map Act could deprive the landowners of all practical use or all reasonable value of their land," but that plaintiffs had failed to establish a sufficient level of deprivation for a taking at that time. Not at issue here, the trial court also dismissed plaintiffs' remaining takings claims with prejudice and dismissed plaintiffs' claim for declaratory judgment without prejudice.

3. The Court of Appeals declined to reach plaintiffs' other claims because its "disposition allow[ed] the trial court, upon consideration of evidence to be presented by Plaintiffs, to award Plaintiffs the relief they sought in their respective complaints." *Kirby*, ___ N.C. App. at ___, 769 S.E.2d at 236. The court "further decline[d] to address any remaining assertions for which Plaintiffs and NCDOT—as appellants and cross-appellants, respectively—have failed to present argument supported by persuasive or binding legal authority." *Id.* at ___, 769 S.E.2d at 236.

regulations under the police power, which the State deploys to protect the public from injury, "the Map Act is a cost-controlling mechanism," *id.* at ___, 769 S.E.2d at 232, that employs the power of eminent domain, allowing NCDOT "to foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the State must pay to obtain those affected parcels," *id.* at ___, 769 S.E.2d at 232 (quoting *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part)). The Court of Appeals determined that the Map Act imposed restrictions on "Plaintiffs' ability to freely improve, develop, and dispose of their own property," *id.* at ___, 769 S.E.2d at 235, that "never expire," *id.* at ___, 769 S.E.2d at 234 (quoting *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478), and that, as a result, the Map Act effectuated a taking of their "elemental [property] rights," *id.* at ___, 769 S.E.2d at 234. Therefore, the Court of Appeals concluded that plaintiffs' inverse condemnation claim was ripe and remanded the matter for a "discrete fact-specific inquiry," *id.* at ___, 769 S.E.2d at 235 (quoting and discussing *Beroth II*, 367 N.C. at 343, 757 S.E.2d at 474 (majority opinion)), to determine "the amount of compensation due," *id.* at ___, 769 S.E.2d at 236.

We allowed NCDOT's petition for discretionary review. We review orders granting summary judgment and dismissal de novo and "view the allegations as true and the supporting record in the light most favorable to the non-moving party." *E.g.*, *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

The NCDOT contends that the Map Act is a valid, regulatory exercise of the police power, not the power of eminent domain, and that therefore no taking has occurred. The NCDOT asserts that "cost-cutting" is not the only underlying purpose of the Map Act and, quoting *Blades v. City of Raleigh*, 280 N.C. 531, 546, 187 S.E.2d 35, 43 (1972), argues that the Act promotes the general welfare of the public "by conserving the values of other properties and encouraging the[ir] most appropriate use." The NCDOT points to "facilitating orderly and predictable development" with "the least impact on the natural and human environments, and minimizing the number of businesses, homeowners and renters who will have to be relocated when a [highway] project is authorized for right-of-way acquisition and road construction" in support of its contentions. While these policies are laudable, we do not agree that the Map Act is a valid, regulatory exercise of the police power. We concur with the analysis of the Court of Appeals.

The fundamental right to property is as old as our state. *See* N.C. Const. of 1776, Declaration of Rights § XII; *Bayard v. Singleton*,

1 N.C. (Mart.) 5, 9 (1787); *see also* 1 William Blackstone, *Commentaries* *138 ("The third absolute right, inherent in every [man], is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."). Public policy has long favored the "free and unrestricted use and enjoyment of land." *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981) (citations omitted); *see* N.C.G.S. § 47B-1(1) (2015) ("Land . . . should be made freely alienable and marketable so far as is practicable."). "Property" encompasses "every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value" and includes "not only the thing possessed but . . . the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." *Hildebrand v. So. Bell Tel. & Tel. Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941).

From the very beginnings of our republic we have jealously guarded against the governmental taking of property. *See* John Locke, *Two Treatises of Government* 295 (London, Whitmore & Fenn et al. 1821) (1689) ("The great and *chief end*, therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of their property.*"); James Madison, *Property* (1792), *reprinted in* 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed., 1906) ("Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses."). Though our state constitution does not contain "an express constitutional provision against the 'taking' or 'damaging' of private property for public use" without payment of just compensation, we have long recognized the existence of a constitutional protection against an uncompensated taking and "the fundamental right to just compensation as so grounded in natural law and justice" that it is considered "an integral part of 'the law of the land' within the meaning of Article 1, Section 19 of our [North Carolina] Constitution." *Long v. City of Charlotte*, 306 N.C. 187, 195-96, 293 S.E.2d 101, 107-08 (1982) (footnotes and citations omitted), *superseded on other grounds by statute*, Act of July 10, 1981, ch. 919, sec. 28, 1981 N.C. Sess. Laws 1382, 1402; *see also* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 67-72 (2d ed. 2013) (discussing the development and interpretation of the Law of the Land Clause). "Property" clearly includes the rights to improve, develop, and subdivide, which were severely and indefinitely restricted here by the Map Act. Our recognition of the impact of the Map Act's restrictions on property rights, however, does not end the inquiry.

Determining if governmental action constitutes a taking depends upon "whether a particular act is an exercise of the police power or of the power of eminent domain." *Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) (quoting 11 Eugene McQuillin, *The Law of Municipal Corporations* § 32.27, at 319 (Ray Smith ed., Callaghan & Co. 3d ed. 1950)). Under the police power, the government *regulates* property to prevent injury to the public. *Beroth II*, 367 N.C. at 351, 757 S.E.2d at 479 (Newby, J., dissenting in part and concurring in part); *City of Durham v. Eno Cotton Mills*, 141 N.C. 615, 637, 54 S.E. 453, 461 (1906) ("[T]he right of property . . . [is] enjoyed subject to reasonable regulations . . . ." "The safety of the people is the supreme law . . . ."). Police power regulations must be "enacted in good faith, and ha[ve] appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." *Eno Cotton Mills*, 141 N.C. at 642, 54 S.E. at 462 (quoting *Mugler v. Kansas*, 123 U.S. 623, 666, 8 S. Ct. 273, 299, 31 L. Ed. 205, 212 (1887)). An exercise of police power outside these bounds may result in a taking. *See Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261-62, 302 S.E.2d 204, 208-09 (1983).

Under the power of eminent domain, the government *takes* property for public use because such action is advantageous or beneficial to the public. *Beroth II*, 367 N.C. at 351, 757 S.E.2d at 479. "[T]he sovereign determines the nature and extent of the property required . . . [and] may take for a limited period of time or in perpetuity . . . an easement, a mere limited use, . . . [or] an absolute, unqualified fee . . . ." *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960) (citations omitted). As such, "[t]he state must compensate for property rights taken by eminent domain; [however,] damages resulting from the [proper] exercise of [the] police power are noncompensable." *Barnes*, 257 N.C. at 514, 126 S.E.2d at 738 (quoting *State v. Fox*, 53 Wash. 2d 216, 220, 332 P.2d 943, 946 (1958)).

The language of the Map Act plainly points to future condemnation of land in the development of corridor highway projects, thus requiring NCDOT to invoke eminent domain. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." (citations omitted)). Section 136-44.50 contemplates the filing of "a transportation corridor official map" that has been adopted or amended by a governing board overseeing a "long-range transportation plan," and "establishment of" an "official map or amendment" triggers

the beginning of "environmental impact studies" and "preliminary engineering work." Sections 136-44.51 to 44.53 provide not only for approval of a building permit or variance but establish procedures for "advanced acquisition of" the property.

The Map Act's indefinite restraint on fundamental property rights is squarely outside the scope of the police power. *See Eno Cotton Mills*, 141 N.C. at 641-42, 54 S.E. at 462. No environmental, development, or relocation concerns arise absent the highway project and the accompanying condemnation itself. *See, e.g., Town of Wake Forest v. Medlin*, 199 N.C. 83, 85-86, 154 S.E. 29, 30-31 (1930) (providing examples of police power regulations for protection against nuisances). Justifying the exercise of governmental power in this way would allow the State to hinder property rights indefinitely for a project that may never be built. *See State v. Vestal*, 281 N.C. 517, 523, 189 S.E.2d 152, 157 (1972) ("His property may not be taken . . . without compensation, under the guise of a regulation of his business pursuant to the police power."). Though the reduction in acquisition costs for highway development properties is a laudable public policy, economic savings are a far cry from the protections from injury contemplated under the police power. *See, e.g., Medlin*, 199 N.C. at 85-86, 154 S.E. at 30-31. The societal benefits envisioned by the Map Act are not designed primarily to prevent injury or protect the health, safety, and welfare of the public. Furthermore, the provisions of the Map Act that allow landowners relief from the statutory scheme are inadequate to safeguard their constitutionally protected property rights.

A taking effectuated by eminent domain does not require "an actual occupation of the land," but "need only be a substantial interference with elemental rights growing out of the ownership of the property." *Long*, 306 N.C. at 198-99, 293 S.E.2d at 109 (citations omitted). These elemental rights are generally considered "an important feature of" the land and, as such, are accounted for within the valuation of the land. *See Town of Midland v. Wayne*, 368 N.C. 55, 66, 773 S.E.2d 301, 309 (2015) (stating that "development rights" are "an important feature of the condemned land and not a separate, compensable property right"); *Brown v. W.T. Weaver Power Co.*, 140 N.C. 333, 345, 52 S.E. 954, 958-59 (1905) ("The market value of property includes its value for any use to which it may be put." (citation omitted)); *see also Beroth II*, 367 N.C. at 343-44, 757 S.E.2d at 474-75 (majority opinion) (discussing various valuation methods).

Through inverse condemnation the owner may "recover to the extent of the diminution in his property's value" as measured by "the difference in the fair market value of the property immediately

before and immediately after the taking." *Long*, 306 N.C. at 201, 293 S.E.2d at 110-11 (citations omitted); *see* N.C.G.S. § 136-112(1) (2015). "Obviously, not every act or happening injurious to the landowner, his property, or his use thereof is compensable." *Long*, 306 N.C. at 199, 293 S.E.2d at 109. Thus, to pursue a successful inverse condemnation claim, a plaintiff must demonstrate not only a substantial interference with certain property rights but also that the interference caused a decrease in the fair market value of his land as a whole.

By recording the corridor maps at issue here, which restricted plaintiffs' rights to improve, develop, and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights. On remand, the trier of fact must determine the value of the loss of these fundamental rights by calculating the value of the land before the corridor map was recorded and the value of the land afterward, taking into account all pertinent factors, including the restriction on each plaintiff's fundamental rights, as well as any effect of the reduced *ad valorem* taxes. *See, e.g.*, *Nantahala Power & Light Co. v. Moss*, 220 N.C. 200, 205-06, 17 S.E.2d 10, 13-14 (1941) (discussing principles involved in fair market valuation); *see also Beroth II*, 367 N.C. at 343-44, 757 S.E.2d at 474-75. Accordingly, the trial court improperly dismissed plaintiffs' inverse condemnation claim. Therefore, we affirm the decision of the Court of Appeals, which reversed the trial court's ruling to the contrary and remanded this case for further proceedings as described above.

AFFIRMED.

ROBERT PAUL MORRIS
v.
SCENERA RESEARCH, LLC AND RYAN C. FRY

No. 429PA13

Filed 10 June 2016

1. Employer and Employee—Wage and Hours Act—patent bonuses—patents pending when employment ended

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not err by denying the employer's motions for direct verdict and judgment notwithstanding the verdict on the issue of whether plaintiff was entitled to patent issuance bonuses for patents still pending when his employment ended. Plaintiff presented more than a scintilla of evidence supporting his Wage and Hours Act claim: Plaintiff testified that his bonuses were earned at the time the patents were filed, and another witness confirmed that bonuses were earned at the time patents were filed.

2. Employer and Employee—Wage and Hours Act—patent bonuses—calculability—question for jury

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the Supreme Court affirmed the holding of the Court of Appeals that the question of whether a wage is "calculable" under the Wage and Hours Act is one of fact, not law, and that the trial court properly submitted the question to the jury. Plaintiff argued at trial that value of the patent issuance bonuses for patent applications still pending with the U.S. Patent and Trademark Office could be calculated using the following formula: 150 outstanding patents x $5,000 for each successfully issued patent x 90% patent issuance success rate = $675,000. The employer failed to offer any other formula at trial, and the meaning of "calculable" includes "capable of being estimated."

3. Employer and Employee—patent bonuses—liquidated damages

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not abuse its discretion by concluding that plaintiff was not entitled to liquidated damages on the jury's award of issuance bonuses associated with unissued patents.

The employer had reason to believe that it did not owe plaintiff the bonuses.

4. Employer and Employee—patent bonuses—Retaliatory Employment Discrimination Act damages—not trebeled

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not err when it declined to treble the jury's award of Retaliatory Employment Discrimination Act (REDA) damages. Proving a willful violation of N.C.G.S. § 95-241 requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute. Competent evidence supported the trial court's decision to not treble plaintiff's REDA award.

5. Employer and Employee—patent bonuses—rescission—money damages sufficient remedy

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the Court of Appeals erred by holding that plaintiff was entitled to rescission. A party may pursue rescission only when a material breach occurs *and* all legal remedies fall short of compensating the injured party for its loss. Plaintiff claimed that his employer owed him $5,000 to $10,000 for each patent at issue, and money damages provided him with a complete remedy.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 229 N.C. App. 31, 747 S.E.2d 362 (2013), finding no error in part, affirming in part, and reversing in part a memorandum opinion entered on 4 January 2012, a judgment entered on 14 May 2012, and an order entered on 27 June 2012, all by Judge James L. Gale in Superior Court, Wake County, and remanding in part for further judgment. On 18 December 2014, the Supreme Court allowed plaintiff's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 18 May 2015.

Young Moore and Henderson P.A., by Walter E. Brock, Jr., Andrew P. Flynt, and Patrick M. Aul, for plaintiff-appellee/appellant.

Parker Poe Adams & Bernstein LLP, by Catharine B. Arrowood, Scott E. Bayzle, and Catherine R.L. Lawson, for defendant-appellants/appellees.

Smith Moore Leatherwood LLP, by Richard A. Coughlin and Matthew Nis Leerberg, for North Carolina Chamber of Commerce, North Carolina Association of Defense Attorneys, and North Carolina State University, amici curiae.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Thomas Holderness, for Qualcomm Incorporated, Qualcomm Technologies, Incorporated, Cisco Systems, Inc., Microsoft Corp., and Cree, Inc., amici curiae.

BEASLEY, Justice.

This appeal arises out of a compensation and intellectual property dispute between Robert Paul Morris ("plaintiff") and his former employer Scenera Research, LLC and its CEO Ryan Fry (collectively, "defendants"). In 2004, Stanley Fry, defendant Ryan Fry's father, hired plaintiff as Scenera's first employee. The parties did not sign a written employment agreement. They did, however, have several discussions concerning the details of plaintiff's employment. Plaintiff expressed interest in inventing, but testified at trial that he had no obligation to invent. According to plaintiff, inventing was not part of his regular job duties for which he received a base salary.

Plaintiff participated in Scenera's patent bonus program (the "bonus program"), under which he received $5000 for every patent application submitted to the United States Patent and Trademark Office ("PTO") and another $5000 if and when the patent issued. Defendant Ryan Fry became concerned with the bonus program's viability and suspended Scenera's bonus program for all employees effective 1 January 2008. Plaintiff testified that Scenera owed him $210,000 in patent bonuses at this time. Plaintiff voluntarily suspended receipt of payments beginning in January 2008, believing that defendant Fry had promised to reinstate the original bonus program if Scenera did not create a new compensation plan and, thereafter, provide plaintiff a written employment contract.

As of 2009, the parties had not been able to agree on a new compensation plan and plaintiff still had no written contract. Frustrated with this lack of progress, plaintiff hired a lawyer and threatened to sue under the North Carolina Wage and Hour Act ("WHA") for the $210,000 in bonuses owed. The parties dispute the events that followed. Plaintiff claimed that Scenera fired him in retaliation for his threatening to bring a lawsuit, thereby violating the North Carolina Retaliatory Employment Discrimination Act ("REDA"). Defendants countered that plaintiff

clearly intended to leave the company and that his lawyer indicated the only option was to negotiate a severance package—thus, plaintiff "effectively resigned" and defendants merely accepted the resignation. Defendants tendered plaintiff a check for $210,000 on the condition that he acknowledge Scenera's ownership of patent applications filed and patents issued between 1 January 2008 and 17 June 2009. Plaintiff did not accept defendants' offer.

Plaintiff filed a complaint against defendants alleging breach of contract, fraudulent inducement, unjust enrichment, and WHA and REDA violations. On 1 April 2011, the Chief Justice designated this action as a complex business case and assigned it to the North Carolina Business Court. Defendants asserted a counterclaim for declaratory judgment that (1) Scenera owns all inventions plaintiff developed during his employment, and (2) plaintiff was not entitled to bonuses for patent applications filed or patents issued any time after January 2008. Defendants also sought damages for breach of fiduciary duty and for plaintiff's failure to support prosecution of patent applications to the PTO.

Both parties moved for summary judgment. The trial court granted defendants' motion in part, concluding that plaintiff was "hired to invent," and that ownership of the patents presumptively rested with Scenera, with the onus on plaintiff to prove that an agreement between the parties vested ownership with him. The trial court also granted defendants' summary judgment on plaintiff's claims for fraudulent inducement and unjust enrichment. The trial court denied the remainder of plaintiff's and defendants' motions for summary judgment.

Trial began on 30 January 2012. At the close of the evidence, the trial court granted defendants' motion for a directed verdict with respect to the issue of patent ownership, but denied defendants' motion for a directed verdict on the WHA and REDA claims. The trial court submitted the rest of the issues to the jury, and the jury awarded plaintiff (1) $210,000 in patent bonuses under the WHA for applications filed or patents issued between 1 January 2008 and 17 June 2009, (2) $675,000 under the WHA in patent issuance bonuses for patent applications pending as of 17 June 2009, (3) and $390,000 for REDA violations.

Plaintiff then requested liquidated damages and attorneys' fees under the WHA, and treble damages and attorneys' fees under REDA. The trial court denied plaintiff's request to treble damages, awarded $450,000 in attorneys' fees, and awarded $210,000 in liquidated damages for patents that have already issued. The trial court denied plaintiff's request for liquidated damages under the WHA for patents that had not yet issued. The trial court further ruled that Scenera owned all of the inventions,

patents, and patent applications listed in plaintiff's complaint, required plaintiff to assign any unassigned patent applications to Scenera, and ruled that Scenera could not recover damages under its counterclaims. Defendants moved for judgment notwithstanding the verdict (JNOV), and the trial court denied the motion. All parties appealed.

The Court of Appeals affirmed the trial court's ruling on the motions for directed verdict and JNOV, liquidated damages, WHA damages, and REDA damages. The court reversed, however, the trial court's ruling that plaintiff could not pursue rescission. *Morris v. Scenera Research, LLC*, 229 N.C. App. 31, 747 S.E.2d 362 (2013). All parties appealed.

I

A

[1] Defendants contend that the trial court should have granted their motions for directed verdict and JNOV as to whether plaintiff was entitled to patent issuance bonuses for patents still pending when his employment with Scenera ended. To survive a motion for directed verdict or JNOV, the non-movant must present "more than a scintilla of evidence" to support its claim. *Stark v. Ford Motor Co.*, 365 N.C. 468, 480, 723 S.E.2d 753, 761 (2012) (citation omitted). While a scintilla is "very slight evidence," *State v. Hawkins*, 155 N.C. 466, 470, 71 S.E. 326, 328 (1911) (quoting *State v. White*, 89 N.C. 462, 464-65 (1883)), the non-movant's evidence must still "do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury," *Jenrette Transp. Co. v. Atl. Fire Ins. Co.*, 236 N.C. 534, 539, 73 S.E.2d 481, 485 (1952) (citation omitted). The trial court must construe the evidence in the light most favorable to the non-movant and resolve all evidentiary conflicts in the non-movant's favor. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986) (citations omitted). We review this question of law de novo. *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 267 (2013) (citations omitted).

The WHA provides:

> Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs.

N.C.G.S. § 95-25.7 (2015).

At trial, plaintiff testified that he, like other Scenera employees, had a unique bonus plan, and that he was never informed that continued employment with Scenera was a prerequisite for receiving patent issuance bonuses. Plaintiff confirmed in his testimony that "the issuance bonus . . . was earned at the time the patent application was filed." He further testified that after a patent was filed and he assigned the corresponding rights to Scenera, "I was entitled to $5,000. . . . There was nothing as far as work with respect to the patent that I needed to do in order to earn that bonus." Moreover, Mona Singh, an inventor and witness for Scenera, confirmed that "whatever bonuses applied to [her] agreement became earned and due at the time the patent was filed." Singh also testified that she had received five or six issuance bonuses after leaving Scenera.

We hold that plaintiff has carried his minimal burden of presenting more than a scintilla of evidence supporting his WHA claim. While defendants cite conflicting evidence (some of which we discuss below), in the context of a directed verdict and JNOV, the trial court must resolve these conflicts in plaintiff's favor. Accordingly, we affirm the Court of Appeals' holding that the trial court properly submitted the question of whether plaintiff was entitled to the issuance bonuses to the jury and properly denied defendants' directed verdict and JNOV motions.

B

[2] Defendants further argue that the Court of Appeals erred in construing the term "calculable" under the WHA to mean capable of being estimated. As a preliminary matter, we address the Court of Appeals' holding that the question of whether a wage is "calculable" under the WHA is one of fact, not law, and that therefore the trial court could properly submit the question to the jury. The Court of Appeals explained that determining whether a wage is calculable "requires a weighing of the evidence and, thus, falls in a jury trial within the exclusive purview of the jury." *Morris*, 229 N.C. App. at 44, 747 S.E.2d at 370 (citations omitted). As we have explained, it is for the trial court "to determine whether the evidence . . . is sufficient to permit a legitimate inference of the facts essential to recovery; and it is the province of the jury to weigh the evidence and to determine what it proves or fails to prove." *Sneed v. Lions Club of Murphy, N.C., Inc.*, 273 N.C. 98, 101, 159 S.E.2d 770, 772 (1968) (citations omitted). "It is still for the jury if reasonable [minds] may differ as to its truth or if conflicting inferences may reasonably be drawn from" the evidence. *Cutts v. Casey*, 278 N.C. 390, 421, 180 S.E.2d 297, 314 (1971) (citations omitted). Because determining whether a wage is

calculable involves a weighing of the evidence, we affirm the Court of Appeals' holding that this issue presents a question of fact.

At trial, plaintiff argued that the value of the patent issuance bonuses for patent applications still pending with the PTO could be calculated using the following formula: 150 outstanding patents x $5,000 for each successfully issued patent x 90% patent issuance success rate = $675,000. The trial court instructed the jury to determine whether it could calculate the issuance bonuses owed, and if so, to compute that amount. The Court of Appeals first noted that neither the WHA nor case law define the term "calculable." The court therefore consulted the *American Heritage College Dictionary*, which defined calculable as " '[t]hat [which] can be calculated or *estimated*.' " *Morris*, 229 N.C. App. at 45, 747 S.E.2d at 371 (quoting *The American Heritage College Dictionary* 198 (3d ed. 1997) (emphasis added)). The court concluded that plaintiff's proffered formula "was at least one reasonable way to calculate" the bonuses and therefore held that the trial court did not err in submitting this question to the jury. *Id.* at 45, 747 S.E.2d at 371.

Defendants again argue that "calculable" does not mean capable of being estimated because this interpretation would allow impermissible speculation as to future wages. Defendants cite the rule that "the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (1987) (citation omitted). Plaintiff's formula, they contend, does not allow for the reasonably certain determination of issuance bonuses associated with pending patent applications.

We disagree. In other contexts in which a party seeks to recover lost profits, that party must show "both the amount and [the] cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of the loss must be shown with reasonable certainty." *Cary v. Harris*, 178 N.C. 624, 628, 101 S.E. 486, 488 (1919) (quoting *Nance v. W. Union Tel. Co.*, 177 N.C. 314, 317, 98 S.E. 838, 840 (1919)). The evidence indicated that plaintiff had completed all the work required for the patents to issue. An employer must pay "those wages and benefits due *when the employee has actually performed the work required to earn them*." *Kornegay v. Aspen Asset Grp.*, 204 N.C. App. 213, 229, 693 S.E.2d 723, 735 (2010) (quoting *Narron v. Hardee's Food Sys., Inc.*, 75 N.C. App. 579, 583, 331 S.E.2d 205, 208 (emphasis added), *disc. rev. denied*, 314 N.C. 542, 335 S.E.2d 316 (1985)).

We further note that defendants presented no evidence at trial challenging the adequacy of plaintiff's formula. Because defendants offered no other formula, this Court need only be concerned that the result reached, based on the evidence presented, is reasonable. *See Jenrette Transp. Co.*, 236 N.C. at 539-40, 73 S.E.2d at 485. We therefore affirm the Court of Appeals' holding that determining calculability of wages under the WHA is a question of fact to be submitted to a jury.

II

[3] We next address plaintiff's argument that the Court of Appeals erred in affirming the trial court's decision to refrain from awarding plaintiff liquidated damages on the jury's award of issuance bonuses associated with unissued patents. First, we must determine the appropriate standard of review. Plaintiff contends that de novo review applies, while defendants contend that we should apply a three-tiered standard as used by federal courts addressing claims under the Fair Labor Standards Act ("FLSA").

In *Kornegay v. Aspen Asset Group, LLC*, the Court of Appeals adopted the latter approach.

> [T]he traditional standard of review that applies to a trial court's factual findings—in federal court, the "clearly erroneous" standard and in North Carolina, the "competent evidence" standard—applies to findings of fact made by a trial court in addressing a claim for liquidated damages. In reviewing the trial court's conclusions of law, the courts have held that review is de novo, including on the issue whether the findings of fact support the conclusions of law.

204 N.C. App. at 245, 693 S.E.2d at 745. The trial court's final decision to award or refrain from awarding liquidated damages is then reviewed for abuse of discretion. *Id.* at 244, 693 S.E.2d at 744. We adopt the Court of Appeals' reasoning in *Kornegay* and review the trial court's decision to not award plaintiff liquidated damages for an abuse of discretion.

We hold that the trial court did not abuse its discretion in concluding that plaintiff was not entitled to liquidated damages.

The WHA provides:

> In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be

> due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

N.C.G.S. § 95-25.22(a1)(2015).

Plaintiff argues that defendants committed a per se WHA violation that was unreasonable as a matter of law when they did not notify him that he would not receive the issuance bonuses when his employment ended. The trial court held, however, that defendants had reasonable grounds for believing that their act or omission was not a violation of the WHA. We agree with the trial court. In considering the evidence, defendants had reason to believe that they did not owe plaintiff issuance bonuses. Therefore, we hold that defendants acted reasonably in not notifying defendant that he would not receive those bonuses.

Plaintiff's own testimony and complaint strongly support the conclusion that defendants acted reasonably. At his deposition, plaintiff stated that he was entitled to receive the issuance bonus "when the patent issued from the U.S. Patent Office." When asked at trial if "Scenera's obligated to pay an issuance bonus only if the patent issues," plaintiff responded, "Under the agreement that I had, yes." Plaintiff also testified that "[t]he issuance bonus was due when the patent issued." Finally, plaintiff's complaint alleged that the issuance bonus became due "when a patent issued."

We thus affirm the Court of Appeals' holding that the trial court properly denied plaintiff's request for liquidated damages on the jury's award of patent issuance bonuses.

III

[4] We next address whether the Court of Appeals erred by affirming the trial court's decision not to treble the jury's award of REDA damages. The REDA provides that if "the court finds that the employee was injured by a willful violation of [the section prohibiting discriminatory or retaliatory action by an employer], the court shall treble the amount awarded." N.C.G.S. § 95-243(c) (2015). But REDA does not define the

term “willful,” and we have not addressed the term in this context. The Court of Appeals adopted the standard used by federal courts in addressing the Fair Labor Standards Act (FLSA), holding that a willful FLSA violation is “one in which the employer ‘either knew or showed reckless disregard for the matter of whether its conduct was prohibited by [the] statute.’ ” *Morris*, 229 N.C. App. at 51, 747 S.E.2d at 375 (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 100 L. Ed. 2d 115, 123 (1988)). Again looking to federal law for guidance, the Court of Appeals held that the determination of willfulness is a question of fact, *id.* at 52, 747 S.E.2d at 375 (citing *Formby v. Farmers & Merchs. Bank*, 904 F.2d 627, 632 (11th Cir. 1990) (*per curiam*) (determination of willfulness under Age Discrimination in Employment Act is a question of fact)), and adopted the competent evidence standard used in bench trials, *id.* at 52, 747 S.E.2d at 375 (citing *In re Estate of Archibald*, 183 N.C. App. 274, 276, 644 S.E.2d 264, 266 (2007)). Finally, the Court of Appeals held that a determination of “willfulness” under REDA is “for the jury to decide, not for the judge.” *Id.* at 52, 747 S.E.2d at 375.[1]

We agree with the Court of Appeals’ definition of “willfulness,” as well as its determination that whether defendants’ violation of REDA was willful is one of fact. But, we disagree with its decision that the determination of willfulness is one for the jury. The statute clearly establishes that damages shall be trebled under REDA if “the *court* finds that the employee was injured by a willful violation.” N.C.G.S. § 95-243(c) (emphasis added). Thus, the trial court must make the finding of willfulness, and a reviewing court must uphold the trial court’s finding of willfulness if there is competent evidence to support that finding.

The record supports the trial court’s finding that defendants did not willfully violate REDA. Plaintiff was the first party to suggest that he and Scenera “part ways” and “negotiate a termination agreement.” Plaintiff speculates that defendants’ retention of counsel is evidence that defendants attempted to conceal their REDA violations; however, plaintiff cites no specific evidence indicating the existence of a cover-up, and the record shows none. Defendants’ retention of counsel may simply demonstrate that they wished to comply with REDA.

1. Nonetheless, the court recognized that a party can waive its right to have a jury determine questions of fact and that plaintiff did so here by “explicitly concur[ring] with the business court’s suggestions that . . . Scenera’s ‘willfulness’ under REDA was for the court to decide.” *Id.* at 52, 747 S.E.2d at 375.

We thus hold that proving a willful violation of N.C.G.S. § 95-241 requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute and affirm the Court of Appeals' holding that competent evidence supported the trial court's decision to not treble plaintiff's REDA award.

IV

[5] Finally, we address defendants' argument that plaintiff is not entitled to rescission. Defendants argue that plaintiff is not entitled to rescission because monetary damages provide plaintiff with an adequate remedy, and because rescission would return plaintiff to a status quo that never existed. We agree.

Rescission is an equitable contract remedy that differs from its legal counterparts. While legal remedies generally compensate the non-breaching party as if there were no breach, rescission treats both parties as if there were no contract. *Brannock v. Fletcher*, 271 N.C. 65, 73-74, 155 S.E.2d 532, 541 (1967). "Rescission is not merely a termination of contractual obligation. It is abrogation or undoing of it from the beginning." *Id.* at 74, 155 S.E.2d at 542 (citing *Dooley v. Stillson*, 46 R.I. 332, 335, 128 A. 217, 218 (1925)). As with all equitable remedies, rescission "will not lend its aid in any case where the party seeking it has a full and complete remedy at law." *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945) (citations omitted). A party may pursue rescission only if "there is a material breach of the contract going to the very heart of the instrument." *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 242, 243 (1964).

The Court of Appeals incorrectly applied the test for rescission. The court held that Scenera's failure to pay plaintiff his patent bonuses was prima facie evidence of a material breach, and, because defendants breached the contract materially, plaintiff could pursue rescission. But, rescission cannot be the remedy for every material breach. A party may pursue rescission only when a material breach occurs and all legal remedies fall short of compensating the injured party for its loss. *Id.* at 43, 134 S.E.2d at 243, *see Jefferson Standard Life Ins. Co.*, 225 N.C. at 300, 34 S.E.2d at 434.

Here, although defendants materially breached their contract with plaintiff, monetary damages sufficiently compensate plaintiff for his loss. Plaintiff's entire claim is that defendants owe him $5,000 to $10,000 for each patent he created while employed at Scenera. Defendants owed plaintiff no other obligation under the contract, and monetary damages provide plaintiff with a full and complete remedy.

To hold otherwise would seriously undermine the rationale of the hired-to-invent doctrine.[2] As this Court explained in *Speck*, an employer takes a risk when hiring an employee to invent, because the employer has no guarantee of a return on its investment. 311 N.C. at 686, 319 S.E.2d at 143 (in which this Court adopted the hired-to-invent doctrine, holding that if the employee succeeds in inventing, "then the invention belongs to the employer even though the terms of employment contain no express provision dealing with the ownership of whatever inventions may be developed." (quoting *Nat'l Dev. Co. v. Gray*, 316 Mass. 240, 247, 55 N.E.2d 783, 787 (1944)). If an employee is hired to invent but could later rescind that agreement and claim ownership of inventions made during his or her employment, the employee would end up in a far better position, and the employer in a far worse position, than when the parties reached their original bargain. The employer's risk would increase exponentially, thereby discouraging businesses and universities from undertaking valuable research efforts that could benefit our State and Nation.

For these reasons, the Court of Appeals' holding that plaintiff may pursue rescission is reversed.

V

In conclusion, we affirm the Court of Appeals' holding that the trial court properly submitted the issue of whether plaintiff was entitled to the issuance bonuses to the jury and properly denied defendants' directed verdict and JNOV motions. We likewise affirm the Court of Appeals' holding that determining calculability of wages under the WHA is a question of fact to be submitted to a jury. We also affirm the Court of Appeals' holdings that plaintiff is not entitled to liquidated damages based on the WHA or treble damages based on REDA. Finally, we reverse the Court of Appeals' holding that plaintiff may pursue rescission.

AFFIRMED IN PART; REVERSED IN PART.

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2. The trial court concluded that plaintiff was "hired to invent." However, the Court of Appeals stated that this conclusion by the trial court was "inapposite" to the issue of rescission. *Morris*, 229 N.C. App. at 62, 747 S.E.2d at 381. We assume, without deciding, that plaintiff was hired to invent.

STATE OF NORTH CAROLINA
v.
ROBERT BISHOP

No. 223PA15

Filed 10 June 2016

Constitutional Law—freedom of speech—cyberbullying statute unconstitutional

The Court of Appeals erred by finding no error in defendant's conviction for cyberbullying. The cyberbullying statute under N.C.G.S. § 14-458.1(a)(1)(d) (2015) was declared unconstitutional because it violated the First Amendment's guarantee of freedom of speech. It restricted speech, not merely nonexpressive conduct; the restriction was content based, not content neutral; and it was not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 774 S.E.2d 337 (2015), finding no error after appeal from a judgment entered on 5 February 2014 by Judge G. Wayne Abernathy in Superior Court, Alamance County. Heard in the Supreme Court on 17 February 2016.

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

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellant.

Ellis & Winters LLP, by C. Scott Meyers; and Eugene Volokh, pro hac vice, UCLA School of Law, for Electronic Frontier Foundation, amicus curiae.

HUDSON, Justice.

On 9 February 2012, defendant Robert Bishop was arrested and charged with one count of cyberbullying under North Carolina's cyberbullying statute, N.C.G.S. § 14-458.1. Under that statute, it is "unlawful for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or

torment a minor." N.C.G.S. § 14-458.1(a)(1)(d) (2015). On 5 February 2014, defendant was convicted on that sole charge by a jury in the Superior Court in Alamance County. On appeal, the Court of Appeals concluded that the cyberbullying statute "prohibits conduct, not speech"; that any burden on speech is "merely incidental"; and that this "incidental" burden "is no greater than necessary" to further the State's "substantial" interest in protecting children from the harmful effects of bullying and harassment. *State v. Bishop*, ___ N.C. App. ___, ___, ___, 774 S.E.2d 337, 344-45, 349 (2015). We now conclude that N.C.G.S. § 14-458.1(a)(1)(d) restricts speech, not merely nonexpressive conduct; that this restriction is content based, not content neutral; and that the cyberbullying statute is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying. Accordingly, we reverse the decision of the Court of Appeals and hold that the statute violates the First Amendment as applied to the states through the Fourteenth Amendment.

I. FACTS AND PROCEDURAL BACKGROUND

During the 2011-2012 school year, defendant and Dillion Price were students at Southern Alamance High School. Starting in the fall of 2011, some of Price's classmates began to post negative pictures and comments about Price on Facebook, including on Price's own Facebook page. In September 2011, a male classmate posted on Facebook a screenshot of a sexually themed text message Price had inadvertently sent him. Below that post, several individuals commented, including Price and defendant. Price accused the posting student of altering or falsifying the screenshot and threatened to fight him over the matter; defendant commented that the text was "excessively homoerotic" and accused others of being "defensive" and "pathetic for taking the [I]nternet so seriously."

At least two other Facebook postings with similar tone and attitude followed, all involving Price, defendant, and other commenters. Many of the messages that ensued included comments and accusations about each other's sexual proclivities, along with name-calling and insults.

Late one night in December 2011, Price's mother found him very upset in his room, crying, throwing things, and hitting himself in the head. She saw on his cellphone some of the comments and pictures that his classmates had posted. Fearing for his well-being and concerned that Price might harm himself, Price's mother contacted the police, who used undercover Facebook accounts to view the Facebook postings and take screenshots of postings relevant to the investigation.

On 9 February 2012, defendant was arrested and charged with one count of cyberbullying in violation of N.C.G.S. § 14-458.1. Some, but not all, of the other students involved in these discussions were also arrested or charged under the cyberbullying statute.[1]

Defendant was tried and convicted in district court, after which he appealed to the Superior Court in Alamance County for a trial de novo. In the superior court, defendant filed a pretrial motion to dismiss, contending that N.C.G.S. § 14-458.1(a)(1)(d) is unconstitutional under the First and Fourteenth Amendments. After hearing the matter on 24 April, the trial court denied defendant's motion in an order entered on 17 May 2013. Defendant's case came on for trial at the 3 February 2014 criminal session of the Superior Court in Alamance County, and on 5 February, defendant was convicted by a jury of one count of cyberbullying. Defendant appealed to the Court of Appeals.

At the Court of Appeals, defendant argued, *inter alia*, that the cyberbullying statute, specifically N.C.G.S. § 14-458.1(a)(1)(d), restricts speech protected under the First Amendment; that this restriction is content based; and that it sweeps too broadly to satisfy the exacting demands of strict scrutiny. In a unanimous opinion, the Court of Appeals rejected those arguments. Instead, applying de novo review, that court concluded that N.C.G.S. § 14-458.1(a)(1)(d) regulates conduct, not speech, and specifically that the statute "punishes the *act* of posting or encouraging another to post on the Internet *with the intent* to intimidate or torment" a minor. *Bishop*, ___ N.C. App. at ___, 774 S.E.2d at 343. The Court of Appeals also concluded that "[t]o the extent the Cyber-bullying Statute touches upon or regulates some aspects of some speech, the burden on speech and expression is merely incidental." *Id.* at ___, 774 S.E.2d at 344 (citing *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 300, 749 S.E.2d 429, 437 (2012), *cert. denied*, ___ U.S. ___, 134 S. Ct. 99 (2013)). And regarding that "incidental" burden, the Court of Appeals concluded that it "is no greater than necessary" because the statute "only prohibits disclosure of 'private, personal, or sexual information pertaining to [a] minor' on the Internet with the specific intent to intimidate or torment a minor" and "does not prohibit any other speech or communication on the Internet outside of this context." *Id.* at ___, 774 S.E.2d at 344-45 (quoting N.C.G.S. § 14-458.1(a)(1)(d)). Partly on this basis, and after rejecting several other arguments defendant raised before that court,

1. According to the trial transcript, it appears that six students were charged in connection with these online conversations.

the Court of Appeals ultimately found no error in defendant's conviction under the cyberbullying statute. *See id.* at ___, 774 S.E.2d at 349. On 20 August 2015, we allowed defendant's petition for discretionary review.

II. ANALYSIS

Here, defendant again contends that the cyberbullying statute, specifically N.C.G.S. § 14-458.1(a)(1)(d), is unconstitutional under the First Amendment, as incorporated and applied to the states through the Fourteenth Amendment, because it criminalizes protected speech based on its content, and because, in doing so, the law extends well beyond the government's asserted interest in protecting children from the harms caused by online bullying. The challenged provision makes it "unlawful for any person to use a computer or computer network" to "[p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." N.C.G.S. § 14-458.1(a)(1)(d). For the reasons that follow, we hold that section 14-458.1 restricts speech, and not just nonexpressive conduct; that the restriction created is content based, not content neutral; and that the statute's scope is not sufficiently narrowly tailored to serve the State's asserted interest in protecting children from the harms resulting from online bullying. Accordingly, we conclude that N.C.G.S. § 14-458.1(a)(1)(d) violates the First Amendment. We therefore reverse the decision of the Court of Appeals.

A. The Statute Burdens Speech, Not Just Nonexpressive Conduct.

We must first determine whether N.C.G.S. § 14-458.1(a)(1)(d) restricts protected speech or expressive conduct, or whether the statute affects only nonexpressive conduct. Answering this question determines whether the First Amendment is implicated. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539 (1989) (stating that conduct acquires First Amendment protection only when it "possesses sufficient communicative elements"). Yet this inquiry is not always easy or straightforward. On one hand, the Supreme Court of the United States has recognized that expressive conduct falls within the ambit of the First Amendment's protections—at least when that conduct is "inherently" expressive. *Rumsfeld v. Forum for Acad. & Inst'l Rights*, *Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 1310 (2006) ("Instead, we have extended First Amendment protection only to conduct that is inherently expressive[, such as flag burning]." (citing *Johnson*, 491 U.S. at 406, 109 S. Ct. at 2540)). On the other, that Court has also long held that otherwise proscribable criminal conduct does not become protected by the First

Amendment simply because the conduct happens to involve the written or spoken word. *See, e.g.*, *United States v. Alvarez*, ___ U.S. ___, ___, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (noting that "speech integral to criminal conduct" remains a category of historically unprotected speech); *accord Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 691 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (citations omitted)); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 389, 112 S. Ct. 2538, 2546 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets) . . . ."); *State v. Camp*, 59 N.C. App. 38, 42-43, 295 S.E.2d 766, 768-69 (opining that a statute barring use of a telephone to harass another person implicated conduct, not speech, and therefore did not violate the First Amendment), *appeal dismissed and disc. rev. denied*, 307 N.C. 271, 299 S.E.2d 216 (1982). Against this blurred doctrinal landscape, the line is not always bright between what is protected by the First Amendment and what is not.

Here, however, we are satisfied that N.C.G.S. § 14-458.1(a)(1)(d) applies to speech and not solely, or even predominantly, to nonexpressive conduct. As noted, the statute prohibits anyone, on threat of criminal punishment, from "[p]ost[ing] or encourag[ing] others to post on the Internet [any] private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." N.C.G.S. § 14-458.1(a)(1)(d). In contrast with the statute we upheld in *Hest*, which proscribed operating or placing into operation "an electronic machine or device" to conduct a sweepstakes, 366 N.C. at 292, 749 S.E.2d at 432, this statute outlawed posting particular subject matter, on the internet, with certain intent. The statute at issue in *Hest* regulated conduct, *id.* at 296, 749 S.E.2d at 434; the statute here regulates protected speech.

Posting information on the Internet—whatever the subject matter—can constitute speech as surely as stapling flyers to bulletin boards or distributing pamphlets to passersby—activities long protected by the First Amendment. *See, e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S. Ct. 666, 669 (1938) ("The [First Amendment] is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."); *see also Jamison v. Texas*, 318 U.S. 413, 416, 63 S. Ct. 669, 672

(1943) ("This right [to express one's views in an orderly fashion] extends to the communication of ideas by handbills and literature as well as by the spoken word." (citations omitted)). Such communication does not lose protection merely because it involves the "act" of posting information online, for much speech requires an "act" of some variety—whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket. *See, e.g., Cohen v. California*, 403 U.S. 15, 18-19, 26, 91 S. Ct. 1780, 1784-85, 1789 (1971) (holding that wearing a jacket with an antiwar vulgarity constituted protected speech, not merely conduct). Nor is such communication subject to any lesser protection simply because it occurs online. As the United States Supreme Court has made clear, the protections of the First Amendment extend in full not just to the Internet, *see Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."), but to all new media and forms of communication that progress might make available, *see Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, 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." (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S. Ct. 777, 781 (1952))). Accordingly, we conclude that N.C.G.S. § 14-458.1(a)(1)(d) of North Carolina's cyberbullying statute implicates the First Amendment because that provision restricts speech and not merely conduct.

B. The Statute is Content Based.

Having concluded that N.C.G.S. § 14-458.1(a)(1)(d) limits speech, we now consider a second threshold inquiry: whether this portion of the cyberbullying statute is content based or content neutral. This central inquiry determines the level of scrutiny we apply here. Content based speech regulations must satisfy strict scrutiny. Such restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, ___ U.S. ___, ___, 135 S. Ct. 2218, 2226 (2015) (citing *R.A.V.*, 505 U.S. at 395, 112 S. Ct. at 2549 and *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S. Ct. 501, 508, 509 (1991)). In contrast, content neutral measures—such as those governing only the time, manner, or place of First Amendment-protected expression—are subjected to a less demanding but still rigorous form of intermediate scrutiny. The government must

prove that they are "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, ___ U.S. ___, ___, 134 S. Ct. 2518, 2529 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989)).

Until recently, it was unclear how a court should determine whether a speech restriction is content based or content neutral. In some cases, the Supreme Court of the United States has suggested that a reviewing court should focus on the intent behind the measure; in others, it has emphasized the plain text of the statute and how it would operate in practice. *Compare Ward*, 491 U.S. at 791, 109 S. Ct. at 2754 ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295, 104 S. Ct. 3065, 3070 (1984))), *with McCullen*, ___ U.S. at ___, 134 S. Ct. at 2531 ("The Act would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383, 104 S. Ct. 3106, 3119 (1984))), *and R.A.V.*, 505 U.S. at 391, 112 S. Ct. at 2547 ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."). At times, the Court suggested both emphases within the course of a single opinion. *Compare Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64, 131 S. Ct. 2653, 2663 (2011) ("On its face, [the challenged measure] enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."), *with id.* at 565, 131 S. Ct. at 2663-64 ("Given the legislature's expressed statement of purpose, it is apparent that [the challenged measure] imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.").

Recently, however, in *Reed v. Town of Gilbert* that Court clarified that several paths can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny. This determination can find support in the plain text of a statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message.[2] In short, "[b]ecause strict

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2. As the Supreme Court of the United States summarized:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content

scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Reed*, ___ U.S. at ___, 135 S. Ct. at 2228.

Here, it is clear that the cyberbullying statute is content based, on its face and by its plain text, because the statute "defin[es] regulated speech by [its] particular subject matter." *Id.* at ___, 135 S. Ct. at 2227. The provision under which defendant was arrested and prosecuted prohibits "post[ing] or encourag[ing] others to post . . . private, personal, or sexual information pertaining to a minor." N.C.G.S. § 14-458.1(a)(1)(d). The statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication. The State's justification for the cyberbullying statute "cannot transform [this] facially content based law into one that is content neutral," *Reed*, ___ U.S. at ___, 135 S. Ct. at 2228, and we therefore reverse the Court of Appeals holding to the contrary.

C. The Statute Fails Strict Scrutiny.

Because we have concluded that N.C.G.S. § 14-458.1(a)(1)(d) creates a content based restriction on protected speech, we can uphold this portion of the cyberbullying statute only if the State can demonstrate that it satisfies strict scrutiny. To do so, the State must show that the statute serves a compelling governmental interest, and that the law is narrowly tailored to effectuate that interest. *See, e.g.*, *id.* at ___, 135 S. Ct. at 2226.

> based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
>
> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys. Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Reed, ___ U.S. at ___, 135 S. Ct. at 2227 (brackets, internal citations, and internal quotation marks omitted).

That protecting children from online bullying is a compelling governmental interest is undisputed. While the State would normally be required specifically to "identify an 'actual problem' in need of solving," *Entm't Merchs. Ass'n*, 564 U.S. at 799, 131 S. Ct. at 2738 (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822, 120 S. Ct. 1878, 1891 (2000)), and to "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial' " *Fisher v. Univ. of Tex. at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2418 (2013) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 98 S. Ct. 2733, 2756 (1978) (plurality opinion)), here the State asserts, and defendant agrees, that the General Assembly has a compelling interest in protecting children from physical and psychological harm. We also note that the special status of minors is a subject for which the Supreme Court of the United States has shown a particular solicitude. That Court's longstanding recognition that "youth is more than a chronological fact," *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 877 (1982), has led it, on one hand, to recognize a compelling interest in the protection of minors, *see, e.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989), and, on the other, to prohibit the imposition of the most serious criminal punishments for offenses committed before the age of eighteen, *see Roper v. Simmons*, 543 U.S. 551, 575, 125 S. Ct. 1183, 1198 (2005) (holding that the death penalty cannot be imposed for offenses committed by a juvenile); *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 2034 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."); *Miller v. Alabama*, ___ U.S. ___, ___, 132 S. Ct. 2455, 2460 (2012) ("[M]andatory life without parole for those under the age of 18 at the time of their crimes [even for homicide offenses] violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (quoting U.S. Const. amend. VIII)). Accordingly, in line with these consistent and converging strands of precedent, we reaffirm that the State has "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Commc'ns*, 492 U.S. at 126, 109 S. Ct. at 2836.

But just as the Court has shown a particular cognizance of the vulnerabilities of minors, so too has it shown a particular wariness of allowing strict scrutiny to become "strict in theory but feeble in fact." *Fisher*, ___ U.S. at ___, 133 S. Ct. at 2421. The State must show not only that a challenged content based measure addresses the identified harm, but that the enactment provides "the least restrictive means" of doing so. *McCutcheon v. FEC*, ___ U.S. ___, ___, 134 S. Ct. 1434, 1444 (2014) (plurality opinion) (citing *Sable Commc'ns*, 492 U.S. at 126, 109 S. Ct. at 2836). Given this "exacting scrutiny," *id.* at ___, 134 S. Ct. at 1444, it is

perhaps unsurprising that few content based restrictions have survived this inquiry. *See Williams–Yulee v. Fla. Bar*, ___ U.S. ___, ___, 135 S. Ct. 1656, 1672 (2015) (upholding a provision that prohibited judicial candidates from personally soliciting campaign contributions but allowed them to raise funds in other ways and to conduct other campaign activities); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 38-39, 130 S. Ct. 2705, 2729-30 (2010) (upholding, in the interest of national security, a specific application of a statute barring the provision of material aid to foreign terrorist groups); *Burson v. Freeman*, 504 U.S. 191, 210-11, 112 S. Ct. 1846, 1857-58 (1992) (plurality opinion) (upholding a buffer zone around election sites as a measure to safeguard the right to vote freely and effectively); s*ee also Wood v. Moss*, ___ U.S. ___, ___, 134 S. Ct. 2056, 2061 (2014) (holding, in light of the "overwhelming importance" of "safeguarding the President," that the Secret Service had not violated the clearly established rights of protestors by moving them farther away than supporters during an unexpected presidential stop).

With these principles in mind, we now turn to sub-subdivision 14-458.1(a)(1)(d) of the cyberbullying statute. Again, that provision makes it a criminal offense "for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." N.C.G.S. § 14-458.1(a)(1)(d). The central question then becomes whether this language embodies the least restrictive means of advancing the State's compelling interest in protecting minors from this potential harm.

We hold that it does not. At the outset, it is apparent that the statute contains no requirement that the subject of an online posting suffer injury as a result, or even that he or she become aware of such a posting. In addition, as to both the motive of the poster and the content of the posting, the statute sweeps far beyond the State's legitimate interest in protecting the psychological health of minors. Regarding motive, the statute prohibits anyone from posting forbidden content with the intent to "intimidate or torment" a minor. However, neither "intimidate" nor "torment" is defined in the statute, and the State itself contends that we should define "torment" broadly to reference conduct intended "to annoy, pester, or harass."[3] The protection of minors' mental well-being

3. Similarly, the State encourages us to define "to intimidate" as "to make timid; fill with fear." While we need not, and do not, address a hypothetical statute limited to proscribing unprotected "true threats"—which the United States Supreme Court has defined as "those statements where the speaker means to communicate a serious expression of

may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance.

The description of the proscribed subject matter is similarly expansive. The statute criminalizes posting online "private, personal, or sexual information pertaining to a minor." *Id.* Again, these terms are not defined by the statute. The State has suggested that we interpret this language by defining "private" to mean "[s]ecluded from the sight, presence, or intrusion of others," or "[o]f or confined to the individual." The State would then define "personal" as "[o]f or relating to a particular person," or "[c]oncerning a particular person and his or her private business, interests, or activities." And it would define "sexual" as "[o]f, relating to, involving, or characteristic of sex, sexuality, the sexes, or the sex organs and their functions," or "[i]mplying or symbolizing erotic desires or activity." While all of these definitions are broad, the State's proposed definition of "personal" as "[o]f or relating to a particular person" is especially sweeping. Were we to adopt the State's position, it could be unlawful to post on the Internet any information "relating to a particular [minor]." Such an interpretation would essentially criminalize posting *any* information about *any* specific minor if done with the requisite intent.

Finally, we note that, while adding a mens rea requirement can sometimes limit the scope of a criminal statute, reading the motive and subject matter requirements in tandem here does not sufficiently narrow the extensive reach of the cyberbullying statute. Even under the State's proposed construction of the statutory terms, N.C.G.S. § 14-458.1(a)(1)(d) could criminalize behavior that a robust contemporary society must tolerate because of the First Amendment, even if we do not approve of the behavior. Civility, whose definition is constantly changing, is a laudable goal but one not readily attained or enforced through criminal laws.

In sum, however laudable the State's interest in protecting minors from the dangers of online bullying may be, North Carolina's cyberbullying statute "create[s] a criminal prohibition of alarming breadth." *United States v. Stevens*, 559 U.S. 460, 474, 130 S. Ct. 1577, 1588 (2010), *superseded by statute*, Pub. L. No. 111-294, § 3(a), 124 Stat. 3178 (2010)

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an intent to commit an act of unlawful violence to a particular individual or group of individuals," *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548 (2003) (citations omitted)—we do note that such a statute might present a closer constitutional question. *Cf. Elonis v. United States*, ___ U.S. ___, ___, ___,135 S. Ct. 2001, 2004, 2012 (2015) (reversing the defendant's conviction under a federal statute that made "it a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another,' " and for that reason, seeing no need to consider related First Amendment concerns (alteration in original) (quoting 18 U.S.C. § 875(c))).

(narrowing the scope of the law at issue). Even under the State's interpretation of N.C.G.S. § 14-458.1, the statute prohibits a wide range of online speech—whether on subjects of merely puerile interest or on matters of public importance—and all with no requirement that anyone suffer any actual injury. In general, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Entm't Merchs. Ass'n*, 564 U.S. at 799, 131 S. Ct. at 2738 (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. at 818, 120 S. Ct. at 1889). Certainly, N.C.G.S. § 14-458.1(a)(1)(d) of the cyberbullying statute is not.

III. CONCLUSION

For the foregoing reasons, we conclude that N.C.G.S. § 14-458.1(a)(1)(d) restricts speech, not merely nonexpressive conduct; that this restriction is content based; and that it is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying. As such, the statute violates the First Amendment's guarantee of the freedom of speech. We therefore reverse the decision of the Court of Appeals finding no error in defendant's conviction for cyberbullying.

REVERSED.

STATE OF NORTH CAROLINA
v.
CHARLES ANTHONY McGRADY

No. 72PA14

Filed 10 June 2016

1. Evidence—expert witness testimony—standards—adoption of federal standard

A 2011 amendment to Rule 702(a) of the North Carolina Rules of Evidence adopted the federal standard for the admission of expert witness testimony articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its line of cases. The proper interpretation of Rule 702(a) remains an issue of state law, and previous N.C. cases are still good law if they do not conflict with the *Daubert* standard.

2. Evidence—expert witness testimony—standards—application of new rule

Rule 702(a) of the North Carolina Rules of Evidence has three main parts, and expert testimony must satisfy each to be admissible. Expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience and must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case" for its own. Expertise can come from practical experience as much as from academic training, but the question remains whether the witness has enough expertise to be in a better position than the trier of fact to have an opinion on the subject. And, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the witness must have applied the principles and methods reliably to the facts of the case.

3. Evidence—expert witness testimony—excluded—no abuse of discretion

The trial court did not abuse its discretion in a first-degree murder prosecution in which defendant claimed self-defense by excluding evidence from a defense expert, Mr. Cloutier, on the use of force. The trial court concluded that Mr. Cloutier's testimony about pre-attack cues and use of force variables would not assist the jury because those matters were within the jurors' common knowledge; that Mr. Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system; and that Mr. Cloutier's reaction time testimony was based on speculation and not reliable.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 232 N.C. App. 95, 753 S.E.2d 361 (2014), finding no error after appeal of a judgment entered on 8 August 2012 by Judge R. Stuart Albright in Superior Court, Wilkes County. Heard in the Supreme Court on 17 March 2015.

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M. Gordon Widenhouse Jr. for defendant-appellant.

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McGuinness Law Firm, by J. Michael McGuinness, for National Association of Police Organizations, Southern States Police Benevolent Association, and North Carolina Police Benevolent Association, amici curiae.

MARTIN, Chief Justice.

This appeal arises from defendant Charles Anthony McGrady's first-degree murder conviction for the shooting death of his cousin James Allen Shore Jr. Defendant admitted to shooting Mr. Shore. The central issue at trial was whether defendant shot and killed Mr. Shore in lawful defense of himself and his adult son Brandon McGrady. Defendant sought to introduce expert witness testimony on this issue. We allowed discretionary review to address whether amended Rule 702(a) of the North Carolina Rules of Evidence now incorporates the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and whether the trial court abused its discretion in excluding the testimony of defendant's expert under the amended rule.

I

Defendant and his cousin Mr. Shore lived in mobile homes across the street from each other in Hays, North Carolina. Various other members of their family also lived nearby. The two men had a combative history, having engaged in multiple verbal and physical altercations. Defendant testified that, on the evening of 19 December 2011, Mr. Shore threatened to kill defendant and his family. The following day, defendant was driving his golf cart between his home and his mailbox with his son Brandon in the passenger seat. Brandon had an AR-15 assault rifle with him, and defendant had a 9-millimeter Beretta handgun in his pocket. Defendant was also carrying an audio cassette recorder.

After stopping at his mailbox and starting to drive toward Brandon's mailbox down the road, defendant saw Mr. Shore in the distance. Defendant testified that Mr. Shore began yelling at him and moving toward the golf cart. Defendant turned on the tape recorder and stopped the golf cart. The tape recorder captured much of the argument that

ensued between defendant and Mr. Shore. Defendant accused Mr. Shore of threatening to kill his family the night before. Mr. Shore accused defendant of shining a spotlight on him that same night. (A witness testified that defendant had previously shined an assault rifle's laser sight on Mr. Shore.) Defendant said to Mr. Shore, "You stole from me, you motherf---er!" After more arguing, Mr. Shore said to defendant, "Get over here and get you some!" Defendant responded, "I'll put you in the grave, man; I'll put you in the morgue, motherf---er!" Brandon testified that Mr. Shore then walked up to the golf cart, put his hands on the roof, and began shaking the cart.

According to defendant, as the argument continued, Mr. Shore threatened Brandon and defendant with a knife, causing defendant to ask Brandon to hand him the AR-15 in an attempt to "defuse the situation." Defendant testified that, as Brandon was handing the rifle to him, Mr. Shore dove into the golf cart, grabbed the rifle, and pulled it away from defendant. Another witness testified that Mr. Shore tried to grab the rifle but did not take it from defendant. According to defendant, Brandon exited the golf cart and began moving toward Mr. Shore, who then pointed the rifle at Brandon's head. Defendant exited the golf cart, removed the Beretta pistol from his pocket, and fired it approximately seven times at Mr. Shore, hitting him four or five times in the front and side and twice in the back. Defendant then said, "What about now, Bobo? What about now, motherf---er?"[1] Mr. Shore died from these gunshot wounds before he could be taken to the hospital. Defendant was indicted for first-degree murder and tried noncapitally.

At trial, defendant claimed that he shot Mr. Shore in defense of himself and his son. He sought to call Dave Cloutier as an expert in "the science of the use of force" to testify in support of this claim. The State objected, and the trial court held a voir dire hearing. After hearing Mr. Cloutier's voir dire testimony and reviewing his expert report, the trial court sustained the State's objection and ruled that Mr. Cloutier's expert testimony did not meet the standard for admissibility set forth in Rule 702(a) of the North Carolina Rules of Evidence. Following trial, the jury unanimously found defendant guilty of first-degree murder, and the trial court sentenced him to life in prison without the possibility of parole. Defendant entered notice of appeal in open court.

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1. It is somewhat unclear whether defendant called Mr. Shore "Bobo" or "Bozo." Defendant's own testimony is not consistent on this point. We opt to use "Bobo" because defendant testified that "Bobo" was a nickname for James Shore, whom he also called Jimmy or Jimbo.

Before the Court of Appeals, defendant argued that the trial court ignored the liberal standard that Rule 702(a) establishes and abused its discretion in excluding Mr. Cloutier's proposed testimony. *State v. McGrady*, 232 N.C. App. 95, 103, 753 S.E.2d 361, 368 (2014). The Court of Appeals held that the 2011 amendment to Rule 702(a) effectively adopted the standard set forth in *Daubert*, *id.* at 101, 753 S.E.2d at 367, and that the trial court did not abuse its discretion in applying that standard, *id.* at 105-06, 753 S.E.2d at 369-70. The Court of Appeals rejected defendant's arguments and found no error in defendant's conviction. *Id.* at 106, 110-11, 753 S.E.2d at 370, 373. We allowed defendant's petition for discretionary review and now affirm the decision of the Court of Appeals.[2]

II

[1] Our first task is to determine the correct interpretation of Rule 702(a) of the North Carolina Rules of Evidence, as it was amended in 2011. We hold that the 2011 amendment adopts the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases. The General Assembly amended North Carolina's rule in 2011 in virtually the same way that the corresponding federal rule was amended in 2000. It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule.

The General Assembly has the power to create and modify rules of evidence for the superior and district courts. *See* N.C. Const. art. IV, § 13(2); *State v. Scoggin*, 236 N.C. 19, 23, 72 S.E.2d 54, 56-57 (1952) (deferring to the General Assembly for the creation of a new rule of evidence); *see also State v. Smith*, 312 N.C. 361, 366, 323 S.E.2d 316, 319 (1984) (recognizing that the General Assembly can create new exceptions to the hearsay rule). When the General Assembly amended Rule 702(a) in 2011, its federal counterpart already had a settled meaning.

In 1993, the United States Supreme Court interpreted Rule 702 of the Federal Rules of Evidence in *Daubert*. *See* 509 U.S. at 588-98. The Court held that Rule 702 required federal district courts to determine, before they admitted expert testimony, "that any and all scientific testimony

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2. Defendant also argued before the Court of Appeals that the trial court erred in excluding testimony from another witness regarding Mr. Shore's "proclivity toward violence." *Id.* at 106, 753 S.E.2d at 370. He further claimed that the exclusion of testimony from Mr. Cloutier and this other witness violated his Sixth Amendment right to present a defense. *Id.* at 106, 110-11, 753 S.E.2d at 370, 373. The Court of Appeals rejected these arguments. *Id.* Because defendant did not seek discretionary review of these issues, they are not before us.

or evidence admitted is not only relevant, but reliable." *Id.* at 589. This determination entailed "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. According to the Court, Rule 702 gave federal district courts a "gatekeeping role." *Id.* at 597. The Court further clarified the *Daubert* standard in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The Court indicated that these three cases established "exacting standards of reliability" for the admission of expert testimony. *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

In 2000, the Supreme Court adopted an amendment to Federal Rule 702. *Amendments to Federal Rules of Evidence*, 529 U.S. 1189, 1191, 1195 (2000). This amendment added three requirements governing the admission of expert testimony to the text of the rule: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Id.* at 1195.

The new text did not expressly mention *Daubert*, *Joiner*, or *Kumho*, or use precise language from those three cases. But the note from the Advisory Committee on the Federal Rules of Evidence that accompanied the amendment stated that the federal rule was amended to incorporate the standard delineated by those cases.[3] *See* Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("Rule 702 has been amended in response to *Daubert* . . . and to the many cases applying *Daubert*, including *Kumho* . . . .") (also citing, inter alia, *Joiner*). And federal appellate courts confirmed that the changes to Rule 702 had precisely that effect. *See, e.g.*, *United States v. Diaz*, 300 F.3d 66, 73 (1st Cir. 2002) ("The three numbered criteria were added to Rule 702 in a recent amendment codifying the Supreme Court's decision in *Daubert* . . . and its progeny, including *Kumho* . . . ."); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 n.1 (4th Cir. 2001) ("As the Advisory Committee Notes indicate, the amendment to Rule 702 is consistent with the district court's gatekeeping function as articulated in *Daubert* and *Kumho Tire*."); *see also United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*,

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3. The United States Supreme Court has looked to advisory committee notes to help clarify ambiguities in the Federal Rules of Evidence and the Federal Rules of Civil Procedure. *See, e.g.*, *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550-51 (2010) (using advisory committee notes to interpret Rule 15(c) of the Federal Rules of Civil Procedure); *Tome v. United States*, 513 U.S. 150, 160-63 (1995) (plurality opinion) (using advisory committee notes to interpret Rule 801 of the Federal Rules of Evidence).

608 F.3d 871, 894 (D.C. Cir. 2010) (per curiam) ("In 2000, the Supreme Court amended Rule 702 to reflect the *Daubert* line of cases, outlining general standards that the trial court must use to assess the reliability and relevance of testimony."), *cert. denied*, 563 U.S. 987 (2011). Thus, the meaning of the federal rule as amended was clear: It now codified the *Daubert* standard.

The original text of North Carolina's Rule 702 was largely identical to the original text of Federal Rule 702. *Compare* N.C.G.S. § 8B-1, Rule 702 (1983), *with* 28 U.S.C. app. Rule 702 (1976). But the judicial construction of North Carolina's rule took a different path. In the wake of the *Daubert* line of cases, this Court addressed whether North Carolina followed the *Daubert* approach. *See Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 455, 597 S.E.2d 674, 684 (2004). In *Howerton*, we examined the development of Rule 702(a)[4] in North Carolina law and concluded that "North Carolina is not, nor has it ever been, a *Daubert* jurisdiction." *Id.* at 469, 597 S.E.2d at 693. Our cases instead delineated "a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Id.* at 458, 597 S.E.2d at 686 (citations omitted).

Though this test "share[s] obvious similarities with the principles underlying *Daubert*, application of the North Carolina approach is decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach." *Id.* at 464, 597 S.E.2d at 690 (quoting *Weisgram*, 528 U.S. at 455). This Court was concerned that the federal "gatekeeping" approach required judges to evaluate "the substantive merits of the scientific or technical theories undergirding an expert's opinion." *Id.* at 464, 597 S.E.2d at 690. We found this gatekeeping role especially troubling when pretrial *Daubert* proceedings became "case-dispositive," as parties could use them to exclude expert testimony necessary to prove an element of a claim and thereby "bootstrap motions for summary judgment that otherwise would not likely succeed." *Id.* at 467, 597 S.E.2d at 691. North Carolina law, we concluded, favored liberal admission of expert witness testimony and left the role of determining its weight to the jury. *Id.* at 468-69, 597 S.E.2d at 692-93.

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4. What had been North Carolina's Rule 702 became Rule 702(a) in 1995, when the General Assembly added subsections 702(b) through (h). Act of June 20, 1995, ch. 309, sec. 1, 1995 N.C. Sess. Laws (1995 Reg. Sess.) 611, 611-13 (codified at N.C.G.S. § 8C-1, Rule 702 (2015)).

In 2011, the General Assembly added language to North Carolina's Rule 702(a) that was virtually identical to the 2000 amendment to the federal rule. Our rule now reads in relevant part:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, *or otherwise*, *if all of the following apply*:
>
> *(1) The testimony is based upon sufficient facts or data.*
>
> *(2) The testimony is the product of reliable principles and methods.*
>
> *(3) The witness has applied the principles and methods reliably to the facts of the case.*

Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws (2011 Reg. Sess.) 1048, 1049 (codified at N.C.G.S. § 8C-1, Rule 702(a)) (new text in italics).

When we interpret the North Carolina Rules of Evidence, as when we interpret other statutes, "[t]he cardinal principle . . . is to discern the intent of the legislature." *State v. Jones*, 359 N.C. 832, 835, 616 S.E.2d 496, 498 (2005). In determining this intent, "we presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts." *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992). And when the General Assembly adopts language or statutes from another jurisdiction, "constructions placed on such language or statutes are presumed to be adopted as well." *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981). The commentary to the North Carolina Rules of Evidence supports this presumption in the specific context of the Rules:

> A substantial body of law construing [the Federal Rules of Evidence] exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules. Uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and

> should be a goal of our courts in construing those rules that are identical.

N.C. R. Evid. 102 commentary.[5]

By adopting virtually the same language from the federal rule into the North Carolina rule, the General Assembly thus adopted the meaning of the federal rule as well. In other words, North Carolina's Rule 702(a) now incorporates the standard from the *Daubert* line of cases. Whatever this Court's reservations about the *Daubert* standard were, *see Howerton*, 358 N.C. at 464-69, 597 S.E.2d at 690-93, the General Assembly has made it clear that North Carolina is now a *Daubert* state.

This is not to say, however, that the 2011 amendment to Rule 702(a) abrogated all North Carolina precedents interpreting that rule. Our previous cases are still good law if they do not conflict with the *Daubert* standard. Nor does this mean that the interpretation of Rule 702(a) is now a federal question. The proper interpretation of Rule 702(a) remains an issue of state law, and any future judicial gloss by the federal courts on the meaning of Federal Rule 702 will not dictate the meaning of the North Carolina rule. Federal case law that continues to refine the *Daubert* standard may, of course, be helpful. But unlike *Daubert*, *Joiner*, and *Kumho*—all of which were decided before the General Assembly amended North Carolina's rule in 2011—this case law could not have been incorporated into the amended state rule.

Here, both parties seem to agree that the 2011 amendment to North Carolina's Rule 702(a) incorporated the standard announced in *Daubert* itself. Defendant, however, seems to overlook the fact that the 2000 amendment to the federal rule codified more than *Daubert* alone. As explained above, the federal rule's amended language codified not only *Daubert*, but also *Joiner* and *Kumho*. To determine the proper application of North Carolina's Rule 702(a), then, we must look to the text of the rule, to all three of these United States Supreme Court cases, and also to our existing precedents, as long as those precedents do not conflict with the rule's amended text or with *Daubert*, *Joiner*, or *Kumho*.

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5. While the commentaries printed with the Rules of Evidence do not have the force of law, we have repeatedly given them "substantial weight in our efforts to comprehend legislative intent." *State v. Hosey*, 318 N.C. 330, 338 n.2, 348 S.E.2d 805, 810 n.2 (1986); *accord State v. Bogle*, 324 N.C. 190, 202-03 & 203 n.5, 376 S.E.2d 745, 752 & n.5 (1989); *State v. Chul Yun Kim*, 318 N.C. 614, 620 & n.3, 350 S.E.2d 347, 351 & n.3 (1986).

Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible.[6] First, the area of proposed testimony must be based on "scientific, technical or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. R. Evid. 702(a). This is the relevance inquiry discussed in both *Daubert* and *Howerton*. *See Daubert*, 509 U.S. at 591; *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688-89. As with any evidence, the testimony must meet the minimum standard for logical relevance that Rule 401 establishes. *See Howerton*, 358 N.C. at 462, 597 S.E.2d at 688 ("[W]e defer to the traditional definition of relevancy set forth in the North Carolina Rules of Evidence . . . ." (citing N.C.G.S. § 8C-1, Rule 401 (2003))). In other words, the testimony must "relate to [an] issue in the case." *Daubert*, 509 U.S. at 591 (quoting 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 702[02], at 702-18 (1988)). But relevance means something more for expert testimony. In order to "assist the trier of fact," N.C. R. Evid. 702(a), expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience. An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to "substitut[e] [the expert's] judgment of the meaning of the facts of the case" for its own. *Burrell v. Sparkkles Reconstr. Co.*, 189 N.C. App. 104, 114, 657 S.E.2d 712, 719, *disc. rev. denied*, 362 N.C. 469, 665 S.E.2d 738 (2008); *accord* N.C. R. Evid. 704 commentary ("These provisions [including Rule 702] afford ample assurance[s] against the admission of opinions which would merely tell the jury what result to reach . . . ." (quoting Fed. R. Evid. 704 advisory committee's note)).

Second, the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." N.C. R. Evid. 702(a). This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? *Id.* at 461, 597 S.E.2d at 688. The

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6. For simplicity's sake, we address these three parts in the order in which they appear in the rule. That is not to say, however, that a trial court must necessarily do the same. *Cf. Howerton*, 358 N.C. at 458-62, 597 S.E.2d at 686-89 (discussing reliability first, then qualifications, and then relevance).

rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. *Id.* at 461-62, 597 S.E.2d at 688. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. *Cf. Daubert*, 509 U.S. at 589. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise. As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: "(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case." N.C. R. Evid. 702(a)(1)-(3). These three prongs together constitute the reliability inquiry discussed in *Daubert*, *Joiner*, and *Kumho*. The primary focus of the inquiry is on the reliability of the witness's principles and methodology, *Joiner*, 522 U.S. at 146, "not on the conclusions that they generate," *Daubert*, 509 U.S. at 595. However, "conclusions and methodology are not entirely distinct from one another," and when a trial court "conclude[s] that there is simply too great an analytical gap between the data and the opinion proffered," the court is not required "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146.

The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test. *See Kumho*, 526 U.S. at 152-53. The trial court "must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether* that expert's relevant testimony is reliable." *Id.* at 152. Many previous cases, both federal and state, articulate particular factors that may indicate whether or not expert testimony is reliable. In its discretion, the trial court should use those factors that it believes will best help it determine whether the testimony is reliable in the three ways described in the text of Rule 702(a)(1) to (a)(3).

In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review

and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147-49. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, so they do not form "a definitive checklist or test," *id.* at 593. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150.

The federal courts have articulated additional reliability factors that may be helpful in certain cases, including:

> (1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations.
>
> (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.
>
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citations and quotation marks omitted). In some cases, one or more of the factors that we listed in *Howerton* may be useful as well. *See Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (listing four factors: use of established techniques, expert's professional background in the field, use of visual aids to help the jury evaluate the expert's opinions, and independent research conducted by the expert).

[2] Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3). The court has discretion to consider any of the particular factors articulated in previous cases, or other factors it may identify, that are reasonable measures of whether the expert's testimony is based on sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the expert has reliably applied those principles and methods in that case. *See Kumho*, 526 U.S. at 150-53.

This three-step framework—namely, evaluating qualifications, relevance, and reliability—is not new to North Carolina law. We recognized the same steps in *Howerton. See* 358 N.C. at 458, 597 S.E.2d at 686. The 2011 amendment to Rule 702(a) did not change the basic structure of the inquiry under that rule. But the amendment did change the level of rigor that our courts must use to scrutinize expert testimony before admitting it. *Cf. id.* at 464, 597 S.E.2d at 690 (noting that the then-existing North Carolina approach was "decidedly less . . . rigorous" than the *Daubert* approach). A rule governing the admission of expert testimony necessarily strikes a balance between competing concerns since the testimony "can be both powerful and quite misleading" to a jury "because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)). The interpretation we gave to Rule 702(a) in *Howerton* struck one such balance; the *Daubert* standard, now incorporated into North Carolina law, strikes another.

Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a). N.C.G.S. § 8C-1, Rule 104(a) (2015); *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686; *see also Daubert*, 509 U.S. at 592 n.10. In answering this preliminary question, the trial judge "is not bound by the rules of evidence except those with respect to privileges." N.C. R. Evid. 104(a). To the extent that factual findings are necessary to answer this question, the trial judge acts as the trier of fact. N.C. R. Evid. 104(a) commentary. The court must find these facts by the greater weight of the evidence. *See Daubert*, 509 U.S. at 592 n.10 ("These matters should be established by a preponderance of proof." (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987) (using the term "preponderance of the evidence" synonymously with "preponderance of proof"))); *Cincinnati Butchers Supply Co. v. Conoly*, 204 N.C. 677, 679, 169 S.E. 415, 416 (1933) (equating "preponderance of the evidence" with "greater weight of the evidence").

As with other findings of fact, these findings will be binding on appeal unless there is no evidence to support them. *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 540 (2012).

The trial court then concludes, based on these findings, whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability. This ruling "will not be reversed on appeal absent a showing of abuse of discretion." *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. And "[a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes "outcome determinative." *Joiner*, 522 U.S. at 142-43.

Rule 702(a), as amended in 2011, does not mandate particular "procedural requirements for exercising the trial court's gatekeeping function over expert testimony." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. The trial court has the discretion to determine "whether or when special briefing or other proceedings are needed to investigate reliability." *Kumho*, 526 U.S. at 152. A trial court may elect to order submission of affidavits, hear voir dire testimony, or conduct an *in limine* hearing. *See* Fed. R. Evid. 702 advisory committee's note to 2000 amendment. More complex or novel areas of expertise may require one or more of these procedures. *See Kumho*, 526 U.S. at 152. In simpler cases, however, the area of testimony may be sufficiently common or easily understood that the testimony's foundation can be laid with a few questions in the presence of the jury. *See id.* The court should use a procedure that, given the circumstances of the case, will "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." N.C.G.S. § 8C-1, Rule 102(a) (2015).

III

[3] Using this analytical framework, we now address whether the trial court abused its discretion in excluding Mr. Cloutier's proposed expert witness testimony under Rule 702(a).

Mr. Cloutier received a bachelor's degree in criminal justice from North Carolina Wesleyan College and also graduated from the FBI National Academy in Quantico, Virginia. He worked as an officer of the

Goldsboro Police Department for almost sixteen years, retiring as a captain. He then spent about eleven years at the North Carolina Justice Academy, working as an instructor and school director. Mr. Cloutier developed and taught courses there in areas such as "subject control and arrest techniques" and the use of lethal and non-lethal force. After retiring from the Academy in 2001 and through the time of the trial in this case, he provided expert testimony about the use of force and crime scene investigation, and also trained civilians in martial arts and some of the "legal aspects of [the] use of force."

Mr. Cloutier intended to offer expert testimony on three principal topics: (1) that, based on the "pre-attack cues" and "use of force variables" present in the interaction between defendant and Mr. Shore, defendant's use of force was a reasonable response to an imminent, deadly assault that defendant perceived; (2) that defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's "fight or flight" response; and (3) that reaction times can explain why some of defendant's defensive shots hit Mr. Shore in the back. Defense counsel encouraged this Court at oral argument to focus on the reaction time testimony, conceding that the trial court was probably correct to exclude much of Mr. Cloutier's other testimony either because it was unhelpful to the jury or because Mr. Cloutier was not qualified to give it. We agree with this admission, but need not rely on it to conclude that the trial court acted within its discretion in excluding all of Mr. Cloutier's expert testimony under Rule 702(a).[7] We address each portion of Mr. Cloutier's testimony in turn.[8]

First, the trial court did not abuse its discretion when it concluded that Mr. Cloutier's testimony about "pre-attack cues" and "use of force variables" would not assist the jury. In his expert report, Mr. Cloutier stated that pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack." According to the report, pre-attack cues include "actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." Relatedly, Mr. Cloutier

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7. In addition to the Rule 702(a) issue, the parties disagree on whether the trial court also properly excluded Mr. Cloutier's testimony under Rule 403, and whether defendant has properly preserved his objection to that ruling. Because the testimony was properly excluded under Rule 702(a), however, the issues related to Rule 403 are moot.

8. Because expert testimony is inadmissible if it fails to meet any part of the Rule 702(a) standard, we need not address the entire three-part test for each portion of Mr. Cloutier's testimony.

testified at voir dire that the phrase "use of force variables" refers to additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat. Mr. Cloutier's expert report indicated that use of force variables include the age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors.

The trial court concluded that Mr. Cloutier's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common knowledge. This ruling was not an abuse of discretion. The factors that Mr. Cloutier cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions. Mr. Cloutier's own expert report stated that, even without formal training, individuals recognize and respond to these cues and variables when assessing a potential threat. And if these cues and variables are logically relevant at all, they are relevant precisely *because* they are within the understanding of a layperson. Though defendant served in the military, he did not testify that he relied on any specialized training in threat assessment when he evaluated the threat that Mr. Shore posed to his life and the life of his son. Nor was there any evidence that he relied on anything other than common experience and instinct when he did so. Jurors possess this experience and instinct as well, which is exactly why they are tasked with deciding whether a defendant has acted in self-defense. In this instance, therefore, it was reasonable for the trial court to conclude that expert testimony would not assist the jury as required by Rule 702(a).

Next, the trial court acted within its discretion in concluding that Mr. Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. Mr. Cloutier's expert report stated that instinctive survival response to fear "can activate the body's sympathetic nervous system and create a condition commonly referred [to] as the 'fight or flight' response." Mr. Cloutier also indicated that defendant's perception of an impending attack would cause a surge of adrenalin in the body to "activate instinctive, powerful and uncontrollable survival responses as a means to prevent or minimize serious injury or death." This nervous system response, Mr. Cloutier maintained, causes "perceptual narrowing," which focuses a person's attention on the threat and leads to a loss of peripheral vision and other changes in visual perception. According to Mr. Cloutier, the nervous system's response to a threat can also cause "fragmented memory," or an "inability to recall

specific events" related to the threatening encounter. Defendant testified at trial that he did not remember the number of shots that he fired at Mr. Shore. He indicated that, during his encounter with Mr. Shore, all of his attention was focused on the threat. Mr. Cloutier's testimony on stress responses was therefore intended to show that the state of defendant's memory and defendant's description of what he experienced were consistent with having perceived a threat to his life and the life of his son.

The trial court excluded this portion of Mr. Cloutier's testimony because it concluded that he was not "qualified to talk about how something affects the sympathetic nervous system." Mr. Cloutier testified at voir dire that he was not a medical doctor but that he had studied "the basics" of the brain in general psychology courses in college. He also testified that he had read articles and been trained by medical doctors on how adrenalin affects the body, had personally experienced perceptual narrowing, and had trained numerous police officers and civilians on how to deal with these stress responses.

Though Rule 702(a) does not create an across-the-board requirement for academic training or credentials, *see Howerton*, 358 N.C. at 462, 597 S.E.2d at 688, it was not an abuse of discretion in this instance to require a witness who intended to testify about the functions of an organ system to have some formal medical training. As we have already said, expertise can come from practical experience. *Id.* But that does not mean that a trial court can never require an expert witness to have academic training. The propriety of imposing such a requirement in a given case is likely to be highly case specific.

Whenever a trial court assesses an expert witness's qualifications under Rule 702(a), the court must look to see whether the witness's knowledge and experience are sufficient to qualify the witness in the particular field of expertise at issue. Different fields require different "knowledge, skill, experience, training, or education." N.C. R. Evid. 702(a). For example, a witness with a Ph.D. in organic chemistry may be able to describe in detail how flour, eggs, and sugar react on a molecular level when heated to 350 degrees, but would likely be less qualified to testify about the proper way to bake a cake than a career baker with no formal education. Mr. Cloutier, conversely, has strong practical experience in police training and tactics but not much medical expertise in human physiology. So while he may have been eminently qualified to testify about standard police practices regarding the use of force, he was far less qualified to testify about the sympathetic nervous system. In this context, it was not "manifestly without reason" for the trial court to exclude Mr. Cloutier's testimony because he lacked medical or scientific training.

Finally, the trial court did not abuse its discretion when it concluded that Mr. Cloutier's testimony regarding reaction times was unreliable. Mr. Cloutier testified at voir dire that, because a person can turn his torso in less time than it takes to perceive a threat and fire a weapon, defendant could have perceived a threat from Mr. Shore while Mr. Shore was facing him but still end up shooting Mr. Shore in the back.

Mr. Cloutier's voir dire testimony included statistics on average reaction times as well as his opinion about how those statistics applied to this case. He testified specifically that an individual can turn his or her body 90 degrees in approximately 0.31 seconds, and can turn 180 degrees in approximately 0.676 seconds. He also testified that it takes a person approximately 0.2 seconds to perceive a threat and decide to shoot, and then another 0.365 to 0.677 seconds to begin firing, depending on whether the shooter's finger is already inside the trigger guard. Another witness had previously indicated that it took defendant 1.82 seconds to fire all seven rounds at Mr. Shore. Mr. Cloutier stated that this testimony was consistent with the literature he had read, as well as with his own experiments. Given the total time that it would take an average person to perceive a threat, decide to shoot, begin shooting, and fire seven rounds, Mr. Cloutier concluded that "it's very possible and likely that during the course of firing . . . Mr. Shore could have, in fact, turned 90 to 180 degrees, or, in fact, could have turned 360 degrees." Defendant offered this reaction time testimony to rebut any assumption in the jurors' minds that he could not have acted defensively if he shot Mr. Shore in the back.

During voir dire, defense counsel elicited testimony from Mr. Cloutier relating to the reliability factors in amended Rule 702(a). Mr. Cloutier testified that he interviewed defendant and other witnesses, reviewed interviews of defendant and Brandon and the case file and physical evidence collected by the Wilkes County Sherriff's Department, and visited the location where defendant shot Mr. Shore. This portion of his testimony appears to address the "sufficient facts or data" requirement in Rule 702(a)(1).

Mr. Cloutier also indicated that the average reaction time numbers he relied on to form his opinion came primarily from two studies: a 1972 Federal Aviation Administration study on the reaction times of aircraft pilots when avoiding midair collisions, and a university study focusing on how quickly college students could both shoot and turn their torsos. He stated that the results from these studies were consistent with testing that he worked on at the Justice Academy on the reaction times of police officers. According to Mr. Cloutier, these studies were reliable and

had been used extensively in his field over the previous fifteen years. All of this information deals with whether Mr. Cloutier's testimony before the jury would be "the product of reliable principles and methods" under Rule 702(a)(2).

On cross-examination and during questioning by the trial court, however, Mr. Cloutier provided testimony that undermined the reliability of his previous testimony about reaction times. He testified that the manner and speed at which a victim can turn could be affected by previous injuries, clothing, and body position. He also admitted that his opinion could change if the shooter had a back injury, and he admitted to being aware that defendant had a back injury and a disability rating from the military. But he did not consider this or anything else about defendant's or Mr. Shore's medical history when he formed his opinions about their relative reaction times. He indicated that he had not thought these factors relevant at the time because he believed that adrenalin would overcome any physical impairment. Yet when pressed further, he admitted that, though he believed that "adrenalin plays a factor," he was not certain how adrenalin would affect reaction times. Mr. Cloutier also admitted that he was unaware of the error rates in any of the studies that he cited.

The trial court concluded that Mr. Cloutier's proffered testimony about reaction times did not satisfy the reliability test in Rule 702(a)(1) to (a)(3). The trial court found that Mr. Cloutier had not provided the court with known or potential error rates for the studies on reaction times that he used. The trial court also found that Mr. Cloutier acknowledged that variables could affect his opinions about the reaction times in this case, and that he knew that defendant suffered from a physical disability but did not consider this in reaching his conclusions. For these reasons, the trial court concluded that Mr. Cloutier's reaction time testimony was based on speculation and was not reliable in this case.

This decision was not an abuse of discretion, either. The trial court properly focused on the three prongs of the reliability test in Rule 702(a)(1) to (a)(3), ruling on each one. And the specific factors that it chose to focus on in assessing the reliability of Mr. Cloutier's testimony were reasonable measures of reliability in this case. *See Kumho*, 526 U.S. at 152-53. Mr. Cloutier based his testimony about average reaction times on statistics from two studies, but he was not aware if those studies reported error rates in their findings and, if so, what those error rates were. A trial judge could reasonably conclude that Mr. Cloutier's degree of unfamiliarity with these studies rendered his testimony about them, and the conclusions about this particular case that he drew from

them, unreliable. And the court's finding about Mr. Cloutier's failure to consider defendant's back injury directly relates both to the sufficiency of the facts and data that Mr. Cloutier relied on and to whether he applied his own methodology reliably in this case. It was not manifestly without reason for the trial court to be skeptical of Mr. Cloutier's opinion testimony when he had failed to consider any pertinent medical conditions that defendant or Mr. Shore had, despite being aware that at least one of them was partly disabled, and when Mr. Cloutier's own testimony established that a disability could affect reaction time.

In sum, our review of the record in this case demonstrates that the trial court properly fulfilled its gatekeeping role. Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, *see State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007), but instead to decide whether the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Here, the trial court recognized the incorporation of the *Daubert* standard into amended Rule 702(a), carefully considered each aspect of the expert testimony that defendant wished to elicit from Mr. Cloutier, and permissibly exercised its discretion to conclude that Mr. Cloutier's proffered testimony should be excluded in its entirety. The Court of Appeals likewise concluded that North Carolina is now a *Daubert* state, and found no error in the trial court's exclusion of Mr. Cloutier's testimony. We therefore affirm the decision of the Court of Appeals.

AFFIRMED.

THOMAS JEFFERSON CLASSICAL ACAD. CHARTER SCH.
v. CLEVELAND CTY. BD. OF EDUC.

[368 N.C. 900 (2016)]

THOMAS JEFFERSON CLASSICAL ACADEMY CHARTER SCHOOL, PIEDMONT COMMUNITY CHARTER SCHOOL, AND LINCOLN CHARTER SCHOOL
v.
CLEVELAND COUNTY BOARD OF EDUCATION D/B/A CLEVELAND COUNTY SCHOOLS

No. 400A15

Filed 10 June 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 778 S.E.2d 295 (2015), affirming a judgment entered on 29 January 2015 by Judge Jesse B. Caldwell, III in Superior Court, Cleveland County. Heard in the Supreme Court on 18 May 2016 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Matthew F. Tilley, for plaintiff-appellees.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for defendant-appellant.

Christine T. Scheef, Staff Attorney, and Allison B. Schafer, Legal Counsel, North Carolina School Boards Association, amicus curiae.

PER CURIAM.

AFFIRMED.

ROBERT E. KING AND WIFE, JO ANN O'NEAL	)))	
v.	)	From Cumberland County
MICHAEL S. BRYANT, M.D., AND VILLAGE SURGICAL ASSOCIATES, P.A.	)))	

No. 294PA14

ORDER

On 21 August 2015, this Court certified this case to the trial court for additional findings of fact as to "[w]hether a physician-patient relationship existed at the time Mr. King signed the arbitration agreement." On 6 November 2015, the trial court entered additional findings of fact.

On 22 February 2016, this Court ordered the parties to submit supplemental briefs addressing the effect, if any, of the trial court's additional findings of fact on the proceedings in this case. Appellants and Appellees submitted supplemental briefs on 21 March 2016 and 18 April 2016, respectively.

The Court, on its own motion, now orders that this case be set for oral argument.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

N.C. STATE BAR v. TILLETT

[368 N.C. 902 (2016)]

THE NORTH CAROLINA STATE BAR	)	
	)	From North Carolina State Bar
v.	)	(15DHC7)
	)	
JERRY R. TILLETT	)	

No. 208PA15

ORDER

On 28 January 2016, the Court denied review in the above-captioned case, which concerns the authority of the North Carolina State Bar to initiate disciplinary proceedings against a sitting judge. Upon reconsideration, the Court, *ex mero motu*, deems the question presented by this case to be of such importance that the invocation of our supervisory jurisdiction is warranted. Accordingly, the Court now issues a writ of certiorari to review the question presented in defendant's petition:

> Do the North Carolina State Bar Council and the Disciplinary Hearing Commission have the jurisdictional authority to discipline a judge of the General Court of Justice for conduct as a judge for which the judge has already been disciplined by the Judicial Standards Commission?

All other proceedings in this matter are hereby stayed pending full briefing by the parties in this Court and our determination of this question.

The Record is due on or before 10 June 2016. The briefing schedule is as provided by the North Carolina Rules of Appellate Procedure.

By order of the Court in Conference, this the 27th day of May, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of May, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

NORTH CAROLINA STATE BOARD OF EDUCATION	)	
v.	)	From Wake County
THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA RULES REVIEW COMMISSION	)	

No. 110P16

ORDER

Defendants' Petitions for Writ of Certiorari are allowed for the limited purpose of vacating the order entered by the Court of Appeals on 2 March 2016 allowing Plaintiff-Appellee State Board of Education's Motion to Dismiss on the grounds that the Order entered by Judge Paul G. Gessner in this case on 2 July 2015 did not "hold[] that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal," N.C.G.S. § 7A-27(a1), and remanding this case to the Court of Appeals for consideration of defendants' challenges to the validity of the trial court's order on the merits. In light of that determination, Defendant's Petitions for Discretionary Review are dismissed and Defendant North Carolina Rules Review Commission's Notice of Appeal is dismissed *ex mero motu*.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

STATE v. CAMPBELL

[368 N.C. 904 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cleveland County
	)	
THOMAS CRAIG CAMPBELL	)	

No. 252PA14-2

ORDER

The State's Petition for Discretionary Review is allowed only as to whether the Court of Appeals erred in invoking Rule 2 of the North Carolina Rules of Appellate Procedure under the circumstances of this case. The State's Petition for Discretionary Review is otherwise denied.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA)
)
v.) From Mecklenburg County
)
DAMARIO MONTREAL COXTON

No. 121A16

ORDER

This matter is before this Court on defendant's Notice of Appeal based on a Constitutional Question, seeking review of the Court of Appeals' opinion dismissing defendant's appeal and denying defendant's petition for writ of *certiorari* filed before that court. The State's Motion to Dismiss Appeal is ALLOWED. This Court on its own motion, however, vacates the denial of defendant's petition writ of *certiorari* at the Court of Appeals and remands this case to the Court of Appeals with directions to allow defendant's petition for writ of *certiorari* as filed before that court.

By Order of this Court, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Union County
	)	
TAE KWON HAMMONDS	)	

No. 389A15

ORDER

On 11 December 2012, defendant was placed on watch at Carolinas Medical Center Union Hospital (a 24-hour facility) after being involuntarily committed upon a finding by a Union County Magistrate that he was "mentally ill and dangerous to self or others." On 12 December 2012, while defendant was still under the involuntary commitment order, two detectives from the City of Monroe Police Department questioned him about his involvement in a recent armed robbery. Defendant made incriminating statements and was subsequently indicted for robbery with a dangerous weapon on 4 February 2013. On 30 June 2014, defendant moved to suppress the statements he made while in the hospital, arguing that he was subjected to a custodial interview without having been read his *Miranda* rights and that his confession was involuntary. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

After a hearing on the matter, the trial court denied defendant's motion to suppress and made the following pertinent findings of fact, among others:

> 11. . . . Nurse Kansella had been on duty approximately two hours when two detectives arrived from the Monroe Police Department. They checked with her before they went to the defendant's room, and she told them that he was alert, oriented, and they were welcome to talk with him. She did not ask the defendant if he wished to speak with them, and did not tell the officers why the defendant was there, although it is clear from the conversation that they were aware that he was actually involuntarily committed at that time.
>
> . . . .
>
> 13. The defendant was interviewed by Detective Williams of the Monroe Police Department and Detective T.J. Goforth at approximately five p.m. on December the 12th. They spoke with the defendant for approximately one and half hours [sic]. No Miranda Rights were given to

> the defendant. On at least three occasions, however, the defendant was told that, "there were no arrest warrants with the officers," and that they were not here to "lock you up." . . . . Throughout the conversation the defendant never asked the officers to leave or to stop talking. . . . The defendant was unable to leave the hospital. He was not actually at a police station and was not told that he could not stop the conversation or request that the officers leave. He was never threatened, voices were never raised. The only promises made were such that the officers would tell the D.A. about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart.

Therefore, the trial court concluded:

> 2. Based on the totality of the circumstances, the Court finds the defendant was not in custody at the time he was interviewed. Based on the totality of the circumstances, the Court finds the defendant made a knowing, voluntary, and understanding statement to the officers on December the 11th [sic] of 2012.

Defendant appealed. The majority of the Court of Appeals affirmed the trial court, concluding that, given the totality of the circumstances, "defendant was not 'in custody' for purposes of *Miranda*." *State v. Hammonds*, ___ N.C. App. ___, ___, 777 S.E.2d 359, 368 (2015). Judge Inman dissented, and defendant filed an appeal of right pursuant to N.C.G.S. § 7A-30, along with a petition for discretionary review as to additional issues, which we allowed. The case was heard by this Court on 18 May 2016, in session in the Old Burke County Courthouse in the City Morganton, pursuant to N.C.G.S § 7A-10(a).

On our own motion, this Court hereby VACATES the opinion of the Court of Appeals filed in this case 20 October 2015 and the trial court's orders denying the motion to suppress (a one-page form order signed on 1 July 2014, and a nine-page order with findings and conclusions signed on 22 July and entered on 24 July 2014). This Court further ORDERS this case certified to the trial court for a new hearing on defendant's motion to suppress, during which the trial court shall apply a totality of the circumstances test, as set out in *Howes v. Fields*, ___ U.S. ___, ___, 132 S. Ct. 1181, 1194 (2012) (holding that an imprisoned suspect was not in custody for *Miranda* purposes after "[t]aking

into account all of the circumstances of the questioning—including *especially* the undisputed fact that [the inmate] was told that he was free to end the questioning and to return to his cell" (emphasis added)). The trial court shall consider all factors, including the important factor of whether the involuntarily committed defendant "was told that he was free to end the questioning." *Id.* at ___, 132 S. Ct. at 1194.

Upon the conclusion of the new suppression hearing, the trial court shall make new findings of fact and conclusions of law regarding whether defendant was in custody at the time of the interview, and whether the motion to suppress should be allowed or denied. The trial court is directed to hold the necessary hearing and certify its order to this Court within 120 days of the filing date of this order.

Once the trial court's order is certified back to this Court, this Court ORDERS that the parties submit supplement briefs addressing the new order. Defendant's supplemental brief shall be filed no later than thirty days after the certification, and the State's supplemental brief shall be filed no later than thirty days after defendant's filing.

By order of the Court in Conference, this the 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. MILLER

[368 N.C. 909 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
BRENT TYLER MILLER	)	

No. 199PA15

ORDER

The following order has been entered on the motion filed on the 19th of April 2016 by defendant and designated Defendant-Appellee's Motion to Vacate Bill of Costs: The motion is allowed. Not having been found guilty in the above-captioned matter, defendant is not obligated to pay court costs.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

STATE v. PINEDA

[368 N.C. 910 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
NICOLAS OLIVARES PINEDA	)	

No. 70P16

ORDER

The opinion of the Court of Appeals in this case states as follows: "the jury found Pineda guilty of violating N.C. Gen. Stat. § 90-95(a)(1) by trafficking heroin by sale and by delivery." The Record on Appeal, however, reveals that defendant was convicted under N.C.G.S. § 90-95(h)(4). Accordingly, we allow the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of the correct statute of conviction.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

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

9 JUNE 2016

005PA15	Commscope Credit Union v. Butler and Burke, LLP, et al.	1. Third-Party Defs' Motion to Withdraw as Counsel of Record 2. Third-Party Defs' Motion to Substitute Counsel	1. Allowed **04/25/2016** 2. Allowed **04/25/2016**
026P16	Shaka Greene v. Trustee Services of Carolina, LLC and U.S. Bank, N.A. In the Matter of the Foreclosure of Real Property Under Deed of Trust from Jeffrey S. Kenley and Laura L. Kenley, in the Original Amount of $296,700, and Dated September 29, 2005 and Recorded on September 30, 2005, in Book 3935 at Page 425, of Union County Registry	1. Plt's Motion for Temporary Stay (COA15-90 & COA15-97) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/22/2016** Dissolved **06/09/2016** 2. Denied 3. Denied
031P16	Shapemasters, Inc. v. Angelo Accetturo, Wilderness Trail Development Corporation, and Wilderness Trail Holdings, LLC.	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-741)	Denied
035P16	State v. William Miller Baker	1. State's Motion for Temporary Stay (COA15-649) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR	1. Allowed **02/05/2016** 2. Allowed 3. Allowed
039P14-2	Robert S. Chamberlain v. Kristy M. Newton and Kristin C. McCrary	Petitioner's *Pro Se* Motion for Complaint/ Grievance/Petition	Dismissed **Ervin, J., recused**
042P04-7	State v. Larry McLeod Pulley	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/15/2016**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

9 June 2016

042P16	Richard B. Spoor, Individually and Derivatively v. John M. Barth, Jr., John M. Barth, John Does 1-5, and J.R. International Holdings, LLC	1. Def's (John M. Barth) PDR Under N.C.G.S. § 7A-31 (COA15-172) 2. Def's (John M. Barth, Jr.) PDR Under N.C.G.S. § 7A-31 3. Def's (John M. Barth) Motion to Admit Michael J. Small and David B. Goroff *Pro Hac Vice* 4. Def's (John M. Barth) Petition for *Writ of Certiorari* to Review Order of COA 5. Def's (John M. Barth, Jr.) Petition for *Writ of Certiorari* to Review Order of COA 6. Plt's Motion to Strike Reply in Support of PDR	1. Denied 2. Denied 3. Dismissed as moot 4. Denied 5. Denied 6. Allowed
043P16	State v. Peter Michael Vallejo	Def's PDR Under N.C.G.S. § 7A-31 (COA15-388)	Denied
055P16	State v. Evans Aine, II	Def's PDR Under N.C.G.S. § 7A-31 (COA15-490)	Denied
058P16	In the Matter of Q.C.R. and L.Q.W.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-504)	Denied
063P16	State v. Michael Anthony York	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-419) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
064A16	In the Matter of the Foreclosure of a Deed of Trust Executed by William Gerald Price in the Original Amount of $190,000.00 Dated December 12, 2002, Recorded in Book 286, Page 113, Ashe County Registry Substitute Trustee Services, Inc., Substitute Trustee	1. Respondent's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-639) 2. Petitioner's Motion to Dismiss Appeal	1. --- 2. Allowed
069A16	State v. Wendy M. Dale	Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-105)	Dismissed *ex mero motu*

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

9 JUNE 2016

070P16	State v. Nicolas Olivares Pineda	1. State's Motion for Temporary Stay (COA15-800) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/04/2016** Dissolved **06/09/2016** 2. Denied 3. Special Order 4. Denied
071P16	State v. Ronald Anthony Miller	Def's PDR Under N.C.G.S. § 7A-31 (COA15-162)	Denied
072P16	Christina D'Alessandro v. Adam D'Alessandro	1. Def's Motion for Temporary Stay (COA15-357) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed; Existing Bond Extended **03/07/2016** Dissolved **06/09/2016** 2. Denied 3. Denied
083P16	State v. Nashid Porter	Def's *Pro Se* Motion to Dismiss – Grounds Applicable to All Criminal Proceedings	Dismissed
086A16	In the Matter of Kay Frances Redmond, by and through Linda Nichols, Administratrix of the Estate of Kay Frances Redmond, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	1. Claimant's Notice of Appeal Based Upon a Dissent (COA15-763) 2. Claimant's PDR as to Additional Issues 3. Claimant's Motion to Consolidate Appeals 4. State's Notice of Appeal Based Upon a Dissent 5. State's PDR as to Additional Issues 6. State's Motion to Consolidate Appeals	1. --- 2. Denied 3. Allowed 4. --- 5. Allowed 6. Allowed

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

9 JUNE 2016

087A16	In the Matter of Mary Lucille Hughes, by and through Virginia Hughes Ingram, Administratrix of the Estate of Mary Lucille Hughes, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	1. Claimant's Notice of Appeal Based Upon a Dissent (COA15-699) 2. Claimant's PDR as to Additional Issues 3. Claimant's Motion to Consolidate Appeals 4. State's Notice of Appeal Based Upon a Dissent 5. State's PDR as to Additional Issues 6. State's Motion to Consolidate Appeals	1. --- 2. Denied 3. Allowed 4. --- 5. Allowed 6. Allowed
088A16	In the Matter of Tommie Junior Smith, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	1. Claimant's Notice of Appeal Based Upon a Dissent (COA15-829) 2. Claimant's PDR as to Additional Issues 3. Claimant's Motion to Consolidate Appeals 4. State's Notice of Appeal Based Upon a Dissent 5. State's PDR as to Additional Issues 6. State's Motion to Consolidate Appeals	1. --- 2. Denied 3. Allowed 4. --- 5. Allowed 6. Allowed
089P16	Dora P. Bullock v. Adam Hopler, Hopler & Wilms, LLP	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-537) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
090A16	Victor Howard v. Patricia E. Chambers; Mattocks Enterprises, Inc.; Steve N. Mattocks, Individually; Jason L. Panciera, Individually; and Cawthorne, Moss & Panciera, P.C.	Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-590)	Dismissed *ex mero motu*
091P16	Robert Andrew Bartlett, Sr. v. David Barber	1. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* (COA15-72) 2. Plt's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed

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

9 JUNE 2016

094PA13-3	State v. George Victor Stokes	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA12-810 and COA12-810-2) 2. Def's *Pro Se* Motion for Arrest of Judgment 3. Def's *Pro Se* Motion for a New Trial	1. Denied 2. Dismissed 3. Dismissed
094P16	State v. Harold Lamont Fletcher	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1312)	Allowed
095P16	Cynthia Walker, D.D.S. v. The North Carolina State Board of Dental Examiners	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-337)	Allowed
096P16	Rodney Hall, Dante Branham, Ehramis Chism, Tyriuq Gordan, M.M. (minor) by his Guardian Ad Litem, Benika Rayford, Benika Rayford, Individually, and Erik Staley v. Michael L. Greene and Mount Zion Christian Academy	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-486)	Denied
097A16	State v. Thomas P. Knight	1. Def's Notice of Appeal Based Upon a Dissent (COA14-1015) 2. State's Notice of Appeal Based Upon a Constitutional Question 3. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. --- 2. Dismissed *ex mero motu* 3. Allowed
098P16	Robert Fuhs, Sr. v. Summer Fuhs, Constance C. Moore, and Legal Aid of North Carolina, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-945)	Denied
099P16	State v. Daniel Lynn Bowlin	Def's PDR Under N.C.G.S. § 7A-31 (COA15-701)	Denied
104P16	State v. William Gerald Price	Def's *Pro Se* Motion for Notice of Appeal	Dismissed

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

9 JUNE 2016

105P16	In the Matter of C.R.B., D.G.B., and C.M.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-644)	Denied
106P16	Kimarlo Antonio Ragland v. N.C. Department of Public Instruction	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-141)	Denied
107P16	State v. Soyer Lewis Moll	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Onslow County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**
108P16	State v. Jonathan Udell Teeter	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-570)	Denied
110P16	North Carolina State Board of Education v. The State of North Carolina and The North Carolina Rules Review Commission	1. Def's (N.C. Rules Review Comm.) Notice of Appeal Based Upon a Constitutional Question (COA15-1229) 2. Def's (N.C. Rules Review Comm.) PDR Under N.C.G.S. § 7A-31 3. Def's (N.C. Rules Review Comm.) Petition for *Writ of Certiorari* to Review Order of COA 4. Def's (State of N.C.) PDR Under N.C.G.S. § 7A-31 5. Def's (State of N.C.) Petition for *Writ of Certiorari* to Review Order of COA	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order
111P16	Paul L. Erickson v. Clayton Siegel, DC, Individually and on Behalf of the Other Named Defendants Identified in Exhibit A to the Plaintiff's Complaint	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA15-984)	Denied
112P16	Foremost Insurance Company of Grand Rapids, Michigan v. Charles Raines, Martha Rains, and Sherri Griggs	Defs' (Charles Raines and Martha Raines) PDR Under N.C.G.S. § 7A-31 (COA15-978)	Denied

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

9 JUNE 2016

113P16	State v. Austin Lynn Miller	1. State's Motion for Temporary Stay (COA15-636) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal	1. Allowed **03/31/2016** 2. Allowed 3. --- 4. Allowed 5. Allowed
115P16	Willie T. Kelly, Jr. v. P. McCrory, Governor, et al.	1. Plt's *Pro Se* Motion for Tort Claim Civil Complaint 2. Plt's *Pro Se* Motion for Summons to Appear in Civil Complaint	1. Dismissed 2. Dismissed
116P16	Linda M. Bennett, Executrix for Elizabeth H. Maynard, Deceased, Lisa M. Bennett, Personally on Behalf of Herself and All Others Similarly Situated v. Hospice & Palliative Care Center of Alamance-Caswell, Community Home Care and Hospice, LLC, The Oaks of Alamance, LLC, Jeffrey Brown, M.D., Beth Hodges, M.D., Does 1-10, Inclusive	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-667) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
117P16	B S K Enterprises, Inc., and B. Kelley Enterprises, Inc. v. Beroth Oil Company	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA15-189) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
118P16	DWC3, Inc., RYFO, LLC, Paul Miller, and Kathleen Miller v. William G. Kissel and Diane L. Kissel	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-252)	Denied
120P16	State v. Bobby Frederick Walls, Jr.	Def's *Pro Se* Motion for PDR (COA15-289)	Denied

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

9 June 2016

121A16	State v. Damario Montreal Coxton	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-575) 2. State's Motion to Dismiss Appeal	1. Special Order 2. Special Order
124A16	Jillian Murray v. The University of North Carolina at Chapel Hill	1. Def's Notice of Appeal Based Upon a Dissent (COA15-375) 2. Def's PDR as to Additional Issues	1. --- 2. Allowed
125P16	State v. Mark Wayne Ballard	1. Def's *Pro Se* Motion for Leave of the Court to File Notice of Appeal (COAP15-832) 2. Def's *Pro Se* Motion for Extension of Time to File Notice of Appeal 3. Def's *Pro Se* Motion for Equitable Tolling 4. Def's *Pro Se* Motion to Stay 5. Def's *Pro Se* Motion for Appointment of Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed **04/06/2016** 5. Dismissed as moot
126P16	State v. Warren H. Summers	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP16-245)	Denied
127P16	State v. Dakota Covington	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion in the Alternative for Petition for Writ of Error *Coram Nobis* 3. Def's *Pro Se* Motion for Evidentiary Hearing	1. Dismissed 2. Dismissed 3. Dismissed
128P16	In the Matter of The Estate of La-Reko A. Williams	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA15-619) 2. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
130P16	State v. Jamario Jermaine McClure	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-266)	Denied
131P01-12	State v. Anthony Dove	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Expedite Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**

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

9 JUNE 2016

134P16	Ronald Thompson Corbett v. State of North Carolina Department of the Secretary of State	Petitioner's *Pro Se* Motion for Notice of Appeal	Dismissed
135P16	State v. Robert Antwain Stanback	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Randolph County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
136P16	State v. Maurice Parker	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Dismissed
137P16	State v. Reid Wilburn McLaughlin	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-333) 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
139P16	State v. Maurice Shepherd	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Northampton 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
142P16	State v. Sylvia Dyson Sprinkle	Def's PDR Under N.C.G.S. § 7A-31 (COA15-657)	Denied
143P16	Shawn Blackburn v. N.C. Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-556)	Denied
145P16	State v. Christopher Lynn Hallum	Def's PDR Under N.C.G.S. § 7A-31 (COA15-526)	Denied
148P16	State v. John Wesley Hearne	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-163)	Dismissed
149P16	State v. Ronald Audra Ingram	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-794)	Dismissed

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

9 June 2016

150P16	Jason Lee Mutter v. Michael Ball, Superintendent of Avery Mitchell Correctional Institution	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-519) 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Denied **04/25/2016** 2. Allowed **04/25/2016** 3. Dismissed as moot **04/25/2016** **Ervin, J., recused**
151P14-3	Kimberly Shreve v. North Carolina Department of Justice, Kristen Fetter, Colon Willoughby, and Tina Hoagland Byrd	1. Plt's *Pro Se* Motion for Leave to File Amended Complaint 2. Plt's *Pro Se* Motion for Review and Appeal 3. Plt's *Pro Se* Motion for Leave to File Amended Complaint	1. Dismissed 2. Dismissed 3. Dismissed
151P16	State v. James L. Johnson	1. State's Motion for Temporary Stay (COA15-793) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/2016** 2. 3.
152P16	Catawba County, by and through its Child Support Agency, ex rel., Shawna Rackley v. Jason Loggins	1. Plt Catawba County's Motion for Temporary Stay (COA15-711) 2. Plt Catawba County's Petition for *Writ of Supersedeas*	1. Allowed **04/25/2016** 2.
153P16	State v. Nashid Porter	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed **05/23/2016** 2. Dismissed as moot **05/23/2016** 3. Dismissed as moot **05/23/2016**
153P16-2	State v. Nashid Porter	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County	Denied **06/07/2016**
157P16	State v. Danielle Star Reynolds	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Onslow County	Dismissed **05/19/2016**

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

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158P06-7	Derrick D. Boger v. Pat McCrory, Governor; W. David Guice, Commissioner; George T. Solomon, Director; D.R. Mitchell, Superintendent; Captain Ms. Mem; Captain Gernmany; Mr. Ingram	Plt's *Pro Se* Motion for Tort Claim Civil Complaint	Dismissed
158P16	Larry Brandon Moore v. Judge Jesse B. Caldwell, III	Plt's *Pro Se* Motion for Petition for Order to Show Cause Under Common Law	Dismissed
161P16	State v. Roger Christopher Oxendine	Def's PDR Under N.C.G.S. § 7A-31 (COA15-508)	Denied
163P16	State v. Arkeem Hakim Jordan	Def's *Pro Se* Motion for Writ of Error	Dismissed **Ervin, J., recused**
164P16	State v. David Michael Wilson	1. Def's *Pro Se* Motion for PDR *of Certiorari* 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
166P16	State v. Jaahkii Quran Harris	1. State's Motion for Temporary Stay (COA15-770) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/09/2016** 2. 3.
167P16	State v. William Edward Godwin, III	1. State's Motion for Temporary Stay (COA15-766) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/09/2016** 2. 3.

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174P16	State v. Travis Taylor Dail	1. State's Motion for Temporary Stay (COAP16-291) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **05/11/2016** 2. 3.
175P16	N.C. Department of Health and Human Services, Division of Medical Assistance v. Parker Home Care, LLC Division of Medical Assistance, N.C. Department of Health and Human Services v. Parker Home Care, LLC	1. State's Motion for Temporary Stay (COA15-1026; COA15-1033) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/11/2016** 2. 3.
180P16	State v. John Wayne Bonetsky	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-811) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas* 4. Def's Motion to Amend PDR and File Notice of Appeal 5. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Allowed **05/13/2016** Dissolved **06/09/2016** 3. Denied 4. Denied **05/18/2016** 5. Dismissed as moot **Ervin, J., recused**
188P16	State v. Timothy Allen Foxworth	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-1092) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 4. Def's *Pro Se* Motion for Subpoena *Duces Tecum*	1. Dismissed 2. Denied 3. Denied 4. Dismissed as moot **Ervin, J., recused**
190P16	Joseph Earl Clark, II v. N.C. Department of Public Safety	Petitioner's *Pro Se* Motion for PDR (COAP16-282)	Denied **05/27/2016**

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191P16	Owen D. Leavitt v. State of North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-977) 3. Petitioner's *Pro Se* Motion for PDR 4. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 5. Petitioner's *Pro Se* Motion to Reconsider Denial of Petition for *Writ of Habeas Corpus*	1. Denied **05/19/2016** 2. Dismissed 3. Dismissed 4. Allowed 5. Denied **06/01/2016**
192P16	Owen D. Leavitt v. State of North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Alexander County 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
193P16	State v. Calvin Renard Carter	1. State's Motion for Temporary Stay (COA15-1234) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/24/2016** 2.
194A16	State v. Michael Antonio Bullock	1. State's Motion for Temporary Stay (COA15-731) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/23/2016** 2.
199PA15	State v. Brent Tyler Miller	Def's Motion to Vacate Bill of Costs	Special Order
199P16	State v. Joseph M. Romano	1. State's Motion for Temporary Stay (COA15-940) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/24/2016** 2. 3.
200P16	North Carolina State Bar v. Dianne Michele Carter El Bey v. State of North Carolina, Paul G. Gessner, Individually and as Judge, North Carolina State Bar, David R. Johnson, Individually and as Judge, and Jennifer Knox, Individually and as Clerk	Def's *Pro Se* Motion for Writ of Prohibition for Usurpation of Power	Dismissed **06/07/2016** **Ervin, J., recused**

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208PA15	The North Carolina State Bar v. Jerry R. Tillett		Special Order **05/27/2016**
208P16	State v. Joshua Earl Holloman	1. State's Motion for Temporary Stay (COA15-1042) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/27/2016** 2. 3.
213P16	State v. Christopher Allen McKiver	1. State's Motion for Temporary Stay (COA15-1070) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/06/2016** 2. 3.
222A14	State v. Bernard George Lamp, Jr. (DEATH)	1. Def's Motion to File Juror Questionnaires Under Seal 2. Def's Motion to Supplement Record on Appeal 3. Def's Motion to Withdraw Appeal	1. Dismissed as moot 2. Dismissed as moot 3. Allowed
244P11-2	State v. Bruce Lamont Gorham	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 4. Def's *Pro Se* Motion for Subpoena *Duces Tecum* 5. Def's *Pro Se* Motion to Amend	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Dismissed 5. Allowed **Ervin, J., recused**
248P99-3	State v. Howard Cleveland, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Rowan County	Dismissed

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248PA13-2	The Estate of Donna S. Ray, by Thomas D. Ray and Robert A. Wilson, IV, Administrators of the Estate of Donna S. Ray, and Thomas D. Ray, Individually v. B. Keith Forgy, M.D., P.A., Individually and as Agent/ Apparent Agent of Grace Health Care System, Inc., Blue Ridge Health Care Systems, Inc., Carolinas Health Care System, Inc., and as an Agent/ Apparent Agent, Employee, and Shareholder of Mountain View Surgical Associates, Grace Hospital, Inc., Grace Health Care System, Inc., Blue Ridge Health Care System, Inc., and Carolinas Health Care System, Inc.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA15-236) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot **Jackson, Beasley, and Ervin, JJ., recused**
252PA14-2	State v. Thomas Craig Campbell	1. State's Motion for Temporary Stay (COA13-1404-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/10/2015** 2. Allowed 3. Special Order
273A01-3	State v. Avenger Ridgeway	1. Def's *Pro Se* Motion for PDR (COAP16-120) 2. Def's *Pro Se* Motion to Amend Petition	1. Dismissed 2. Allowed **Ervin, J., recused**
289P06-6	State v. Steve Morrison	1. Def's *Pro Se* Petition for *Writ of Certiorari* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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294PA14	Robert E. King and wife, Jo Ann O'Neal v. Michael S. Bryant, M.D., and Village Surgical Associates, P.A.		Special Order
322P15-4	Raymond Griffin v. Debora Shandler, Assistant District Attorney of Wake County and Donald W. Stephens, Senior Resident Superior Court Judge	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **06/07/2016**
334P15	Ashley Keith Pittman, and wife, Deanna Pittman v. Henry Moncure Motors, Inc., Mobile Home Sales, a Corporation, and Crestline Homes, Inc., a Corporation	Def's (Henry Moncure Motors, Inc.) PDR Under N.C.G.S. § 7A-31 (COA14-1186)	Denied
368PA15	Wilkes v. City of Greenville	Def's Motion to Amend New Brief	Allowed **05/27/2016**
370P09-2	State v. Michael Harrison Hunt, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 2. Def's *Pro Se* Motion to Proceed I*n Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Beasley, J., recused**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

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374P13-6	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Consider Universal Rights be Reinstated 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel 5. Def's *Pro Se* Motion for Extraordinary Writ 6. Def's *Pro Se* Motion to Modify/Vacate Old Age Conviction	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as moot 5. Dismissed 6. Dismissed **Ervin, J., recused**
375P09-6	State v. Avenger Ridgeway	1. Def's *Pro Se* Motion to Supplement PDR 2. Def's *Pro Se* Motion for Petition for Moratorium 3. Def's *Pro Se* Motion for Request to Order Public Records	1. Dismissed as moot 2. Dismissed 3. Dismissed **Ervin, J., recused**
389A15	State v. Tae Kwon Hammonds	Def's Motion to File Amended Brief (COA15-53)	Allowed **04/27/2016**
389A15	State v. Tae Kwon Hammonds	State's Motion for Extension of Time to File Brief (COA15-53)	Allowed **04/29/2016**
392PA13-3	State v. Robert Timothy Walston, Sr.	1. State's Motion for Temporary Stay (COA12-1377-3) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/18/2015** 2. Allowed 3. Allowed
409PA15	Nies v. Town of Emerald Isles	1. Civitas Institute Center for Law and Freedom's Motion for Leave to File Amicus Brief 2. Owners' Counsel of America and Professor David L. Callies' Motion for Leave to File Amicus Brief 3. Motion to Admit Robert H. Thomas *Pro Hac Vice*	1. Allowed **05/25/2016** 2. Allowed **05/25/2016** 3. Allowed **05/25/2016**
411P15-2	State v. John W. Hearne	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-829)	Dismissed

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

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421P10-4	Robert Allen Lillie v. Michael Ball, Superintendent, Avery-Mitchell Correctional Inst.	Petition for *Writ of Certiorari* to Review Denial of Petition for *Writ of Habeas Corpus*	Denied **05/18/2016**
424P15	State v. John Thomas Patterson, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-138) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Amend Notice of Appeal and PDR 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed
449P11-13	State v. Charles Everette Hinton	1. Petitioner's *Pro Se* Motion to Take Judicial Notice of Adjudicative Facts 2. Petitioner's *Pro Se* Motion for Necessary Joinder of Parties 3. Petitioner's *Pro Se* Motion for Joinder of Claims and Remedies 4. Petitioner's *Pro Se* Motion for Evidentiary Oral Hearing and Findings and Conclusions by the Court 5. Petitioner's *Pro Se* Motion for Inquiry into Restraints on Liberty; Petition for *Writ of Habeas Corpus;* Relief from Judgments 6. Petitioner's *Pro Se* Motion for Calendaring Cause	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Denied **02/19/2016** 6. Dismissed **Ervin, J., recused**
491P02-7	Dontez Simuel v. Senior Resident Superior Judge Donald Stephens and Senior Resident Judge Paul C. Ridgeway	Plt's *Pro Se* Motion for Writ of Prohibition	Denied **Ervin, J., recused**
514PA11-2	State v. Harry Sharod James	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **05/20/2016** 2.
580P05-14	In re David L. Smith	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **Ervin, J., recused**

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on 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 Board of Law Examiners, as particularly set forth in 27 N.C.A.C. 1C, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0100, Board of Law Examiners

.0101 Election

(a) ~~At the first meeting of the council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933. The council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected, and such members shall serve for a term of three years or until their successors are elected and qualified. Beginning with the year 1935 and every third year thereafter the council shall elect three members for a term of three years or until their successors are elected and qualified.~~ The Board of Law Examiners shall consist of 11 members. The members are elected for three-year terms to serve until expiration of the term, resignation, death, or other cause for termination of members' service.

(b) ~~No member of the council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the council.~~ The council, in making appointments to the Board of Law Examiners, shall make appointments for no more than four consecutive three-year terms, not counting any partial term which may have previously been served.

(c) The council shall elect board members for three-year terms at its annual meeting in October, with the term of service to begin on the following January 1. Election of a board member to complete an unexpired

term shall be conducted at the next meeting of the council following the termination of service by the member and the giving of notice of the vacancy.

(d) When vacancies occur for the Board of Law Examiners, notice shall be published in the official publication of the North Carolina State Bar giving the date by which any person desiring to make a suggestion for someone to be considered as a possible member of the Board of Law Examiners must submit the name to the North Carolina State Bar.

(e) In the selection process for an appointment to the Board of Law Examiners, the council may consult with current members of the Board of Law Examiners and consider factors such as geography, practice area, gender, and racial diversity.

(f) No member of the council shall be a member of the Board of Law Examiners.

(g) Any former Board of Law Examiners member being considered for appointment as emeritus member shall have served on the Board of Law Examiners for not less than five years.

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 27th day of April, 2016.

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

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

s/Ervin, J.
For the Court

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

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on 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, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

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

.1517 Exemptions

(a) Notification of Board.

...

(e) Law Teachers. An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

> (1) …
>
> (3) A full-time teacher of law-related courses at a <u>graduate level</u> professional school accredited by its respective professional accrediting agency.

(f) Special Circumstances Exemptions.

...

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 October 23, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION 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 a specially called meeting on February 1, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the legal specialization program, as particularly set forth in 27 N.C.A.C. 1D, Section .3200, be amended as follows (rules are entirely new, additions are not underlined):

27 N.C.A.C. 1D, Section .3200, Certification Standards for the Utilities Law Specialty

.3201 Establishment of Specialty Field
The North Carolina State Bar Board of Legal Specialization (the board) hereby designates utilities law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.3202 Definition of Specialty
The specialty of utilities law is the practice of law focusing on the North Carolina Public Utilities Act (Chapter 62 of the North Carolina General Statutes) and practice before the North Carolina Utilities Commission (the Commission) and related state and federal regulatory bodies.

.3203 Recognition as a Specialist in Utilities Law
If a lawyer qualifies as a specialist in utilities law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a “Board Certified Specialist in Utilities Law.”

.3204 Applicability of Provisions of the North Carolina Plan of Legal Specialization
Certification and continued certification of specialists in utilities law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

.3205 Standards for Certification as a Specialist in Utilities Law
Each applicant for certification as a specialist in utilities law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In

addition, each applicant shall meet the following standards for certification in utilities law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in utilities law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of utilities law but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work in utilities law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in utilities law includes, but is not limited to, practice before or representation in matters relative to the Commission, Federal Energy Regulatory Commission (FERC), Federal Communications Commission (FCC), Nuclear Regulatory Commission (NRC), Pipeline and Hazardous Materials Safety Administration (PHMSA), North Carolina Department of Environment and Natural Resources (NCDENR), North American Electric Reliability Corporation, utilities commissions of other states, and related state and federal regulatory bodies as well as participation in committee work of organizations or continuing legal education programs that are focused on subject matter involved in practice before the Commission or related state and federal regulatory bodies.

(4) “Practice equivalent” shall mean:

(A) Each year of service as a commissioner on the Commission during the five years prior to application may be substituted for a year of the experience necessary to meet the five-year requirement set forth in Rule .3205(b)(1).

(B) Each year of service on the legal staff of the Commission or of the Public Staff during the five years prior to application

may be substituted for a year of the experience necessary to meet the five-year requirement set forth in Rule .3205(b)(1).

(c) Continuing Legal Education – To be certified as a specialist in utilities law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in utilities law and related fields during the three years preceding application. The 36 hours must include at least 18 hours in utilities law; the remaining 18 hours may be in related-field CLE. Utilities law CLE includes but is not limited to courses on the subjects identified in Rule .3202 and Rule .3205(b)(3) of this subchapter. A list of the topics that qualify as related-field CLE shall be maintained by the board on its official website.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in utilities law. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of utilities law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter – The examination shall test the applicant's knowledge and application of utilities law.

.3206 Standards for Continued Certification as a Specialist
The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3206(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3205(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in utilities law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 30 hours shall be in utilities law, and the balance of 30 hours may be in the related fields set forth in Rule .3205(c).

(c) Peer Review - The specialist must comply with the requirements of Rule .3205(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days, nor less than 90 days, prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3205 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, the application shall be treated as if it were for initial certification under Rule .3205 of this subchapter.

.3207 Applicability of Other Requirements
The specific standards set forth herein for certification of specialists in utilities law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

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 a specially called meeting on February 1, 2016.

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

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Education Program

.1518 Continuing Legal Education Program

(a) Annual Requirement.

...

(b) Carryover.

...

(c) Professionalism Requirement for New Members. Except as provided in paragraph (d)(1), each active member admitted to the North Carolina State Bar after January 1, 2011, must complete the North Carolina State Bar Professionalism for New Attorneys Program (PNA Program)...

> (1) Content and Accreditation. The State Bar PNA Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management.…To be approved as a PNA Program, the program must be provided by an accredited sponsor under Rule .1603 of this subchapter and the ~~a~~ sponsor must satisfy the annual content requirements, and submit a detailed description of the program to the board for approval~~. At~~ at least 45 days prior to the presentation. ~~of a PNA Program, a sponsor must submit a detailed description of the program to the board for approval. Accredited sponsors shall not be exempt from the prior submission requirement and~~ A sponsor may not advertise a PNA Program until approved by the board. PNA Programs

shall be specially designated by the board and no course that is not so designated shall satisfy the PNA Program requirement for new members.

(2) Evaluation...

(d) Exemptions from Professionalism Requirement for New Members.

...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

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 a specially called meeting on February 1, 2016.

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

27 N.C.A.C. 1D, Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1602 Course Content Requirements

(a) Professional Responsibility Courses on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions

...

(h) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except as follows:

> (1) ~~those~~ programs exempted by the board under Rule .1501(c)(10) of this subchapter~~,~~;
>
> (2) ~~or~~ as provided in Rule .1604(e) of this subchapter; and
>
> (3) live programs on professional responsibility, professionalism, or professional negligence/malpractice presented by a person or organization that is not affiliated with the lawyers attending the program or their law firms and that has demonstrated qualification to present such programs through experience and knowledge.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by

the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION 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 a specially called meeting on February 1, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the legal specialization program, as particularly set forth in 27 N.C.A.C. 1D, Section .2300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2300 Certification Standards for the Estate Planning and Probate Law Specialty

.2305 Standards for Certification as a Specialist in Estate Planning and Probate Law

Each applicant for certification as a specialist in estate planning and probate law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in estate planning and probate law:

(a) Licensure and Practice -

...

(c) Continuing Legal Education - An applicant must have earned no less than 72 hours of accredited continuing legal education (CLE) credits in estate planning and probate law during the three years preceding application. Of the 72 hours of CLE, at least 45 hours shall be in estate planning and probate law (provided, however, that eight of the 45 hours may be in the related areas of elder law, Medicaid planning, and guardianship), and the balance may be in ~~the~~ <u>designated</u> related <u>fields</u> ~~areas~~. <u>A list of the topics that qualify as related-field CLE shall be maintained by the board on its official</u> website ~~of taxation, business organizations, real property, family law, elder law, Medicaid planning, and guardianship~~.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review.

...

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in estate planning and probate law.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall ~~cover~~ test the applicant's knowledge and application of the law ~~in the following topics~~ of estate planning and probate.~~:~~ A list of the topics covered on the exam shall be maintained by the board on its official website.

~~(A) federal and North Carolina gift taxes;~~

~~(B) federal estate tax;~~

~~(C) North Carolina inheritance tax;~~

~~(D) federal and North Carolina fiduciary income taxes;~~

~~(E) federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;~~

~~(F) North Carolina law of wills and trusts;~~

~~(G) North Carolina probate law, including fiduciary accounting;~~

~~(H) federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts:~~

~~(I) North Carolina law of business organizations, family law, and property law as they may be applicable to estate planning transactions;~~

~~(J) federal and North Carolina tax law applicable to partnerships and corporations (including S corporations) which may be encountered in estate planning and administration.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

s/Ervin, J.
For the Court

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

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 certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G Section .0100, be amended as follows (additions are underlined, deletions are interlined)

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must ….

(b) Alternative Qualification Period.

...

(c) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual ~~has been~~

(A) was convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness, or fitness as a paralegal~~,~~; ~~or~~

(B) ~~has~~ engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation~~,~~;

(C) engaged in the unauthorized practice of law; or

(D) has had a nonlegal state or federal occupational or professional license suspended or revoked for misconduct;

~~Provided~~ however, the board may certify an applicant whose application discloses conduct described in Rule .0119(c)(3) if, after consideration of mitigating factors, including remorse, reformation of character, and the passage of time, the board determines that the individual is honest, trustworthy, and fit to be a certified paralegal; or

(4) the individual is not a legal resident of the United States.

(d) ...

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 2nd day of March, 2016.

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

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

s/Ervin, J.
For the Court

CERTIFICATION OF PARALEGALS

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

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 a specially called meeting on February 1, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0200, Rules Governing Continuing Paralegal Education

.0204 Fees

Accredited Program Fee – Sponsors seeking accreditation for a particular program (whether or not the sponsor itself is accredited by the North Carolina State Bar Board of Continuing Legal Education), that has not already been approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, shall pay a non-refundable fee of $75.00. However, no fee shall be charged for any program that is offered without charge to attendees. ~~The~~ All programs ~~program~~ must be approved in accordance with Rule .0203(1). An accredited program may be advertised by the sponsor in accordance with Rule .0203(2).

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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

CERTIFICATION OF PARALEGALS

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.

his the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

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 October 23, 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 (additions are underlined, deletions are interlined except where noted):

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

Rule 1.15 Safekeeping Property

This rule has ~~three~~ four subparts: Rule 1.15-1, Definitions; Rule 1.15-2, General Rules; ~~and~~ Rule 1.15-3, Records and Accountings; and Rule 1.15-4, Trust Account Management in Multiple-Lawyer Firm. The subparts set forth the requirements for preserving client property, including the requirements for preserving client property in a lawyer's trust account. The comment for all ~~three~~ four subparts as well as the annotations appear after the text for Rule ~~1.15-3~~ 1.15-4.

Rule 1.15-1 Definitions

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank~~,~~ ~~or~~ savings and loan association, or credit union chartered under North Carolina or federal law.

(b) ...

(k) "Legal services" denotes services (other than professional fiduciary services) rendered by a lawyer in a client-lawyer relationship.

Rule 1.15-2 General Rules

(a) Entrusted Property.

...

(f) ~~Segregation of Lawyer's Funds.~~ Funds in Accounts. A trust or fiduciary account may only hold entrusted property. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services or professional fiduciary

services may not be deposited or maintained in a trust or fiduciary account. Additionally, ~~No~~ no funds belonging to ~~a~~ the lawyer shall be deposited or maintained in a trust account or fiduciary account of the lawyer except:

> (1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or
>
> (2) funds belonging in part to a client or other third party and in part currently or conditionally to the lawyer.

(g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer ~~may~~ shall withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) Items Payable to Lawyer. Any item drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate on the item by client name, file number, or other identifying information the client from whose balance ~~on which~~ the item is drawn. Any item that does not include ~~capture~~ this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer's fees or expenses.

(i) No Bearer Items. No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer and no cash shall be withdrawn from a trust account or fiduciary account by any means ~~of a debit card~~.

(j) Debit Cards Prohibited. Use of a debit card to withdraw funds from a general or dedicated trust account or a fiduciary account is prohibited.

~~(j)~~ (k) No ~~Personal~~ Benefit to Lawyer or Third Party. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

~~(k)~~ (l) Bank Directive.

...

[Re-lettering intervening paragraphs.]

~~(o)~~ (p) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an accounting or bank error results in an unintentional and inadvertent use of one client's trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)(1). This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication.

~~(p)~~ (q) Interest on Deposited Funds.

...

~~(q)~~ (r) Abandoned Property. ….

(s) Signature on Trust Checks.

> (1) Checks drawn on a trust account must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer. Prior to exercising signature authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature authority.
>
> (2) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures.

Rule 1.15-3 Records and Accountings

(a) Check Format...

(b) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts, and fiduciary accounts maintained at a bank shall consist of the following:

> (1) ...;

(2) all canceled checks or other items drawn on the account, or ~~printed~~ digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client name, file number, or other identifying information of the client from whose ~~client~~ balance ~~against which~~ each item is drawn, provided, that:...

(c) Minimum Records for Accounts at Other Financial Institutions.

(1)...;

(2) a copy of all checks or other items drawn on the account, or ~~printed~~ digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(d) Reconciliations of General Trust Accounts.

(1) Quarterly Reconciliations. ~~At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank statement balance for the trust account as a whole~~. For each general trust account, a reconciliation report shall be prepared at least quarterly. Each reconciliation report shall show all of the following balances and verify that they are identical:

(A) The balance that appears in the general ledger as of the reporting date;

(B) The total of all subsidiary ledger balances in the general trust account, determined by listing and totaling the positive balances in the individual client ledgers and the administrative ledger maintained for servicing the account, as of the reporting date; and

(C) The adjusted bank balance, determined by adding outstanding deposits and other credits to the ending balance in the monthly bank statement and subtracting outstanding checks and other deductions from the balance in the monthly statement.

(2) Monthly Reconciliations.

....

(3) The lawyer shall review, sign, date, and retain a ~~record~~ copy of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(g).

(e) Accountings for Trust Funds.

...

(i) Reviews.

(1) Each month, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the bank statement and cancelled checks for the month covered by the bank statement.

(2) Each quarter, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) The lawyer shall take the necessary steps to investigate, identify, and resolve within ten days any discrepancies discovered during the monthly and quarterly reviews.

(4) A report of each monthly and quarterly review, including a description of the review, the transactions sampled, and any remedial action taken, shall be prepared. The lawyer shall sign, date, and retain a copy of the report and associated documentation for a period of six years in accordance with Rule 1.15-3(g).

(j) Retention of Records in Electronic Format. Records required by Rule 1.15-3 may be created, updated, and maintained electronically, provided

(1) the records otherwise comply with Rule 1.15-3, to wit: electronically created reconciliations and reviews that are not printed must be reviewed by the lawyer and electronically signed using a "digital signature" as defined in 21 CFR 11.3(b)(5);

(2) printed and electronic copies of the records in industry-standard formats can be made on demand; and

(3) the records are regularly backed up by an appropriate storage device.

Rule 1.15-4 Trust Account Management in a Multi-Member Firm [ENTIRELY NEW RULE, underlined font is not used]

(a) Trust Account Oversight Officer (TAOO). Lawyers in a law firm of two or more lawyers may designate a partner in the firm to serve as the trust account oversight officer (TAOO) for any general trust account into which more than one firm lawyer deposits trust funds. The TAOO and the partners of the firm, or those with comparable managerial authority (managing lawyers), shall agree in writing that the TAOO will oversee the administration of any such trust account in conformity with the requirements of Rule 1.15, including, specifically, the requirements of this Rule 1.15-4. More than one partner may be designated as a TAOO for a law firm.

(b) Limitations on Delegation. Designation of a TAOO does not relieve any lawyer in the law firm of responsibility for the following:

(1) oversight of the administration of any dedicated trust account or fiduciary account that is associated with a legal matter for which the lawyer is primary legal counsel or with the lawyer's performance of professional fiduciary services; and

(2) review of the disbursement sheets or statements of costs and receipts, client ledgers, and trust account balances for those legal matters for which the lawyer is primary legal counsel.

(c) Training of the TAOO.

(1) Within the six months prior to beginning service as a TAOO, a lawyer shall,

(A) read all subparts and comments to Rule 1.15, all formal ethics opinions of the North Carolina State Bar interpreting Rule 1.15, and the North Carolina State Bar *Trust Account Handbook*;

(B) complete one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a lawyer to serve as a TAOO;

(C) complete two hours of training (live, online, or self-guided) presented by a qualified educational provider on one or more of the following topics: (i) financial fraud, (ii) safeguarding funds from embezzlement, (iii) risk assessment and management for bank accounts, (iv) information security and online banking, or (v) accounting basics; and

(D) become familiar with the law firm's accounting system for trust accounts.

(2) During each year of service as a TAOO, the designated lawyer shall attend one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a TAOO or one hour of training, presented by a qualified educational provider, on one or more of the subjects listed in paragraph (c)(1)(C).

(d) Designation and Annual Certification. The written agreement designating a lawyer as the TAOO described in paragraph (a) shall contain the following:

(1) A statement by the TAOO that the TAOO agrees to oversee the operation of the firm's general trust accounts in compliance with the requirements of all subparts of Rule 1.15, specifically including the mandatory oversight measures in paragraph (e) of this rule;

(2) Identification of the trust accounts that the TAOO will oversee;

(3) An acknowledgement that the TAOO has completed the training described in paragraph (c)(1) and a description of that training;

(4) A statement certifying that the TAOO understands the law firm's accounting system for trust accounts; and

(5) An acknowledgement that the lawyers in the firm remain professionally responsible for the operation of the firm's trust accounts in compliance with Rule 1.15.

Each year on the anniversary of the execution of the agreement, the TAOO and the managing lawyers shall execute a statement confirming the continuing designation of the lawyer as the TAOO, certifying compliance with the requirements of this rule, describing the training undertaken by the TAOO as required by paragraph (c)(2), and reciting the statements required by subparagraphs (d)(1), (2), (4), and (5). During

the lawyer's tenure as TAOO and for six years thereafter, the agreement and all subsequent annual statements shall be maintained with the trust account records (see Rule 1.15-3(g)).

(e) Mandatory Oversight Measures. In addition to any other record keeping or accounting requirement set forth in Rule 1.15-2 and Rule 1.15-3, the firm shall adopt a written policy detailing the firm's trust account management procedures which shall annually be reviewed, updated, and signed by the TAOO and the managing lawyers. Each version of the policy shall be retained for the minimum record keeping period set forth in Rule 1.15-3(g).

Comment [to follow Rule 1.15-4]

[1]….

Responsibility for Records and Accountings

[16]….

[17] The rules permit the retention of records in electronic form. A storage device is appropriate for backing up electronic records if it reasonably assures that the records will be recoverable despite the failure or destruction of the original storage device on which the records are stored. For a discussion of storage methods not solely under the control of the lawyer, see *2011 FEO 6*.

~~[17]~~[18] Many businesses….

[Renumbering the following paragraphs.]

Fraud Prevention Measures

[23] The mandatory monthly and quarterly reviews and oversight measures in Rule 1.15-3(i) facilitate early detection of internal theft and early detection and correction of errors. They are minimum fraud prevention measures necessary for the protection of funds on deposit in a firm trust or fiduciary account from theft by any person with access to the account. Internal theft from trust accounts by insiders at a law firm can only be timely detected if the records of the firm's trust accounts are routinely reviewed. For this reason, Rule 1.15-3(i)(1) requires monthly reviews of the bank statements and cancelled checks for all general, dedicated, and fiduciary accounts. In addition, Rule 1.15-3(i)(2) requires quarterly reviews of a random sample of three transactions for each trust account, dedicated trust account, and fiduciary account including examination of the statement of costs and receipts, client ledger, and cancelled checks

for the transactions. Review of these documents will enable the lawyer to verify that the disbursements were made properly. Although not required by the rule, a larger sample than three transactions is advisable to increase the likelihood that internal theft will be detected.

[24] Another internal control to prevent fraud is found in Rule 1.15-2(s) which addresses the signature authority for trust account checks. The provision prohibits an employee who is responsible for performing the monthly or quarterly reconciliations for a trust account from being a signatory on a check for that account. Dividing the check signing and reconciliation responsibilities makes it more difficult for one employee to hide fraudulent transactions. Similarly, signature stamps, preprinted signature lines on checks, and electronic signatures are prohibited to prevent their use for fraudulent purposes.

[25] In addition to the recommendations in the North Carolina State Bar Trust Account Handbook (see the chapter on *Safeguarding Funds from Embezzlement*), the following fraud prevention measures are recommended:

(1) Enrolling the trust account in an automated fraud detection program;

(2) Implementation of security measures to prevent fraudulent wire transfers of funds;

(3) Actively maintaining end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and periodic consultation with an information technology security professional to advise firm employees; and

(4) Insuring that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

Lawyers should frequently evaluate whether additional fraud control measures are necessary and appropriate.

Duty to Report Misappropriation or Misapplication

[26] A lawyer is required by Rule 1.15-2(p) to report to the Trust Account Compliance Counsel of the North Carolina State Bar Office of Counsel if the lawyer knows or reasonably believes that entrusted property, including trust funds, has been misappropriated or misapplied. The rule requires the reporting of an unintentional misapplication of trust funds,

such as the inadvertent use of one client's funds on deposit in a general trust account to pay the obligations of another client, unless the lawyer discovers and rectifies the error on or before the next scheduled quarterly reconciliation. A lawyer is required to report the conduct of lawyers and non-lawyers as well as the lawyer's own conduct. A report is required regardless of whether information leading to the discovery of the misappropriation or misapplication would otherwise be protected by Rule 1.6. If disclosure of confidential client information is necessary to comply with this rule, the lawyer's disclosure should be limited to the information that is necessary to enable the State Bar to investigate. *See* Rule 1.6, cmt. [15].

Designation of a Trust Account Oversight Officer

[27] In a firm with two or more lawyers, personal oversight of all of the activities in the general trust accounts by all of the lawyers in the firm is often impractical. Nevertheless, any lawyer in the firm who deposits into a general trust account funds entrusted to the lawyer by or on behalf of a client is professionally responsible for the administration of the trust account in compliance with Rule 1.15 regardless of whether the lawyer directly participates in the administration of the trust account. Moreover, Rule 5.1 requires all lawyers with managerial or supervisory authority over the other lawyers in a firm to make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. Rule 1.15-4 provides a procedure for delegation of the oversight of the routine administration of a general trust account to a firm partner, shareholder, or member (see Rule 1.0(h)) in a manner that is professionally responsible. By identifying, training, and documenting the appointment of a trust account oversight officer (TAOO) for the law firm, the lawyers in a multiple-lawyer firm may responsibly delegate the routine administration of the firm's general trust accounts to a qualified lawyer. Delegation consistent with the requirements of Rule 1.15-4 is evidence of a lawyer's good faith effort to comply with Rule 5.1.

[28] Nevertheless, designation of a TAOO does not insulate from professional discipline a lawyer who personally engaged in dishonest or fraudulent conduct. Moreover, a lawyer having actual or constructive knowledge of dishonest or fraudulent conduct or the mismanagement of a trust account in violation of the Rules of Professional Conduct by any firm lawyer or employee remains subject to professional discipline if the lawyer fails to promptly take reasonable remedial action to avoid the consequences of such conduct including reporting the conduct as required by Rule 1.15-2(p) or Rule 8.3. *See also* Rule 5.1 and Rule 5.3.

Limitations on Delegation to TAOO

[29] Despite the designation of a TAOO pursuant to Rule 1.15-4, each lawyer in the firm remains professionally responsible for the trust account activity associated with the legal matters for which the lawyer provides representation. Therefore, for each legal matter for which the lawyer is primary counsel, the lawyer must review and approve any disbursement sheet or settlement statement, trust account entry in the client ledger, and trust account balance associated with the matter. Similarly, a lawyer who establishes a dedicated trust account or fiduciary account in connection with the representation of a client is professionally responsible for the administration of the dedicated trust account or fiduciary account in compliance with Rule 1.15.

Training for Service as a TAOO

[30] A qualified provider of the educational training programs for a TAOO described in Rule 1.15-4(c)(1)(C) need not be an accredited sponsor of continuing legal education programs (see 27 N.C.A.C. 1D, Rule .1520), but must be knowledgeable and reputable in the specific field and must offer educational materials as part of its usual course of business. Training may be completed via live presentations, online courses, or self-guided study. Self-guided study may consist of reading articles, presentation materials, or websites that have been created for the purpose of education in the areas of financial fraud, safeguarding funds from embezzlement, risk management for bank accounts, information security and on-line banking, or basic accounting.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) …..

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated

violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. <u>A lawyer is not generally required by this rule to report the lawyer's own professional misconduct; however, to advance the goals of self-regulation, lawyers are encouraged to report their own misconduct to the North Carolina State Bar or to a court if the misconduct would otherwise be reportable under this rule. Nevertheless, Rule 1.15-2(p) *requires* a lawyer to report the misappropriation or misapplication of entrusted property, including trust funds, to the North Carolina State Bar regardless of whether the lawyer is reporting the lawyer's own conduct or that of another person.</u>

[2]….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing 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 2nd day of March, 2016.

<u>s/ L. Thomas Lunsford, II</u>
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 9th day of June, 2016.

<u>s/Mark Martin</u>
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 9th day of June, 2016.

s/Ervin, J.
For the Court

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