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OF
NORTH CAROLINA

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[1] Term ended 31 December 2016.
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APPEAL AND ERROR

Court of Appeals dissent and motion for appropriate relief—Supreme Court supervisory authority—The Supreme Court exercised the supervisory authority granted by Article IV, Section 12 of the North Carolina Constitution where the case involved a dissent in the Court of Appeals and a motion for appropriate relief. Although the plain language of N.C.G.S. § 7A-28 precludes Supreme Court review when there is a dissent in the Court of Appeals and the case involves a motion for appropriate relief, a statute cannot restrict the Supreme Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise jurisdiction to review any decision of the courts below. **State v. Todd, 707.**

Impaired driving—blood draw from unconscious defendant—per se exception—other issues not considered--In an impaired driving prosecution involving a blood draw at a hospital from an unconscious defendant, whether a third party was acting as an agent of the State or whether the independent source exception to the exclusionary rule applied were separate determinations from the statutory per se exception. **State v. Romano, 678.**

Preservation of issues—appeal by State—Where the State failed to advance an argument prior to filing its discretionary review petition in the Supreme Court, the State did not waive the right to make the argument on appeal. The question was whether the ruling of the trial court was correct rather than whether the reason given was sound or tenable, and the State had consistently maintained its position. **State v. Baker, 586.**

Rule of Appellate Procedure 2—invoked by Court of Appeals without discussion of merits—The Court of Appeals erred in this case (*Campbell II*) by invoking Rule 2 of the Rules of Appellate Procedure to review defendant's fatal variance argument. The panel in *Campbell II* merely noted that a previous panel of that court had, for the same case (*Campbell I*), invoked Rule 2 to review a similar fatal variance argument and then, without further discussion or analysis regarding Rule 2, the *Campbell II* panel addressed the merits of defendant's argument. The panel failed to exercise its discretion when it did not consider whether defendant's case was one of the rare instances meriting exercise of the court's supervisory power under Rule 2. The case was reversed and remanded to the Court of Appeals for an independent determination of whether the facts and circumstances merited the exercise of the court's discretion to review the case under Rule 2. **State v. Campbell, 599.**

ARBITRATION AND MEDIATION

Doctor's form—handed to patient with other forms—fiduciary relationship—An arbitration agreement between a doctor (Dr. Bryant) and patient (Mr. King) that was obtained as the result of a breach of fiduciary duty from which defendants benefitted was not enforceable. The agreement was one of several forms given to Mr. King to sign when he first arrived at Dr. Bryant's office. Mr. King reposed trust and confidence in Dr. Bryant and provided confidential information even before seeing Dr. Bryant, so that a fiduciary relationship existed at the time that Mr. King signed the arbitration agreement. Defendants violated their fiduciary duty to Mr. King by failing to make full disclosure of the nature and import of the arbitration agreement at or before the time that it was presented for Mr. King's signature. **King v. Bryant, 451.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Miranda rights—knowing and voluntary waiver—by course of conduct— Under the totality of the circumstances, the State established by a preponderance of the evidence that defendant understood his *Miranda* rights but knowingly and voluntarily waived them during a police interrogation. Through his course of conduct, defendant effected a knowing and voluntary waiver of his rights: He listened as the detective read his *Miranda* rights; he spoke coherently and was mature and experienced enough to understand his rights; he did not state that he wanted to remain silent or wanted an attorney; he emphatically denied any wrongdoing and tried to convince the police of his innocence; and he was not threatened or coerced in any way. An affirmative response acknowledging that defendant understood his rights was not required for his waiver to be valid. Further, even assuming defendant denied that he understood his rights, a bare statement that he did not understand, without more, would not outweigh all of the evidence that he understood. **State v. Knight, 640.**

CONSTITUTIONAL LAW

Confrontation Clause—911 calls—The Confrontation Clause did not prohibit the use of information received from an anonymous 911 caller and a reverse call by the 911 operator where the circumstances objectively indicated that the primary purpose for the calls was to enable law enforcement to meet an ongoing emergency and the statements were nontestimonial in nature. **State v. McKiver, 652.**

Effective assistance of appellate counsel—failure to raise sufficiency of evidence—The record was insufficient to determine whether defendant received ineffective assistance of counsel in the Court of Appeals where there was no determination of whether defendant's appellate counsel had a strategic reason to refrain from addressing the sufficiency of the evidence supporting the conviction. The case was remanded to the Court of Appeals. **State v. Todd, 707.**

Eugenics Board compensation—Court of Appeals jurisdiction—In a matter arising from the Eugenics Board and the resulting compensation program, heard first before the Industrial Commission, the Court of Appeals had jurisdiction to consider claimant's constitutional challenge to N.C.G.S. § 143B-426.50(1). The Industrial Commission had no authority to decide constitutional questions. **In re Redmond, 490.**

CRIMINAL LAW

Self-defense—aggressor regaining the right—The trial court did not err, on the evidence, in its self-defense instruction in a prosecution for assault with a deadly weapon inflicting serious injury in a case where both the defendant and the victim pulled guns in an argument over a woman. Historically, North Carolina law did not allow an aggressor using deadly force to regain the right to self-defense when the other responded by using deadly force. However, the General Assembly, by passing N.C.G.S. § 14-51.4, appears to have allowed an aggressor to regain the right to utilize defensive force under certain circumstances (use of non-deadly force). A careful review of the record evidence in this case demonstrates, however, the complete absence of any evidence tending to show that defendant was the aggressor using non-deadly, as compared to deadly, force. **State v. Holloman, 615.**

DIVORCE

Equitable distribution—arbitration and settlement—allegations of fraud—interlocutory appeal—settlement—In an action involving equitable distribution and arbitration in which fraud in the valuation of a business was alleged after a settlement, plaintiff had a right to appeal the trial court's order denying discovery under the substantial rights analysis of N.C.G.S. § 7A-27(b)(3)(a), and a right to appeal may exist under section 7A-27 even if the order is not appealable under the arbitration statute itself. The trial court had discretion to award discovery because the action was pending pursuant to sections 50-53 and 50-54 of the Family Law Arbitration Act. **Stokes v. Crumpton, 713.**

DRUGS

Newly enacted statute—unlawful to possess pseudoephedrine if prior conviction for methamphetamine possession or manufacture—as-applied challenge—active conduct—Where defendant was convicted of violating a newly enacted statute, N.C.G.S. § 90-95(d1)(1)(c), which made it unlawful for any person with a prior conviction for the possession or manufacture of methamphetamine to possess a pseudoephedrine product, based on his purchase of "Allergy Congestion Relief D-ER tabs," the Supreme Court held that his conviction did not violate his federal constitutional right to due process of law. His as-applied challenge failed because his conviction rested upon his own active conduct rather than a "wholly passive" failure to act. **State v. Miller, 658.**

ESTOPPEL

Judicial—collateral attack—inconsistent position—The trial court did not abuse its discretion by invoking the doctrine of judicial estoppel to dismiss counterclaims arising from a failed hotel development project. In a prior related case, defense counsel had assured a federal court that defendant would not collaterally attack the federal judgment by relitigating claims from the same facts. The trial court found that defendant essentially took the action which defense counsel had stated it would not take, thereby adopting an inconsistent position. **Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co., 500.**

LARCENY

Mistaken deposit—constructive possession—The State presented sufficient evidence to support defendant's larceny convictions where defendant, a truck driver and independent contractor, passively but knowingly received an overpayment by direct deposit and then proceeded to withdraw the excess funds against the wishes of the rightful possessor. The company for which defendant was driving (West) had the intent and capability to maintain control and dominion over the funds by effecting a reversal of the deposit; the fact that the reversal order was not successful did not indicate that West lacked constructive possession. Defendant had no possessory interest in the funds for the same reasons. **State v. Jones, 631.**

MOTOR VEHICLES

Driving while impaired—instructions—The standard jury instruction on credibility was sufficient in an impaired driving prosecution, and the trial court adequately conveyed the substance of defendant's requested instructions. Defendant's proposed instructions were meant to ensure that the jury realized it

could consider the evidence presented by defendant of his lack of impairment, notwithstanding the evidence provided by the chemical analysis. **State v. Godwin, 604.**

Driving while impaired—reasonable grounds—There was sufficient evidence in the record to show that a police sergeant had reasonable grounds to believe defendant had committed a driving while impaired offense. The record showed that defendant stopped his vehicle at a congested intersection in the middle of the day, left the vehicle while wearing his sweater backwards, stumbled across four lanes of traffic, had a bottle of rum in his possession, and had vomited on himself and in his vehicle before exiting the vehicle. When police arrived, defendant was incoherent with slurred speech; his eyes were bloodshot; he smelled strongly of alcohol; and he could not stand or sit without assistance. Reasonable grounds in this context is equivalent to probable cause. **State v. Romano, 678.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—anti-deficiency statute—true value of property—evidence not sufficient—The trial court did not err by granting summary judgment for plaintiff-bank in an action under N.C.G.S. § 45-21.36, North Carolina's anti-deficiency statute. The borrower must show that the creditor's successful foreclosure bid was less that the property's true value; merely reciting the statutory language or asserting an unsubstantiated opinion is not sufficient. **United Cmty. Bank v. Wolfe, 555.**

Foreclosure—pleadings—The trial court erred by dismissing plaintiff's foreclosure claim under N.C.G.S. § 1A-1, Rule 12(b)(6) where it applied requirements applicable to non-judicial foreclosures by power of sale to a judicial foreclosure. Foreclosure by action or "judicial foreclosure," unlike non-judicial foreclosure by power of sale, is an ordinary civil action governed by the liberal standard of notice pleading. A missing indorsement at the initial notice-pleading stage did not preclude the bank from proceeding with its civil action. **U.S. Bank Nat'l Ass'n v. Pinkney, 723.**

RAPE

Attempted—evidence sufficient—completed rape—Evidence tending to show that a completed rape occurred in the victim's bedroom was sufficient to support defendant's conviction for attempted rape of a child, and the trial court did not err in denying defendant's motion to dismiss the attempted rape charge for insufficiency of the evidence. **State v. Baker, 586.**

SEARCH AND SEIZURE

Driving while impaired—blood draw—unconscious—In a prosecution for impaired driving, the trial court correctly suppressed blood test results taken from a highly inebriated defendant at a hospital without a warrant. The officer did not attempt to obtain a warrant for defendant's blood, did not believe any exigency existed, and instead expressly relied upon the statutory authorization set forth in N.C.G.S. § 20-16.2(b), allowing the taking and testing of blood from a person who has committed a driving while impaired offense if the person is unconscious or otherwise incapable of refusal. However, unlike breath tests, blood tests require an intrusive piercing of the skin and give law enforcement a sample that can be preserved and from which more than a blood alcohol reading can be determined. The United States Supreme Court has concluded that the

SEARCH AND SEIZURE—Continued

Fourth Amendment does not permit warrantless blood tests incident to arrest for drunk driving. The analysis here is limited to N.C.G.S. § 20-16.2(b) and does not address any other provision of the implied-consent statute. **State v. Romano, 678.**

WITNESSES

Expert—officer implicitly qualified—The trial court did not err in an impaired driving prosecution by allowing a police officer to testify about the Horizontal Gaze Nystagmus (HGN) test and about defendant's impairment even though the officer was not explicitly qualified as an expert. The trial court implicitly found that the officer was qualified to give expert testimony. Moreover, it is evident that the General Assembly envisioned this scenario and made clear provision to allow testimony from an individual who has successfully completed training in HGN and meets the criteria set forth in Rule of Evidence 702(a). **State v. Godwin, 604.**

Expert—repressed memory and suggestibility of memory—The trial court did not err in a prosecution for child sex offenses by excluding the testimony of a defense expert regarding repressed memory and the suggestibility of memory. A defense expert is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues concerning the prosecuting witness at trial. Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony, and the record here demonstrated sufficient evidence to support the trial court's decision to exclude the testimony. **State v. Walston, 547.**

WORKERS' COMPENSATION

Compensable condition—effect on wage-earning capacity—In a Workers' Compensation case, the Industrial Commission erred by failing to address the effects of plaintiff-employee's tinnitus in determining whether he lost wage-earning capacity. The case was remanded to the Commission for findings addressing plaintiff's wage-earning capacity, considering plaintiff's compensable tinnitus in the context of all the preexisting and coexisting conditions bearing upon his wage-earning capacity. **Wilkes v. City of Greenville, 730.**

Form 60 compensable injuries—additional medical treatment sought—presumption in favor of plaintiff—Where plaintiff-employee sustained significant physical injuries as a result of an automobile accident that occurred during the course and scope of his employment, and defendant-employer filed a Form 60 accepting that plaintiff had suffered compensable injuries by accident and began paying temporary total compensation and medical compensation for his injuries, the Industrial Commission erred by failing to give plaintiff the benefit of a presumption that the additional medical treatment he sought was for conditions related to his compensable injuries. Plaintiff was entitled to a presumption that additional medical treatment for tinnitus, anxiety, and depression was related to his compensable conditions. **Wilkes v. City of Greenville, 730.**

Permanent partial disability—findings and conclusions—insufficient—The Industrial Commission in a workers' compensation case did not carry out a 2014 mandate of the Court of Appeals on remand that it make additional findings of fact and conclusions of law on the issue of plaintiff's entitlement to permanent partial disability benefits under N.C.G.S. § 97-31. The case was remanded for compliance with the 2014 mandate. **Harrison v. Gemma Power Sys., LLC, 572.**

SCHEDULE FOR HEARING APPEALS DURING 2017

NORTH CAROLINA SUPREME COURT

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

February 13, 14, 15
March 20, 21, 22
April 10, 11, 12
May 9
June 13
August 28, 29, 30, 31
October 9, 10, 11, 12
November 6, 7, 8
December 11, 12, 13

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

No. 294PA14

Filed 27 January 2017

Arbitration and Mediation—doctor's form—handed to patient with other forms—fiduciary relationship

An arbitration agreement between a doctor (Dr. Bryant) and patient (Mr. King) that was obtained as the result of a breach of fiduciary duty from which defendants benefitted was not enforceable. The agreement was one of several forms given to Mr. King to sign when he first arrived at Dr. Bryant's office. Mr. King reposed trust and confidence in Dr. Bryant and provided confidential information even before seeing Dr. Bryant, so that a fiduciary relationship existed at the time that Mr. King signed the arbitration agreement. Defendants violated their fiduciary duty to Mr. King by failing to make full disclosure of the nature and import of the arbitration agreement at or before the time that it was presented for Mr. King's signature.

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

Chief Justice MARTIN dissenting.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 235 N.C. App. 218, 763 S.E.2d 338 (2014), affirming an order entered on 10 May 2013 by Judge Lucy N. Inman in Superior Court, Cumberland County. After hearing oral argument on 18 May 2015 and receiving additional findings of fact following the entry of a remand order on 19 February 2016, the Court ordered the parties to submit supplemental briefs. Additional issues raised in the supplemental briefs heard on 31 August 2016.

Beaver, Courie, Sternlicht, Hearp & Broadfoot, P.A., by Mark A. Sternlicht, for plaintiff-appellees.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Robert D. Walker, Jr., O. Drew Grice, Jr., and Alexandra L. Couch, for defendant-appellants.

Zaytoun Law Firm, PLLC, by Matthew D. Ballew, and Patterson Harkavy LLP, by Burton Craige, for North Carolina Advocates for Justice, amicus curiae.

ERVIN, Justice.

This case arises out of a medical malpractice action that plaintiffs, Robert E. King and his wife, Jo Ann O'Neal, brought against defendants, Michael S. Bryant, M.D., and Village Surgical Associates, P.A. According to the allegations contained in plaintiffs' complaint, Mr. King was scheduled to undergo a bilateral inguinal hernia repair to be performed by Dr. Bryant at the Fayetteville Ambulatory Surgery Center on 14 May 2009. At the time of his initial appointment with Dr. Bryant, Mr. King was presented with an Agreement to Alternative Dispute Resolution (arbitration agreement) that defendants routinely presented to new patients along with other documents prior to the first occasion on which a patient met with a physician. The arbitration agreement provided that:

> **In accordance with the terms of the Federal Arbitration Act, 9 USC 1-16, I agree that any dispute arising out of or related to the provision of health-care services by me, by Village Surgical Associates, PA, or its employees, physician members, and agents shall be subject to final and binding resolution through private arbitration.**
>
> The parties to this Agreement shall agree upon three Arbitrators and at least one arbitrator of the three shall be a physician licensed to practice medicine and shall be board certified in the same specialty as the physician party. The remaining Arbitrators either shall be licensed to practice law in NC or licensed to practice medicine in NC. The parties shall agree upon all rules that shall govern the arbitration, but may be guided by the Health Care Claim Settlement Procedures of the American Arbitration Association, a copy of which is available to me upon request. I understand that this agreement includes all health care [sic] services which previously have been or will in the future be provided to me, and that this

> agreement is not restricted to those health care [sic] services rendered in connection with any particular treatment, office or hospital admission. I understand that this agreement is also binding on any individual or entity and not a precondition to receiving health care [sic] services.

Mr. King, a witness, and Dr. Bryant each signed the arbitration agreement on 29 April 2009.

According to the unchallenged findings of fact, a front desk employee at Village Surgical Associates provided Mr. King with several intake forms to complete and sign while he waited to meet Dr. Bryant. The initial intake forms asked Mr. King to provide personal and medical history information and to sign the signature lines on all of the forms, including the arbitration agreement. Mr. King stated in his affidavit that he was then provided with a second set of documents, which addressed insurance and payment-related issues, after he had met with Dr. Bryant. Mr. King acknowledged that he did not read any of the documents that he signed after his initial meeting with Dr. Bryant and stated that he had believed them to be "just a formality." Mr. King denied having received a copy of the arbitration agreement on the day that it was signed and asserted that the contents of the agreement were not clear to him even after he had read it. Mr. King contended that, "[i]f the agreement had been brought to my attention and I had been told signing it was optional, I would not have signed it."[1]

In the course of the performance of the hernia repair procedure, Dr. Bryant injured Mr. King's distal abdominal aorta, resulting in abdominal bleeding. Although Dr. Bryant was able to repair Mr. King's injury, the necessary remedial procedures led to occlusion of an artery, a thromboembolism to Mr. King's right lower leg, and acute ischemia in Mr. King's right foot. After undergoing the performance of an immediate revascularization at Cape Fear Valley Health Systems for the purpose of salvaging his right leg, Mr. King remained hospitalized until 26 May 2009. At the time of his discharge, Mr. King continued to suffer from complications related to his abdominal aortic injury and needed additional treatment. As a result of the injury that he sustained during the hernia repair procedure, Mr. King incurred unexpected medical expenses, abdominal scarring, lost wages, numbness, and a limited ability to use his right leg and foot.

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1. Plaintiffs have not complained about, much less challenged the validity of, any of the other documents that Mr. King signed during his visit to the Village Surgical Center on 29 April 2009. The identity and contents of these documents are not clear from the record.

On 28 September 2011, plaintiffs filed a complaint against defendants in the Superior Court, Cumberland County, seeking damages for medical malpractice. On 7 November 2011, defendants filed a motion seeking to have further litigation in this action stayed and the arbitration agreement that had been entered into between Mr. King and defendants enforced and an answer in which defendants denied the material allegations of plaintiffs' complaint. Plaintiffs responded to defendants' motion to stay and enforce the arbitration agreement by arguing that:

> [T]he purported agreement is not enforceable for reasons that include but are not limited to the undue, prohibitive financial burden that enforcement of the agreement would have on plaintiffs by requiring the hiring of three arbitrators, one who must be a board certified physician in the same specialty as the defendant, Michael S. Bryant, M.D., and two who must be attorneys or physicians licensed in North Carolina; the inherent unfairness of requiring one arbitrator be a member of the same profession and medical specialty as the defendant, . . . especially in light of the absence of any comparable requirement for an arbitrator to be similarly affiliated with the plaintiffs . . . .

On 13 February 2012, defendants filed a motion seeking the entry of an order compelling arbitration. On 23 March 2012, the trial court entered an order denying defendants' motion to enforce the arbitration agreement on the basis of conclusions that:

> 4. The Agreement to Alternative Dispute Resolution leaves material portions open to future agreements by providing, *inter alia*, that the parties shall agree upon three arbitrators and that the parties shall agree upon all rules that shall govern the arbitration.
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> 5. At most, the Agreement to Alternative Dispute Resolution is an "agreement to agree" that is indefinite and depends on one or more future agreements. *Seawell v. Continental Cas. Co.*, 84 N.C. App. 277, 281, 352 S.E.2d 263, 265 (1987).
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> 6. The Agreement to Alternative Dispute Resolution is not a binding contract and is not enforceable.

Defendants noted an appeal to the Court of Appeals from the trial court's order.

On 5 February 2013, the Court of Appeals filed an opinion reversing the March 2012 order and remanding this case for further proceedings, *King v. Bryant*, 225 N.C. App. 340, 737 S.E.2d 802 (2013) (*King I*), on the grounds "that the trial court erred in concluding the Agreement between the parties was too indefinite to be enforced," *id.* at 345, 737 S.E.2d at 807. According to the Court of Appeals, "there was clearly an offer to arbitrate any dispute which arose out of Defendants' provision of medical care, as well as an acceptance of that offer by Mr. King." *Id.* at 346, 737 S.E.2d at 807. Although plaintiffs had argued before the trial court and the Court of Appeals that the arbitration agreement was unenforceable on unconscionability grounds, the Court of Appeals declined to address that issue given that the trial judge in the March 2012 order had not made the necessary factual findings. *Id.* at 347, 737 S.E.2d at 808. According to the Court of Appeals, "the trial court is the appropriate body to determine whether the agreement is unconscionable," *id.* at 347-48, 737 S.E.2d at 808 (citation omitted), with the needed unconscionability analysis to "be undertaken with an understanding of the unique nature of the physician/patient relationship," *id.* at 348, 737 S.E.2d at 808. In addition, the Court of Appeals noted that, "[u]nder North Carolina law, fiduciary relationships create a rebuttable presumption that the plaintiff put his trust and confidence in the defendant as a matter of law." *Id.* at 349, 737 S.E.2d at 809. As a result, the Court of Appeals required that these issues be addressed on remand. *Id.* at 350, 737 S.E.2d at 809.

On 10 May 2013, the trial court entered an order on remand determining that, given the nature of the fiduciary relationship that existed between Mr. King and defendants, defendant Bryant "had a fiduciary duty to disclose to his patient all facts material to their transaction." More specifically, the trial court's May 2013 order found as a fact that:

> 2. Mr. King, now 68, has no educational degree beyond high school and his job requires little reading. He has minimal experience reading legal documents.
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> 3. Defendant Village Surgical Associates, P.A. ("Village Surgical") has experience in managing patient complaints, responding to claims of medical negligence made by patients, and resolving disputes through arbitration.
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> 4. On April 29, 2009, Plaintiffs visited Defendant's office for the first time to consult with Defendant Bryant about performing laparoscopic surgery on Plaintiff King

to repair a hernia. Plaintiff King had been referred to Defendants by his primary care physician.

5. While Plaintiffs were waiting to meet Defendant Bryant and consult with him about performing surgery, Defendant's receptionist provided Plaintiff King with several intake forms to complete and sign. Plaintiff King considered the forms to be a formality.

6. Neither the receptionist, nor Defendant Bryant, nor any agent of Defendants called to Plaintiff King's attention the fact that one of the forms he was asked to sign, the Agreement, differed from all of the other forms because it did not concern medical information, insurance information, or payment for the surgery, all routine for a new patient. Nor did anyone disclose to Plaintiff King that the Agreement sought to foreclose his access to the judicial process in the event that any dispute arose out of or related to the surgery to be performed by Defendant Bryant.

. . . .

8. The Agreement does not provide that by signing it, the patient waives his or her right to a trial. The Agreement does not include the word "jury" or "judge" or "trial." The Agreement does not provide that the patient can consult an attorney before signing it.

9. There is no evidence that the physician or any agent of Defendants discussed with the patient, Plaintiff King, any provision of the Agreement.

. . . .

11. At the time Plaintiff King signed the Agreement and provided his medical information on intake forms, even though he had not yet met Defendant Bryant, he was already placing his confidence and trust in Defendants, as demonstrated by his willingness to share his confidential medical information.

. . . .

14. The first, bold-faced paragraph of the Agreement is poorly drafted, confusing, and nonsensical. For

example, it refers to the "provision of healthcare services by me," suggesting that "me" refers to the physician rather than the patient.

15. The Agreement repeatedly refers to arbitration without defining the term. The Agreement includes no mention whatsoever of the judicial process, a trial, or a jury. The Agreement does not disclose Defendants' intent for Plaintiff King to waive his rights to the judicial process, including his right to a jury trial, in the event of any claim arising from or related to the surgery. A person of Plaintiff King's education and experience should not reasonably have been expected to know from the language of the Agreement, or from any information provided to him by Defendants, that he had a right to a jury trial to resolve any potential dispute with his surgeon. Nor should he have been expected to understand from the language of the Agreement or other information provided to him by Defendants that by signing the Agreement, he would waive his right to a jury trial.

16. The last sentence of the second paragraph in the Agreement starts with complex but complete clauses . . . and ends with an incomplete clause . . . . A person of Plaintiff King's education and experience should not reasonably be expected to understand the last, tacked on, incomplete clause to mean that he did not need to sign the Agreement in order for Defendant Bryant to perform the surgery.

17. Plaintiff King read the Agreement after a copy was provided to him by his attorney, and he still did not understand its contents or the intended consequence of signing it.

18. Unlike arbitration agreements which have been upheld and enforced in medical negligence cases, the Agreement includes no provision allowing or recommending that the patient consult with an attorney regarding the Agreement prior to signing it.

19. Defendants sought Plaintiff's signature on the Agreement to benefit themselves.

> 20. The Agreement's provision requiring at least one physician arbitrator, and its provision allowing all three arbitration panelists to be a physician, confers a benefit to Defendants and detriment to Plaintiffs.
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> . . . .
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> 23. Ms. Ramos, a receptionist at Defendant Village Surgical, states in a sworn affidavit that the form arbitration agreement is included in "registration paperwork" presented to each new patient when he or she visits the practice for an initial appointment, prior to meeting with a physician. . . . It is reasonable to infer from Ms. Ramos' sworn statement that, in fact, it is the practice of Defendants to obscure the form arbitration agreement by presenting it among a pile of other documents without pointing it out or explaining its contents.

Based upon these findings of fact, the trial court concluded as a matter of law in the May 2013 order that:

> 3. Defendants were fiduciaries of Plaintiff King as the result of the physician-patient relationship.
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> 4. Defendant Bryant and other agents of Defendants breached their fiduciary duties to Plaintiff King by failing to disclose to him all material terms of the Agreement and failing to deal with him openly, fairly, honestly, and without imposition, oppression, or fraud in procuring his signature on the Agreement.
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> . . . .
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> 6. The Agreement is the product of constructive fraud and is therefore unenforceable.
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> 7. The Agreement is unconscionable and is therefore unenforceable.

Defendants noted an appeal to the Court of Appeals from the trial court's May 2013 remand order declining to enforce the arbitration agreement.

On 15 July 2014, the Court of Appeals filed an unpublished opinion affirming the May 2013 remand order on unconscionability grounds. *King v. Bryant*, 235 N.C. App. 218, 763 S.E.2d 338, 2014 WL 3510481 (2014) (unpublished) (*King II*). Although defendants had argued on appeal that the arbitration agreement was "not a product of constructive

fraud and not unconscionable" and that the trial court had "erred by denying their motion to compel arbitration," *King II*, 2014 WL 3510481 at *2, the Court of Appeals noted that "[d]efendants do not argue that the trial court's findings of fact are not based on competent evidence," *id.* at *6, making the trial court's findings "binding on appeal," *id.* at *6 n.1. In addition, the Court of Appeals declined to address defendants' contention that "a fiduciary relationship did not exist at the time that Mr. King signed the arbitration agreement because [Dr. Bryant] had not yet accepted King as a patient," *id.* at *6, given that the Court had already decided in *King I* "that a fiduciary relationship existed between the parties and directed the trial court to consider that fact on remand," *id.* (citing *N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631 (1983) (concluding that, "once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case")).

Upon reaching the unconscionability issue, the Court of Appeals noted this Court's holding in *Tillman v. Commercial Credit Loans, Inc.*, to the effect that, although

> [a]rbitration is favored in North Carolina. . . . "equity may require invalidation of an arbitration agreement that is unconscionable." A court will find a contract to be unconscionable "only when the inequity of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other."

362 N.C. 93, 101-02, 655 S.E.2d 362, 369-70 (2008) (internal citations omitted) (quoting *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 302 (4th Cir. 2002), and *Brenner v. Little Red Sch. House Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981)). "A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability." *Id.* at 102, 655 S.E.2d at 370 (citations omitted). However,

> [s]ince *Tillman*, the United States Supreme Court has issued two important opinions on the use of state law to set aside an arbitration agreement when that agreement is governed by the FAA: *AT&T Mobility v. Concepcion*, ___ U.S. ___, 179 L.Ed.2d 742 (2011) (determining that the FAA preempted California's judicial rule prohibiting class

> waivers in consumer arbitration agreements contained within contracts of adhesion) and *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 186 L.Ed.2d 417 (2013) (holding that the FAA does not permit courts to invalidate an arbitration agreement on the grounds that it does not permit class arbitration).

King II, 2014 WL 3510481, at *8. The Court of Appeals had addressed the impact of *Concepcion* and *Italian Colors* on *Tillman* in *Torrence v. Nationwide Budget Finance*, 232 N.C. App. 306, 753 S.E.2d 802, *disc. rev. denied and cert. denied*, 367 N.C. 505, 759 S.E.2d 88 (2014), and stated that, "[w]hile both *Concepcion* and *Italian Colors* dealt with class action waivers, underlying those decisions was a broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated." *Torrence*, 232 N.C. App. at 321, 753 S.E.2d at 811 (citation omitted). As a result, in *Torrence*, the Court of Appeals held that "(1) the 'prohibitively high' cost factor is no longer applicable to an unconscionability analysis; (2) an agreement's lack of mutuality, alone, is not sufficient to justify a finding of substantive unconscionability; and (3) the prohibition of joinder of claims and class actions does not render an arbitration agreement unconscionable." *King II*, 2014 WL 3510481 *8 (citing *Torrence*, 232 N.C. App. at 322, 753 S.E.2d at 811-12).

In spite of the limitations on the use of state law to preclude enforcement of arbitration agreements noted in *Torrence*, the Court of Appeals concluded that "the trial court correctly determined that the arbitration agreement here is unconscionable," *id.*, given defendant's failure to take "any *active* steps, in accordance with their fiduciary duty, to make a full, open disclosure of material facts to King before he signed the arbitration agreement," *id.* at *9 (internal quotations marks omitted). The Court of Appeals concluded that the arbitration agreement is procedurally unconscionable because,

> [g]iven (1) the fact that we analyze the agreement here in the context of the fiduciary duty Defendants owed King, (2) the disparate levels of sophistication between the parties, (3) the nature of the delivery of the agreement, and (4) *Defendants' burden* because of their fiduciary duty to King to provide full and open disclosure of the material facts surrounding the transaction between the parties, we hold that the arbitration agreement suffered from significant procedural unconscionability. King did not have a

> meaningful choice between whether to sign the agreement or not. Accordingly, Defendants' argument is overruled.

Id. at *10. Similarly, the Court of Appeals found the arbitration agreement to be substantively unconscionable because it is "a harsh, one-sided and oppressive instrument." *Id.* As a result, after concluding that "this agreement is unconscionable because of Defendants' failure to properly prepare and present the arbitration agreement to King in the context of their confidential, physician-patient, fiduciary relationship," *id.* at *11, the Court of Appeals affirmed the remand order, *id.*

On 18 August 2014, defendants filed a petition for discretionary review requesting this Court to grant further review of the Court of Appeals' decision in *King II*. On 18 December 2014, this Court granted defendants' discretionary review petition. After briefing and oral argument, this Court entered an order on 21 August 2015 remanding this case to the Superior Court, Cumberland County, for the making of further findings of fact relating to the issue of whether a physician-patient relationship existed at the time that Mr. King signed the arbitration agreement on the grounds that both the trial court's May 2013 remand order and the Court of Appeals decision in *King II* had "assumed the existence of such a relationship" and that the record was devoid of sufficient findings to permit the proper resolution of this case in the absence of such findings.

On 6 November 2015, Judge Mary Ann Tally entered an order on remand making the factual findings requested in this Court's remand order. In the November 2015 order, the trial court found as fact that:

> 5. When Mr. King completed the forms by providing his confidential medical history, symptoms, personal identifying information, and health insurance [ ] information, and signing the arbitration agreement, he trusted Dr. Bryant as his doctor, Dr. Bryant's practice, and its employees, particularly because of the referral from his family doctor. Mr. King would not have provided private and confidential information and signed the documents, including the arbitration agreement, if he had not considered Dr. Bryant to be his doctor and trusted him.
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> 6. Patient trust is fundamental to the physician-patient relationship. The requirements of that relationship include adequate communication between the physician and patient; there be no conflict of interest

> between the patient and the physician; personal details of the patient[']s life shared with the physician be held in confidence; there be respect for the patient's autonomy; patient primacy; and selflessness. These requirements are described in the North Carolina Medical Board Position Statement, *The physician-patient relationship*. Each of these requirements applied to the relationship between defendants and Mr. King.
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> 7. Each of those requirements arose because a physician-patient relationship existed between defendants and Mr. King. . . . [A] physician-patient relationship can exist before a physician meets a patient, particularly when the physician delegates to others certain duties that are involved in the relationship, even though this may "not fit traditional notions of the doctor-patient relationship." *Mozingo v. Pitt Cnty. Mem. Hosp., Inc.*, 331 N.C. 182, 188, 415 S.E.2d 341, 344-45 (1992). These cases support the fact that a physician-patient relationship can exist when a physician has fewer than all of the duties that attach to the relationship after the duty to treat arises or when a physician, in today's modern health care environment, relies on others to participate in activities necessary for patient care.
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> 8. By analogy, the [a]ttorney-client privilege protects "not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390, 394 (1981).
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> 9. The physician-patient relationship began before Mr. King signed the arbitration agreement and was in existence at the time he signed the arbitration agreement.

After receiving these additional findings of fact concerning the physician-patient relationship issue, this Court ordered supplemental briefing and argument. In their supplemental brief, defendants urge us to "disregard the findings of fact entered by the trial court, find that no physician-patient relationship existed at the time Mr. King signed the arbitration agreement, and reverse the decision of the Court of Appeals affirming the trial court's order on the grounds that the arbitration agreement is unconscionable." Plaintiffs, on the other hand, argue that the findings contained in the November 2015 order establish that a physician-patient

relationship existed when Mr. King signed the arbitration agreement, so that "this Court should affirm the holdings that the Agreement is unenforceable due to constructive fraud and unconscionability."

Although they have vigorously challenged the legal effect of the factual findings contained in the May 2013 and November 2015 orders, defendants have not challenged the sufficiency of the evidence to support any of those findings. According to well-established North Carolina law, "[w]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing, *inter alia*, *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). However, defendants do argue that the findings of fact fail to support the conclusions of law to the effect that "[d]efendants were fiduciaries of Plaintiff King as the result of the physician-patient relationship" and that "[t]he Agreement is unconscionable and is therefore unenforceable." Unlike findings of fact, "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citations omitted). As a result, we will review defendants' challenges to these conclusions of law using a de novo standard of review.

After carefully considering the record and the briefs and arguments submitted by the parties, we believe that the proper resolution of this case hinges upon the nature of the relationship that existed between Mr. King and Dr. Bryant at the time that the arbitration agreement was signed. Although the parties, especially in their supplemental briefs, have placed particular emphasis upon the issue of whether a physician-patient relationship could have existed between Mr. King and Dr. Bryant before Dr. Bryant met with and accepted Mr. King as a patient, we are not, after extensive reflection, convinced that this case is properly viewed through a physician-patient relationship lens. Instead, we believe that this case is most properly understood as revolving around the issue of whether a fiduciary relationship existed between Mr. King and Dr. Bryant independent of the existence of a physician-patient relationship at the time that Mr. King signed the arbitration agreement.[2]

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2. Defendants have never contended at any point in this litigation that the breach of fiduciary duty issue, which was clearly discussed in the trial court and raised before the Court of Appeals during the proceedings that led to *King II*, is not properly before the Court.

"For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citing *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984), and *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971)). "The courts generally have declined to define the term 'fiduciary relation' and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or property of either." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). "In general terms, a fiduciary relation is said to exist [w]herever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951) (internal quotation marks omitted).

A number of relationships have been held to be inherently fiduciary, including the relationships between spouses, attorney and client, trustee and beneficiary, members of a partnership, *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263 266, and physician and patient, *Watts v. Cumberland County Hospital System Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986). However,

> [t]he relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. . . . . Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.

Abbitt, 201 N.C. at 598, 160 S.E. at 906-07 (internal quotation marks omitted); *see also Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266 (concluding that fiduciary relationships are characterized by "a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party").

If a fiduciary relationship is found to exist, the fiduciary is "held to a standard 'stricter than the morals of the market place' . . . '[n]ot honesty alone, but the punctilio of an honor the most sensitive, is [then] the standard of behavior.' " *Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266 (second alteration in original) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)). Liability for breach of fiduciary duty "is based on [the taking advantage of] a confidential relationship rather than a specific misrepresentation." *Barger v. McCoy Hillard Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678-79 (1981)); *Priddy v. Kernersville Lumber Co.*, 258 N.C., 653, 658, 129 S.E.2d 256, 261 (1963) (stating that liability for breach of fiduciary duty "may exist without any fraudulent intent"). As a result, "[w]here a relation of trust and confidence exists between the parties, there is a duty to disclose all material facts and failure to do so constitutes" a breach of fiduciary duty. *Vail*, 233 N.C. at 114, 63 S.E.2d at 206 (internal quotation marks omitted).[3] However, before liability for breach of fiduciary duty can exist, it must be shown that the defendant sought to benefit himself at the expense of the other party. *Barger*, 346 N.C. at 666-67, 488 S.E.2d at 224.

The record evidence, as reflected in the factual findings contained in the May 2013 and November 2015 orders, demonstrates that Mr. King was referred to Dr. Bryant by his family practitioner for the purpose of having a hernia repair procedure performed. Individuals consult with surgeons, like they do with other physicians, because such persons possess "special knowledge and skill in diagnosing and treating diseases and injuries, which the patient lacks;" accordingly, "the patient has sought and obtained the services of the physician because of such special knowledge and skill." *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985) (internal quotation marks omitted). Upon arrival at defendants' office, Mr. King was presented with a collection of documents, including the arbitration agreement, and asked to complete them. The majority of the documents that Mr. King was requested to

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3. The elements of a claim for breach of fiduciary relationship are the same as those for constructive fraud. *See Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971) (stating that, "[w]here a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud" (citing *Vail*, 233 N.C. 109, 63 S.E.2d 202)); *Rhodes v. Jones*, 232 N.C. 547, 548, 61 S.E.2d 725, 726 (1950) (stating that "[c]onstructive fraud often exists where the parties to a transaction have a special confidential or fiduciary relation which affords the power and means to one to take undue advantage of, or exercise undue influence over the other." (internal quotation marks omitted) (citing *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943)).

complete and sign involved the provision of medical information, which is inherently sensitive and confidential in nature, for Dr. Bryant's use in determining whether to accept Mr. King as a patient and in determining how he should be treated. No one directed Mr. King's attention to the arbitration agreement, which was only one of a number of documents presented to him on that occasion, or made any attempt to explain the ramifications that would result from any decision on his part to sign it. After Mr. King completed and signed these documents and met with Dr. Bryant, Dr. Bryant agreed to assume responsibility for providing Mr. King with medical care and treatment.

A careful examination of the information contained in the findings of fact made in the May 2013 and November 2015 orders persuades us that, regardless of whether a physician-patient relationship existed between Mr. King and Dr. Bryant at the time that the arbitration agreement was signed, there was a confidential relationship between them at that point. It is difficult for us to see how one could reach any conclusion other than that Mr. King reposed trust and confidence in Dr. Bryant, to whom he had been referred by his family physician for the purpose of receiving surgical treatment. As we have already noted, the fact that Mr. King decided to consult Dr. Bryant constituted recognition on Mr. King's part that Dr. Bryant possessed "special knowledge and skill in diagnosing and treating diseases and injuries, which the patient lacks." *Black*. 312 N.C. at 646, 325 S.E.2d at 482. Before he even saw Dr. Bryant, Mr. King demonstrated sufficient trust and confidence in him to provide Dr. Bryant with confidential medical information. Finally, unlike Dr. Bryant, Mr. King had received a limited education and had little to no experience interpreting legal documents. As a result, we conclude that a fiduciary relationship existed between Mr. King and Dr. Bryant at the time that Mr. King signed the arbitration agreement.

Similarly, we conclude that defendants violated their fiduciary duty to Mr. King by failing to make full disclosure of the nature and import of the arbitration agreement to him at or before the time that it was presented for his signature. Instead of specifically bringing this agreement, which substantially affected his legal rights in the event that an untoward event occurred during the course of the treatment that he received from defendants, to Mr. King's attention and explaining it to him, defendants presented Mr. King with the arbitration agreement, which, at a minimum, could have been worded more clearly, in a collection of documents, thereby creating the understandable impression that the arbitration agreement was simply another routine document that Mr. King needed to sign in order to become a patient. Moreover, consistent with

the unchallenged findings of fact, defendants benefitted from Mr. King's action in signing the arbitration agreement by ensuring that any subsequent dispute between the parties would be resolved using the forum, procedures, and decision makers of their choice. As a result, the findings of fact contained in the May 2013 and November 2015 orders establish that defendants failed to act consistently with their fiduciary duty to Mr. King by requesting that he sign a document with substantial legal ramifications and which they believed to be of benefit to themselves without making full disclosure to Mr. King.

Aside from the fact that defendants have failed to clearly advance a federal preemption argument in reliance upon *Concepcion* and related decisions in the briefs that they filed before this Court, *State v. Garcell*, 363 N.C. 10, 41, 678 S.E.2d 618, 638 (stating that, "[d]espite citing due process concerns to the trial court, defendant fails to adequately develop a constitutional claim on appeal and has thus abandoned any such argument") (citing N.C. R. App. P. 28(a), (b)(6))), *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009), and the fact that defendants have made no attempt to show that the present arbitration agreement is subject to the Federal Arbitration Act,[4] we do not believe that our decision in this case is in any way inconsistent with the federal preemption principles enunciated in *Concepcion* and related cases. As those decisions clearly recognize, arbitration agreements are subject to invalidation based upon " 'generally applicable contract defenses, such as fraud,[[5]] duress, or unconscionability,' but not by defenses that

4. Any federal preemption claim advanced in this case pursuant to *Concepcion* and related decisions must rest upon 9 U.S.C. § 2, which applies to "contract[s] evidencing a transaction involving commerce." The necessary nexus between the relevant transaction and "interstate commerce" exists in the event that "the 'transaction' in fact 'involv[e][s]' interstate commerce, even if the parties did not contemplate an interstate commerce connection." *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753, 769 (1995) (first set of brackets in original). Given that the present record contains no indication that the agreement between the parties constitutes a "transaction involving commerce," 9 U.S.C. § 2 (2012), and given that the burden of demonstrating the applicability of the Federal Arbitration Act rests upon defendants, *Sillins v. Ness*, 164 N.C. App. 755, 760, 596 S.E.2d 874, 877-78 (2004) (observing that "defendants were required to submit sufficient evidence in support of their motion to compel arbitration to establish that plaintiff's contract evidenced a transaction involving interstate commerce" and reversing and remanding for additional findings an order denying arbitration, while noting that "defendants offered no evidence in support of their motion to compel arbitration apart from the employment agreement" itself), a necessary precondition to federal preemption under *Concepcion* and related cases simply does not appear to exist in this case.

5. According to well-established North Carolina law, a breach of fiduciary duty "constitutes fraud." *Link*, 278 N.C. at 192, 179 S.E.2d at 704.

apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[6] *Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1746, 179 L. Ed. 2d at 751 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902, 909 (1996)) (other citations omitted). A decision to refrain from enforcing the agreement on breach of fiduciary duty grounds does not rest upon the fact that it provides for the arbitration of medical negligence claims, does not treat arbitration agreements differently than other contracts, and does not make the enforcement of arbitration agreements more difficult than the enforcement of any other contract. On the contrary, we would have reached the same result on these facts with respect to any agreement that substantially affected Mr. King's substantive legal rights, such as an agreement absolving defendants from the necessity for compliance with otherwise applicable confidentiality requirements, providing for the transfer of items of real or personal property from Mr. King to defendants, or waiving any tort or contract-based claims that Mr. King might have had against either or both defendants. Thus, since the breach of fiduciary duty defense to enforcement of the agreement that we uphold in this case does not apply "only to arbitration" or "derive [its] meaning from the fact that an agreement to arbitrate is at issue," *id.* at 339, 131 S. Ct. at 1746, 179 L. Ed. 2d at 759, a refusal to enforce an arbitration agreement on that basis does not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* at 352, 131 S. Ct. at 1753, 179 L. Ed. 2d at 759 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 2d 581, 587 (1941)). Instead, consistently with *Prima Paint Corp. v. Flood & Conklin Manufacturing. Co.*, 388 U.S. 395, 403-04, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270, 1277 (1967), our decision simply recognizes that a "claim [of] fraud in the inducement of the arbitration [agreement] itself—an issue which goes to the 'making' of the agreement to arbitrate—[is one that a] court may proceed to adjudicate."[7] As a result,

6. As the language quoted in the text of this opinion clearly recognizes, a party is entitled to challenge the enforceability of an arbitration agreement on recognized state law grounds in addition to unconscionability.

7. Given that judicial consideration of fraud-based challenges to the enforceability of arbitration agreements is limited, by virtue of *Prima Paint*, to instances in which the arbitration agreement, rather than the entire contract between the parties, was induced by fraud, the fact that the "benefit" that defendants derived from the existence of the arbitration agreement in this case was the right to litigate any dispute between the parties in an arbitral rather than a judicial forum has no bearing on a proper analysis of any federal preemption issue that might be before us in this case. Any other result, given the limitations that *Prima Paint* places upon judicial challenges to the enforceability of arbitration agreements predicated on fraud or some similar defense, would effectively eliminate the ability of a party to assert such a defense despite *Concepcion's* recognition of its continued viability.

our decision to refrain from enforcing the arbitration agreement at issue in this case is not precluded by the doctrine of federal preemption.

Thus, for all of these reasons, we hold that the arbitration agreement at issue in this case was obtained as a result of defendants' breach of a fiduciary duty that they owed to Mr. King.[8] In light of that determination, we hold that the Court of Appeals did not err by upholding the trial court's decision to deny defendants' motion to enforce the arbitration agreement.[9] We do, however, wish to make clear that nothing in our decision in this case should be understood to cast any doubt upon the ability of physicians and patients, assuming that proper disclosure is made, to enter into appropriately drafted agreements providing for the arbitration of disputes like the one that underlies this case. However, given our determination that Mr. King had entered into a fiduciary relationship with Dr. Bryant at the time that the arbitration agreement was signed and the fact that defendants did not make full disclosure to Mr. King before presenting the agreement at issue in this case for his signature, we hold that the arbitration agreement was obtained as the result of a breach of fiduciary duty from which defendants benefitted and is, for that reason, unenforceable. Thus, we modify and affirm the decision of the Court of Appeals in *King II* by holding the arbitration agreement unenforceable on breach of fiduciary duty, as opposed to unconscionability, grounds.

MODIFIED AND AFFIRMED.

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

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8. In view of our determination that the arbitration agreement is unenforceable on breach of fiduciary duty grounds, we need not address plaintiff's unconscionability claim, *Vail*, 233 N.C. at 114, 63 S.E.2d 206 (stating that, in the event of a breach of fiduciary duty, " 'the transaction will be set aside even though it could not have been impeached had no such relation existed, whether the unconscionable advantage was obtained by misrepresentation, concealment or suppression of material facts, artifice, or undue' advantage" (quoting 23 Am. Jur. *Fraud and Deceit* § 14 (1939))), even if there is no finding of unconscionability.

9. The decision of the Court of Appeals in *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 721 S.E.2d 712 (2012), has no bearing upon the proper resolution of this case given the absence of a claim that the contract at issue in that case was allegedly procured as the result of a breach of fiduciary duty.

Chief Justice MARTIN dissenting.

In *Tillman v. Commercial Credit Loans, Inc.*, this Court applied common law unconscionability doctrine to invalidate an arbitration clause in the plaintiffs' loan agreements. 362 N.C. 93, 103-09, 655 S.E.2d 362, 370-74 (2008) (plurality opinion); *id.* at 110-11, 655 S.E.2d at 374-75 (Edmunds, J., concurring in result only). Three years later, the Supreme Court of the United States decided *AT&T Mobility LLC v. Concepcion*, which clarified the scope of the Federal Arbitration Act's preemptive effect when state law might otherwise make an arbitration agreement unenforceable. *See* 563 U.S. 333, 340, 352 (2011). Because *Concepcion*'s rationale extends to a case like this one, in which a broadly applicable state law defense (constructive fraud) purportedly requires non-enforcement of an arbitration agreement specifically because it is an arbitration agreement, I respectfully dissent.

Before I turn to the preemption issue, a few observations are in order about the majority's parsing of state law fiduciary duty principles. Because it asserts that Dr. Bryant committed constructive fraud by failing to adequately disclose certain contractual terms to Mr. King, the majority first has to find that a fiduciary relationship between Mr. King and Dr. Bryant existed when Mr. King filled out the paperwork that included the arbitration agreement—paperwork that Mr. King filled out at Dr. Bryant's office before Dr. Bryant had met him or accepted him as a patient. As the majority correctly notes, certain relationships automatically "give[ ] rise to a fiduciary relationship as a matter of law." *CommScope Credit Union v. Butler & Burke, LLP*, ___ N.C. ___, ___, 790 S.E.2d 657, 660 (2016). Curiously, though, the majority does not decide whether a *physician-patient* relationship had been formed by the time Mr. King signed the arbitration agreement. The majority thus does not determine whether, as a matter of law, a fiduciary duty existed at that time. Instead, the majority decides only that, at the time that Mr. King signed the arbitration agreement, Dr. Bryant owed Mr. King a fiduciary duty in fact.

But, although the majority finds that a fiduciary relationship existed here only as a matter of fact, it effectively determines that a physician patient relationship existed here in all but name. A fiduciary relationship exists as a matter of fact "whenever 'there is confidence reposed on one side, and resulting domination and influence on the other.' " *Id.* at ___, 790 S.E.2d at 661 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). Pointing to specific findings of fact by the trial court, the majority maintains that a fiduciary relationship existed between Mr. King

and Dr. Bryant primarily because Mr. King placed his trust in Dr. Bryant *as a doctor*.[1] In addition, the majority quotes *Black v. Littlejohn* to suggest that Mr. King sought Dr. Bryant's services because of Dr. Bryant's "special knowledge and skill," *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985) (quoting 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 167 (1981)), and later quotes *Black* to assert that Dr. Bryant possessed "special knowledge and skill in diagnosing and treating diseases and injuries, which the patient lacks," *id.* (quoting 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 167 (1981)). Both of these quotes come from a passage in *Black* that discusses the characteristics of a fiduciary relationship that exists between a physician and his patient. *See id.* Thus, the majority determines, in effect, that the fiduciary relationship existed *because* Dr. Bryant was Mr. King's *doctor*—even though the majority claims that its conclusion is reached "independent of the existence of a physician-patient relationship."

So the majority tries to have its cake and eat it too. It purports not to take a position on whether a physician-patient relationship exists, but then rests its analysis on the characteristics of the physician-patient relationship. More particularly, the majority does not indicate whether a physician-patient relationship exists at the moment that a prospective patient fills out his preliminary paperwork, even when (as here) the doctor has never met the patient or accepted him as a patient. Yet the majority uses the characteristics of a physician-patient relationship, and the things that a prospective patient thinks and does, to find a fiduciary relationship in fact. By relying almost exclusively on aspects of a physician-patient relationship but then finding a fiduciary duty that is "independent" of that kind of relationship, the majority has muddied the waters in this area of the law. This legal sleight of hand is especially troubling for our fiduciary duty jurisprudence and for doctors and patients, who necessarily rely on us to provide clear and predictable rules to guide their daily interactions.

What's more, the majority's muddled parsing of state law, however well intentioned, must yield to principles of federal preemption. Section 2 of the Federal Arbitration Act (FAA) provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such

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1. On the other hand, the majority also finds a fiduciary duty here at least in part because Mr. King "provide[d] Dr. Bryant with confidential medical information," which is not exactly based on Dr. Bryant's status as a doctor. (A patient may, for instance, provide confidential medical information to a health insurance company.) But the majority's reasoning confuses a duty of confidentiality—a more limited duty that can arise even when no fiduciary duty exists—with a full-fledged fiduciary duty.

grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012).[2] In cases that it handed down before this Court decided *Tillman*, the Supreme Court of the United States held that Section 2 of the FAA preempted state law provisions that "set[ ] out a precise, arbitration-specific limitation." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 n.3 (1996). In *Perry v. Thomas*, for example, the Supreme Court held that Section 2 of the FAA preempted a California statute that allowed actions for the collection of wages to be maintained even in the face of a private arbitration agreement. *See* 482 U.S. 483, 484, 490-91 (1987). And in *Doctor's Associates, Inc. v. Casarotto*, the Court held that Section 2 preempted a Montana statute that imposed special notice requirements "specifically and solely" on "contracts 'subject to arbitration.' " 517 U.S. at 683 (quoting Mont. Code Ann. § 27 5 114(4) (1995)); *id.* at 688. Both of these cases addressed state statutory provisions that applied specifically to arbitration agreements, but did not apply to contracts that did not have arbitration agreements.

After *Tillman*, however, the Supreme Court of the United States issued its decision in *AT&T Mobility v. Concepcion*. In *Concepcion*, the Court squarely held that the use of even a doctrine like unconscionability—which can be applied to any contract, even one that does not contain an arbitration clause—can be preempted by Section 2 of the FAA when the doctrine "ha[s] been applied in a fashion that disfavors arbitration." 563 U.S. at 341. The Court reaffirmed its holding in *Concepcion*

2. The majority expresses considerable doubt that Section 2 of the FAA applies to the arbitration agreement at issue in this case. But it is unclear why the majority thinks that this is such an uphill battle. By its terms, Section 2 applies to any contract to arbitrate a transaction that is either specified in the contract or referred to by the contract, as long as the contract "evidenc[es] a transaction involving commerce." 9 U.S.C. § 2. Section 2's phrase "involving commerce" has the same meaning as the phrase "affecting commerce," *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995), and Section 2's reach thus "extend[s] . . . to the limits of Congress' Commerce Clause power," *id.* at 268. The arbitration agreement that Mr. King signed pertained to "any dispute arising out of or related to the provision of healthcare services," and clearly falls within both the commerce power and, by extension, the terms of Section 2. The provision of healthcare services is a form of commerce, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, ___ U.S. ___, ___, 132 S. Ct. 2566, 2587-88 (2012) (opinion of Roberts, C.J.); *id.* at ___, ___, 132 S. Ct. at 2617, 2621 (Ginsburg, J., concurring in part and dissenting in part), and contracting for those services is an economic activity that, when aggregated with other economic activities of its kind, is bound to substantially affect interstate commerce, *see Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *see also Nat'l Fed'n of Indep. Bus.*, ___ U.S. at ___ n.7, 132 S. Ct. at 2622 n.7. The only quirk in this case is that the arbitration agreement was made separately from any agreement to provide the services themselves. But Section 2, which applies to "a contract . . . to settle by arbitration a controversy thereafter arising out of such contract *or transaction*," 9 U.S.C. § 2 (emphasis added), clearly covers this scenario.

two years later. *See Am. Express Co. v. Italian Colors Rest.*, ___ U.S. ___, ___, 133 S. Ct. 2304, 2312 (2013). *Concepcion*'s holding and rationale apply directly to the majority's approach and make the majority's holding untenable.[3]

The majority claims that, because Dr. Bryant owed a fiduciary duty to Mr. King, Dr. Bryant committed constructive fraud "by failing to make full disclosure of the nature and import of the arbitration agreement to" Mr. King. But this conclusion requires the majority to find that defendant sought to benefit himself at Mr. King's expense. *See Barger v. McCoy Hillard & Park*s, 346 N.C. 650, 666-67, 488 S.E.2d 215, 224 (1997). The majority does so by finding that the arbitration agreement "ensur[ed] that any subsequent dispute between the parties would be resolved using the forum, procedures, and decision[-] makers of their choice."[4] Of course, that is precisely what arbitration clauses in contracts of adhesion do. And that gets to the heart of the matter: the majority takes issue with the arbitration agreement in this case *because it is an arbitration agreement.*

In doing so, the majority runs headlong into the FAA's prohibition of state law defenses that specifically target arbitration agreements. State law cannot address the concerns presented by contracts of adhesion in a way that "conflict[s] with the FAA or frustrate[s] its purpose to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 347 n.6. Nor can state courts apply a doctrine like constructive fraud "in a fashion that disfavors arbitration."

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3. The majority asserts that "defendants have failed to clearly advance a federal preemption argument" but then proceeds to address that argument at length. That is likely because defendants did cite to *Concepcion*. Quoting *Torrence v. Nationwide Budget Finance*, a recent case from our Court of Appeals, defendants raised the fact that *Concepcion* "dismiss[ed] . . . the idea that an arbitration agreement, apart from any other form of contract, could be found substantively unconscionable based solely upon its adhesive nature." 232 N.C. App. 306, 322, 753 S.E.2d 802, 812, *disc. rev. denied and cert. denied*, 367 N.C. 505, 759 S.E.2d 88 (2014). Although defendants' reference to this sentence is not the clearest articulation of *Concepcion*'s preemption principle, it is notable that the very next sentence in *Torrence* states that the dismissal of this unconscionability argument "was an explicit part of the Supreme Court's reasoning" in holding that the FAA preempted a state unconscionability rule. *Id.* at 322, 753 S.E.2d at 812.

4. The majority refers to the trial court's "unchallenged findings of fact" that Dr. Bryant benefitted from the arbitration agreement in this way. But the majority is making a *legal* argument that the arbitration agreement benefitted Dr. Bryant, and that Dr. Bryant may therefore be liable for the breach of his purported fiduciary duty to Mr. King. We review all conclusions of law de novo, even those that the trial court has characterized as findings of fact.

Id. at 341. Because the majority does exactly that, its holding is preempted by Section 2 of the FAA.

The majority maintains that its rationale does not single out arbitration agreements for negative treatment because the majority would treat "any agreement that substantially affected Mr. King's substantive legal rights" in the same way. The majority gives examples of other agreements that it thinks would substantially affect a person's legal rights in ways that have nothing to do with arbitration. But the fact that the majority might find *other* contractual provisions to be problematic for other reasons does not change the fact that the majority finds *this* arbitration agreement to be problematic because it is an arbitration agreement.[5]

In sum, if a state court cannot say that an arbitration agreement is unconscionable for arbitration-specific reasons, it likewise cannot say that the same agreement gives rise to a constructive fraud claim for arbitration-specific reasons. By declining to reach the unconscionability issue and focusing on constructive fraud instead, the majority artfully tries to evade federal preemption. But in our post-*Concepcion* legal landscape, federal law cannot be so easily evaded. Because the majority has applied the constructive fraud doctrine in a way that disfavors arbitration, and because the FAA clearly prohibits applying that doctrine in that way, I respectfully dissent.

Justice NEWBY dissenting.

The United States Supreme Court has repeatedly held that arbitration agreements may not be invalidated by state-law defenses arising from the fact that an arbitration agreement is at issue. Congress has explicitly indicated that arbitration is to be favored. Despite these mandates, the majority invents a new defense to enforcement of an arbitration agreement, not raised by plaintiff below, to mask their disparate treatment of and continued hostility towards arbitration, thereby attempting to

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5. The majority quotes *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*'s statement that, "if [a] claim is fraud in the inducement of the arbitration clause itself," then a "court may proceed to adjudicate it." 388 U.S. 395, 403-04 (1967). But this invocation of *Prima Paint* is a red herring because *Prima Paint* is not about preemption at all. It is simply about whether a certain kind of claim arising under Section 2 of the FAA—namely, a "claim[ ] of fraud in the inducement of [a] contract generally," *id.* at 404—should be resolved by an arbitrator or by a court, *id.* at 396-97. Thus, *Prima Paint*'s holding that an arbitrator, not a court, should resolve this claim, *see id.* at 404—and its related assertion that a court *may* resolve a claim about fraud in the inducement of an arbitration clause specifically, *see id.* at 403-04—does not provide any grist for the majority's mill.

circumvent an unconscionability analysis. Startlingly, without argument or findings, the majority baldly asserts that the Federal Arbitration Act (FAA) does not apply. This jiggery-pokery is precisely the type of impermissible "rationalization" admonished by the United States Supreme Court. Such a tortured attempt to obviate the FAA fails. Because the arbitration agreement at issue here is not unconscionable and is otherwise enforceable at law, I respectfully dissent.

The majority seeks to avoid an unconscionability analysis by fabricating a contract defense not raised by plaintiff, namely the breach of a fiduciary duty.[1] Based solely on the fact that the contract in question is an arbitration agreement, which the majority contends "substantially affected [plaintiff's] legal rights," the majority holds that "defendants violated their fiduciary duty to [plaintiff] by failing to make full disclosure of the nature and import of the arbitration agreement to him." In their view, this breach of fiduciary duty would void the arbitration agreement ab initio. The majority asserts that "defendants benefitted by [plaintiff's] action in signing the arbitration agreement," and states that the language "could have been worded more clearly" and was presented "in a collection of documents, thereby creating the [ ] impression that the arbitration agreement was simply another *routine* document." (Emphasis added.)

Since 1925 Congress has established that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act (FAA), ch. 213, § 2, 43 Stat. 883, 883 (1925) (codified as amended at 9 U.S.C. § 2 (2012)). The FAA "reverse[d] the longstanding judicial hostility to arbitration agreements . . . and place[s them] upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26, 36 (1991). The

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1. Though plaintiffs are Robert E. King and wife Jo Ann O'Neal, the record reflects Mr. King was the primary actor in the following events, and I refer to him in the singular as "plaintiff."

Plaintiff never raised a "breach of fiduciary duty" defense to enforcement of the agreement. At the trial court, plaintiff opposed defendants' motion to compel arbitration on three grounds: that the arbitration agreement was (1) "not a contract" but an unenforceable "agreement to agree," (2) ineffective as to co-plaintiff's consortium claim for lack of her signature, and (3) unconscionable. The trial court denied defendants' motion on the first ground. Only on interlocutory appeal did the Court of Appeals, not plaintiff, mention "fiduciary relationship" as a *procedural consideration* for plaintiff's burden of proof *under his unconscionability defense* on remand. *King v. Bryant*, 225 N.C. App. 340, 349, 737 S.E.2d 802, 809 (2013).

preemptive effect of the FAA may "extend even to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract.' " *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S. Ct. 1740, 1747, 179 L. Ed. 2d 742, 752 (2011) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527 n.9, 96 L. Ed. 2d 426, 437 n.9 (1987) (emphasis omitted)).

Arbitration agreements may "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 339, 131 S. Ct. at 1746, 179 L. Ed. 2d at 751 (quoting *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902, 909 (1996)). A court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9.

Contract defenses cannot be "applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341, 131 S. Ct. at 1747, 179 L. Ed. 2d at 752. Such an application is not justified by state-law "rationalizations," even when the defense could apply to other contracts. *Id.* at 342, 131 S. Ct. at 1747, 179 L. Ed. 2d at 752 ("In practice, of course, the [defense] would have a disproportionate impact on arbitration agreements; but it would presumably apply to [nonarbitration] contracts . . . as well."); *see also id.* at 342, 131 S. Ct. at 1747, 179 L. Ed. 2d at 753 ("Such [rationalizations] are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959))).

Contrary to well-settled law, the majority impermissibly targets arbitration agreements for disparate treatment, attempting to ignore plaintiff's claim of unconscionability and cloaking their disfavor of arbitration under the guise of newly constructed fiduciary-relationship principles. This sort of manufactured state-law justification is a facade and cannot displace the preemptive effect of the FAA.

The purported breach of a fiduciary duty described by the majority is a procedural consideration in an unconscionability analysis. As such, any concerns arising from the circumstances under which plaintiff signed the arbitration agreement are squarely contemplated by his assertion of unconscionability, yet the majority refuses to address this defense *at all*. *See Rite Color Chem. Co. v. Velvet Textile Co.*, 105 N.C.

App. 14, 20, 411 S.E.2d 645, 648 (1992) ("Procedural unconscionability involves 'bargaining naughtiness,' " which encompasses the use of sharp practices and unequal bargaining power. (citations omitted)). Instead, the majority has taken the extraordinary step of crafting a new legal theory for plaintiff, attempting to bypass the obligation to address his unconscionability defense. Though plaintiff "should not be allowed to change his position with respect to a material matter in the course of litigation," *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 340, 777 S.E.2d 272, 282 (2015) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 886 (2004)), and "[i]t is not the role of the appellate court[ ] . . . to create [his] appeal," *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam), it seems this Court is more than willing to do so for him when arbitration is involved.

Our case law is clear that a fiduciary relationship raises a procedural hurdle, not a requirement to void the transaction. Only when a complainant alleges and establishes that a fiduciary relationship arose *and* that the offending party benefitted from the transaction to the detriment of the complainant, does the burden shift from the complainant to the offending party to prove that "no fraud was committed, and no undue influence or moral duress exerted." *Wachovia Bank & Tr. Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967) (emphasis omitted) (quoting *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616-17 (1943)); *see Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986). The majority fails to identify any such detriment to plaintiff and instead relies on the unlawful presumption that arbitration itself is harmful. The majority's speculation that "defendants benefitted from [plaintiff's] action in signing the arbitration agreement by ensuring that any subsequent dispute between the parties would be resolved using the forum, procedures, and decision makers of their choice" falls well short of establishing the requisite benefit and harm. Such a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with" the FAA. *Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9.

Assuming without deciding that the alleged breach of fiduciary duty results in procedural unconscionability, the agreement is plainly not substantively unconscionable, and plaintiff's defense therefore fails. The agreement contains none of the "harsh, oppressive, and 'one-sided terms' " that are the hallmarks of substantive unconscionability, *Rite Color Chem. Co.*, 105 N.C. App. at 20, 411 S.E.2d at 648-49 (citations omitted), and follows the "Health Care Claim Settlement Procedures

of the American Arbitration Association," governed by the FAA. Furthermore, this analysis comports with recent comprehensive appellate review of arbitration agreements. *See Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 77-78, 721 S.E.2d 712, 715 (2012) (concluding that an arbitration agreement was valid and not unconscionable when signed among a stack of other patient intake forms for a nursing home facility). By skirting such an analysis, *see id.* at 79, 721 S.E.2d at 716, the majority's new breach of fiduciary duty defense seems without limit, deprived of the traditional constraints of the unconscionability doctrine.[2]

Irrespective of whether a fiduciary relationship arose, the majority justifies handling plaintiff's arbitration agreement differently than other "routine [contract] documents" because the agreement "substantially affected [plaintiff's] legal rights." Isolating arbitration agreements in this way plainly subjects them to impermissible scrutiny. *See Concepcion*, 563 U.S. at 342, 131 S. Ct. at 1747, 179 L. Ed. 2d at 752. All contracts affect legal rights; the contract at issue here designates dispute resolution through arbitration. *See Am. Express Co. v. Italian Colors Rest.*, ___ U.S. ___, ___, 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417, 424 (2013) ("[A]rbitration is a matter of contract" and "courts must 'rigorously enforce' arbitration agreements." (citations omitted) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158, 165 (1985)); *see also Ussery*, 368 N.C. at 336, 777 S.E.2d at 279 ("One who executes a written instrument is ordinarily charged with knowledge of its contents, . . . and he may not base his action on ignorance of the legal effect of its provisions in the absence of considerations such as fraud or mistake." (citations omitted)); *accord Westmoreland*, 218 N.C. App. at 83, 721 S.E.2d at 718 (citation omitted). Either arbitration agreements are on equal footing with other "routine" contracts or they are not. The United States Supreme Court has directed that a court cannot construe arbitration "agreement[s] in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9.

In a strained effort to add more window dressing, the majority brazenly claims that the FAA does not apply "[g]iven the record contains no indication that the agreement between the parties constitutes a 'transaction involving commerce,' 9 U.S.C. § 2." Not only have the parties not argued this point, nor has the trial court made any accompanying

2. For example, is there always a breach of fiduciary duty by a professional who does not adequately explain arbitration, and is the required result that the agreement is void ab initio?

findings, but the first line of plaintiff's arbitration agreement expressly incorporates the FAA by stating: "In accordance with the terms of the Federal Arbitration Act, 9 USC 1-16 . . . ." *See Johnston County v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 92-93, 414 S.E.2d 30, 33 (1992) (discussing the incorporation of law into contracts); *Pike v. Wachovia Bank & Tr. Co.*, 274 N.C. 1, 16, 161 S.E.2d 453, 465 (1968) ("[L]aws in force at the time of the execution of a contract become a part of the contract."); *see also Perry*, 482 U.S. at 490, 107 S. Ct. at 2526, 96 L. Ed. 2d at 436 (The FAA's ambit is expansive and "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause."). Moreover, such professional service contracts generally "involve commerce" under the broad purview of the FAA.[3]

In sum, plaintiff raised his contract defenses and received the benefit of asserting them.[4] The arbitration agreement is not substantively unconscionable, and plaintiff's defense therefore fails. Apparently unsatisfied with this result, the majority, once again, impermissibly targets arbitration agreements. *E.g.*, *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 114, 655 S.E.2d 362, 377 (2008) (Newby, J., dissenting) ("The majority finds the agreement unconscionable based on provisions that would *only exist in an arbitration agreement.*" (emphasis added)); *see also Torrence v. Nationwide Budget Fin.*, 232 N.C. App. 306, 321, 753 S.E.2d 802, 811 (concluding that *Tillman* conflicts with United States Supreme Court precedent), *disc. rev. denied and cert. denied*, 367 N.C. 505, 759 S.E.2d 88 (2014). Such a policy decision is not for this Court to determine. *See Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9 (A court may not construe arbitration agreements differently or "rely on the[ir] uniqueness . . . as a basis" for a contract defense, "for this would enable the court to effect what . . . the state legislature cannot."). Instead of pursuing its relentless assault on the FAA, the majority should follow the principles clearly expressed by the United States Supreme Court. Because the majority has concocted a new contract defense in a fashion that disfavors arbitration in contravention of the FAA and binding United States Supreme Court precedent, I respectfully dissent.

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3. *See, e.g.*, *Morrison v. Colo. Permanente Med. Grp.*, 983 F. Supp. 937, 943-44 (D. Colo. 1997) (finding a patient-physician "medical services agreement" evidenced a "transaction involving commerce"); *Ex parte Lorance*, 669 So. 2d 890, 892 (Ala. 1995) (finding a physician's professional services contract "involve[es] commerce"); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 515-16 (Miss. 2005) (same for patient's "nursing home admissions agreement"), *overruled in part on other grounds by Covenant Health & Rehab., LP v. Estate of Moulds*, 14 So. 3d 695, 706 (Miss. 2009).

4. Plaintiff's remaining contract defenses are not before the Court at this time.

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

26 JANUARY 2017

002P17	State v. Juan Antonia Miller	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/04/2017** 2.
004P17	State v. Leonard Paul Schalow	1. State's Motion for Temporary Stay (COA16-330) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR under N.C.G.S. § 7A-31	1. Allowed **01/6/2017** 2. 3.
007P17	In the Matter of J.A.M.	1. Petitioner's PDR Under G.S. 7A-31 (COA16-563) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for *Writ of Supersedeas*	1. 2. Allowed **01/10/2017** 3.
014A17	State v. Barry Randall Revels	1. Def's Motion to Abate Proceeding Based on Defendant's Death 2. Def's Motion for Extension of Time to File Brief	1. Allowed **01/25/2017** 2. Dismissed as moot **01/25/2017**
020P17	State v. Melvin Emanuel Goodwin	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/12/2017**
025P17	State v. Jesus Martinez	1. State's Motion for Temporary Stay (COA16-374) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/19/2017** 2. 3.
038P06-2	State v. Omeako Lavon Brisbon	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Denied
042P04-9	State v. Larry McLeod Pulley	1. Def's *Pro Se* Motion for Formal Complaint Against the Office of the Clerk 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
082A14	State v. Sethy Tony Seam	Def's Motion to Expedite Mandate	Denied **12/29/2016** **Ervin, J., recused**

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

26 JANUARY 2017

088P15-5	Mason White Hyde v. Katie Poole	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/12/2016** **Ervin, J., recused**
123P16	State of North Carolina, *ex rel.* William G. Ross, Secretary, North Carolina Department of Environmental and Natural Resources, Division of Waste Management v. Jay Carter, a/k/a William Joseph Carter, a/k/a William Joseph Carter, IV, a/k/a William Joseph Carter, Sr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-629) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
201P16-2	State v. Timothy Wiley, Jr.	Def's *Pro Se* Motion for PDR (COA06-451)	Dismissed
252A16	Michael Krawiec, Jennifer Krawiec, and Happy Dance, Inc./CMT Dance, Inc. (d/b/a Fred Astaire Franchised Dance Studios) v. Jim Manly, Monette Manly, Metropolitan Ballroom, LLC, Ranko Bogosavac, and Darinka Divljak	Defs' Motion to Appear on Behalf of All Defendants	Allowed
254P16	Dawn Weideman v. Erin Atalie Shelton v. Annette Wise, Intervenor	Intervenor's PDR Under N.C.G.S. § 7A-31 (COA15-772)	Denied
260P16-2	Archie David Powell, Jr. v. State of NC	1. Plt's *Pro Se* Motion for PDR 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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

26 January 2017

281P06-9	Joseph E. Teague, Jr., P.E., C.M. v. The North Carolina Department of Transportation, et al.	Plt's *Pro Se* Motion for Petition for Properly Hearing 281P06-8 to Dismiss Underlying Case of Wrongful Termination	Dismissed **Martin, C.J., recused**
301P16-2	Michael Anthony Taylor v. Ola Mae Lewis, Senior Resident Superior Court Judge of Brunswick County	1. Petitioner's *Pro Se* Motion for Notice of Appeal (COAP16-462) 2. Petitioner's *Pro Se* Motion for PDR 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* **12/29/2016** 2. Denied **12/29/2016** 3. Allowed **12/29/2016**
313P16	State v. Lawrence Henry Dawson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1399)	Denied
326P15-4	Burl Anderson Howell v. North Carolina Wayne County Department of Health and Human Services, by and through, Reese Phelps; Lou Jones	Petitioner's *Pro Se* Motion for Reconsideration	Dismissed
329P16	State v. Travis Lamont Daughtridge	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-1160) 2. State's PDR Under N.C.G.S. § 7A-31 3. State's Conditional PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied 3. Dismissed as moot 4. Dismissed as moot
334P16	ACTS Retirement-Life Communities, Inc. v. Town of Columbus, North Carolina	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1333)	Allowed
337P16	State v. Brian Hancock	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1311)	Denied

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

26 January 2017

347P16	Cape Hatteras Electric Membership Corporation, An Electric Membership Corporation Organized and Existing Pursuant to N.C. Gen. Stat. Chapter 117 v. Gina L. Stevenson and Joseph F. Noce	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1102)	Denied
357P16	State v. Robert Lee Nichols	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County	Dismissed
361P16	North Carolina Department of Transportation v. Mission Battleground Park, DST; Mission Battleground Park Leaseco, LLC, Lessee; Lasalle Bank National Association, as Trustee for the Registered Holders of CD 2006-CD3 Commercial Mortgage Pass-Through Certificates; and LAT Battleground Park, LLC	1. Defs' PDR Pursuant to N.C.G.S. § 7A-31 (COA16-125) 2. James F. Collins' Conditional Motion for Leave to File Amicus Brief	1. Allowed 2. Allowed
370P04-16	State v. Anthony Leon Hoover	Def's *Pro Se* Motion for Mandamus Mandate Mandatory Injunction Appeal	Dismissed **Hudson, J., recused**
381P16	State v. Rickey Harding Wagner, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1111)	Denied
385P16	State v. Matthew Devon Fields	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-1086) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed

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

26 JANUARY 2017

390P16	State v. Linda Beth Chekanow and Robert David Bishop	1. State's Motion for Temporary Stay (COA15-1294) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/19/2016** 2. Allowed 3. Allowed
391A16	Next Advisor Continued, Inc. v. LendingTree, Inc. et al.	Court Order	Appeal Dismissed *ex mero motu* **12/14/2016**
402PA15-2	State v. Donna Helms Ledbetter	1. Def's Motion for Temporary Stay (COA15-414-2) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **12/22/2016** 2.
407P03-2	State v. Phillip Vance Smith, II	1. Def's *Pro Se* Motion for Notice of Appeal (COA16-847) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
407P14-4	State v. Dwain Cornelius Ferrell	Def's *Pro Se* Motion for PDR (COAP16-627)	Dismissed
409PA15	Gregory P. Nies and Diane S. Nies v. Town of Emerald Isle	Court Order	Appeal Dismissed *ex mero motu* **12/14/2016**
409P16	In Re N.G.F., A.L.F.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA16-297)	Denied
411P16	Union County v. Town of Marshville	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Denied **11/15/2016** 2. Denied **Ervin, J., recused**
412P16	Campbell, et al. v. The City of Statesville, et al.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-101)	Denied
414P16	State v. Brenda Sanders Lanclos	Def's PDR Pursuant to N.C.G.S. § 7A-31 (COA16-122)	Denied
415P16	Curtis L. Sangster v. Deborah Shandles, Attorney	Plt's *Pro Se* Motion for Appeal of Decision of the North Carolina State Bar	Dismissed

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

26 JANUARY 2017

419P16	Willowmere Community Association, Inc., A North Carolina Non-Profit Corporation and Nottingham Owners Association, Inc., A North Carolina Non-Profit Corporation v. City of Charlotte, A North Carolina Body Politic and Corporate, and Charlotte-Mecklenburg Housing Partnership, Inc., A North Carolina Non-Profit Corporation	Plaintiffs' PDR Under N.C.G.S. § 7A-31 (COA15-977)	Allowed
422P16	State v. Drayton Lamar Thompson	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 (COA16-406) 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
424P16-2	Corey D. Greene v. Susan White	Petitioner's *Pro Se* Motion for PDR	Denied **12/09/2016**
425P16	State v. Ronald Michael Thomas	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-326)	Dismissed

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

26 JANUARY 2017

427A16	Abrons Family Practice and Urgent Care, PA; Nash OB-GYN Associates, PA; Highland Obstetrical-Gynecological Clinic, PA; Children's Health of Carolina, PA; Capital Nephrology Associates, PA; Hickory Allergy & Asthma Clinic, PA; Halifax Medical Specialists, PA; and Westside OB-GYN Center, PA; Individually and on Behalf of All Others Similarly Situated v. NC Department of Health and Human Services and Computer Sciences Corporation	1. Def's (Computer Sciences Corporation) Notice of Appeal Based Upon a Dissent (COA15-1197) 2. Def's (Computer Sciences Corporation) PDR as to Additional Issues 3. Def's (NCDHHS) Notice of Appeal Based Upon a Dissent 4. Def's (NCDHHS) PDR as to Additional Issues	1. --- 2. Allowed 3. --- 4. Allowed
429P16	Denise Catanese Chafin v. Stephen Robert Chafin	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1152)	Denied
431P16	State v. Edward Roy Frye	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-362) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
432P16	State v. Robert Leon Gray, III	Def's *Pro Se* Motion for Return of Property	Dismissed
433P16	Steven James Hall v. Attorney Fredilyn Sison	Plt's *Pro Se* Motion for Court Review	Dismissed
434P16	State v. Seyi Odueso	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County	Denied
435P16	State v. Stephen Lamont Ward	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-52)	Denied

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

26 JANUARY 2017

438P16	State v. Darryl A. McPhaul	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of N.C. Court of Appeals (COA16-799) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
439P16	State v. Twyan Kenneth Coleman	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-305) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. 2. Allowed **12/09/2016** 3.
442P16	State v. Calvin Denard Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA16-84)	Denied
443P16	State v. Ronnie Paul Godbey	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-877) 2. State's Motion to Amend Response to PDR	1. Allowed 2. Allowed
444P16	Susan Hedden v. Ann Isbell	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA16-406)	1. Dismissed *ex mero motu* 2. Denied
446P16	In the Matter of A.J.P.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA16-473)	Denied
448P16	State v. Timothy Devon King	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-261)	Denied
449P16	Patrick A. Merrill v. Winston-Salem Forsyth County Board of Education	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-232)	Denied
452P16	State v. John Eddie Mangum	1. Def's Motion for Temporary Stay (COA16-344) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **12/16/2016** 2.
454P16	State v. Andrew Robert Holloway	1. State's Motion for Temporary Stay (COA16-381) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/20/2016** 2.

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

26 JANUARY 2017

455P16	State v. William Sheldon Howell	1. State's Motion for Temporary Stay (COA16-303) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/20/2016** 2.
458P16	State v. Danny Wayne Powell	Def's PDR Under N.C.G.S. § 7A-31 (COA16-499)	Denied
459P16	State v. James Howard Killian	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-268) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. 2. Allowed **12/22/2016** 3.
464P16	State v. Terril Courtney Battle	1. State's Motion for Temporary Stay (COA16-355) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/22/2016** 2.
465P16	State v. Christopher Angelo Whitehead	1. State's Motion for Temporary Stay (COA16-294) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/22/2016** 2.
482P13-2	State v. Carl Lynn Williams	Def's *Pro Se* Motion for PDR (COAP16-323)	Denied
499P10-2	State v. Damien Lanel Gabriel	1. Def's *Pro Se* Motion for Review of the Appellate Court's Decision (COAP16-535) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

IN THE MATTER OF MARY LUCILLE HUGHES, by and through VIRGINIA HUGHES INGRAM, Administratrix of the Estate of Mary Lucille Hughes, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program

No. 87A16

Filed 17 March 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 111 (2016), dismissing an appeal from an amended decision and order filed on 28 April 2015 by the North Carolina Industrial Commission and remanding the matter to the Commission for transfer to the Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1(a1). On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 13 February 2017.

UNC Center for Civil Rights, by Elizabeth Haddix and Mark Dorosin; and Pressly, Thomas & Conley, PA, by Edwin A. Pressly, for claimant-appellant/appellee.

Joshua H. Stein, Attorney General, by Elizabeth A. Fisher, Assistant Solicitor General, and Amar Majmundar, Special Deputy Attorney General, for defendant-appellant/appellee State of North Carolina.

PER CURIAM.

For the reasons stated in *In re Redmond*, ___ N.C. ___, ___ S.E.2d ___ (Mar. 17, 2017) (No. 86A16), the decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals.

REVERSED AND REMANDED.

IN THE MATTER OF KAY FRANCES REDMOND, BY AND THROUGH LINDA NICHOLS, ADMINISTRATRIX OF THE ESTATE OF KAY FRANCES REDMOND, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM

No. 86A16

Filed 17 March 2017

Constitutional Law—Eugenics Board compensation—Court of Appeals jurisdiction

In a matter arising from the Eugenics Board and the resulting compensation program, heard first before the Industrial Commission, the Court of Appeals had jurisdiction to consider claimant's constitutional challenge to N.C.G.S. § 143B-426.50(1). The Industrial Commission had no authority to decide constitutional questions.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 111 (2016), dismissing an appeal from a decision and order filed on 27 April 2015 by the North Carolina Industrial Commission and remanding the matter to the Commission for transfer to the Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1(a1). On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 13 February 2017.

UNC Center for Civil Rights, by Elizabeth Haddix and Mark Dorosin; and Pressly, Thomas & Conley, PA, by Edwin A. Pressly, for claimant-appellant/appellee.

Joshua H. Stein, Attorney General, by Elizabeth A. Fisher, Assistant Solicitor General, and Amar Majmundar, Special Deputy Attorney General, for defendant-appellant/appellee State of North Carolina.

JACKSON, Justice.

In this case we consider whether the North Carolina Court of Appeals has jurisdiction to consider claimant's constitutional challenge to an act of the General Assembly on appeal from a final decision and order of the North Carolina Industrial Commission. Because we conclude that the Court of Appeals has jurisdiction to reach the merits of claimant's constitutional challenge, we reverse the Court of Appeals' dismissal of claimant's appeal and remand this case to that court to consider the merits of claimant's constitutional challenge.

In 1956 claimant Kay Frances Redmond was sterilized involuntarily at the age of fourteen by order of the now-dismantled Eugenics Board of North Carolina pursuant to Chapter 224 of the Public Laws of North Carolina of 1933. *See* N.C.G.S. § 35-39 (1950) (repealed 2003). Claimant passed away in 2010. In 2013 the General Assembly established the Eugenics Asexualization and Sterilization Compensation Program (Compensation Program) to provide "lump-sum compensation" to any "claimant determined to be a qualified recipient." *Id.* § 143B-426.51 (2013). A qualified recipient was "[a]n individual who was asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." *Id.* § 143B-426.50(5) (2013). More relevant to this case, a claimant was defined as "[a]n individual on whose behalf a claim is made for compensation as a qualified recipient" who was "alive on June 30, 2013."[1] *Id.* § 143B-426.50(1) (2013).

Claimant's estate filed a claim pursuant to the Compensation Program to the North Carolina Industrial Commission (the Commission); however, the claim initially was determined to be ineligible because claimant was not alive on 30 June 2013, as required by subsection 143B-426.50(1). That conclusion was upheld following an evidentiary hearing before a deputy commissioner. On appeal to the full Commission, claimant raised a constitutional challenge to subsection 143B-426.50(1), arguing that the requirement that a claimant be alive on 30 June 2013 violates the guarantees of equal protection and due process in Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. The full Commission denied the claim for not meeting the subsection 143B-426.50(1) criteria, but certified the constitutional question to the Court of Appeals. In certifying the question, the Commission noted the lack of an explicit statutory framework for doing so. In contrast to N.C.G.S. § 97-86, which gives the Commission statutory authority to certify questions of law to the Court of Appeals in workers' compensation

1. The Compensation Program expired as provided in the 2013 enabling act, as amended in 2014. *See* [The] Current Operations and Capital Improvements Appropriations Act of 2013, ch. 360, secs. 6.18(a)-(g), 2013 N.C. Sess. Laws 995, 1019-23 (making pertinent provisions of the statutes creating the Program effective July 1, 2013, and setting an expiration date of June 30, 2015, except for final adjudication of any claims still pending on that date), *as amended by* The Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, secs. 6.13(a)-(f), 2013 N.C. Sess. Laws (Reg. Sess. 2014) 328, 346-48 (adding, *inter alia*, a provision stating that the Office of Justice for Sterilization Victims also expired on June 30, 2015).

cases, the Commission observed that the statutes providing adjudicatory authority to the Commission here pursuant to the Compensation Program contain no such provision. Claimant appealed the final decision of the full Commission to the Court of Appeals.

The Court of Appeals did not reach the constitutional question raised in claimant's appeal. *In re Hughes*, ___ N.C. App. ___, ___, 785 S.E.2d 111, 116 (2016).[2] Instead, the Court of Appeals held that it did not have jurisdiction to consider claimant's appeal from the full Commission because any challenge to the constitutionality of an act of the General Assembly first must be submitted to a three-judge panel of the Superior Court of Wake County pursuant to N.C.G.S. § 1-267.1(a1). *Id.* at ___, 785 S.E.2d at 116. Consequently, the Court of Appeals dismissed claimant's appeal and remanded the case to the Commission to transfer "those portions of the action[ ] challenging the constitutional validity of N.C. Gen. [ ]Stat. § 143B-426.50(1)" to Wake County for resolution by a three-judge panel. *Id.* at ___, 785 S.E.2d at 116. Both claimant and the State have appealed the Court of Appeals' dismissal of the appeal to this Court and argue that the Court of Appeals has jurisdiction to consider claimant's constitutional challenge to subsection 143B-426.50(1). We agree.

Eligibility for compensation pursuant to the Compensation Program is determined by the North Carolina Industrial Commission. N.C.G.S. § 143B-426.52(c) (2013). "[I]nitial determinations of eligibility for compensation" are made by a deputy commissioner upon review of "the claim and supporting documentation submitted on behalf of a claimant." *Id.* § 143B-426.53(b) (2013). In determining eligibility, the Commission has "all powers and authority granted under Article 31 of Chapter 143 of the General Statutes." *Id.* § 143B-426.53(a) (2013). Article 31, Chapter 143, commonly referred to as the Tort Claims Act, states that the Commission is "constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments." *Id.* § 143-291(a) (2015). Section 143B-426.53 of the Compensation Program statutes provides for multiple stages of review within the Commission and an ultimate appeal as of right from a decision of the full Commission to the Court of Appeals "in accordance with the procedures set forth in G.S. 143-293 and G.S. 143-294." *Id.* § 143B-426.53(d)-(f) (2013).

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2. On appeal to the Court of Appeals, claimant's case was combined with those of two other claimants—one being Mary Lucille Hughes—who were also deemed ineligible for the Compensation Program by the Commission pursuant to subsection 143B-426.50(1). *See In re Hughes*, ___ N.C. App. at ___, 785 S.E.2d at 112.

Although the Commission acts as a court for purposes of the Tort Claims Act and for determining eligibility of claimants pursuant to the Compensation Program, *see id.* § 143B-426.53(a), the Commission's judicial power is limited, or quasi-judicial. We have determined that the Commission "is not a court with general implied jurisdiction" but "primarily is an administrative agency of the state" granted judicial power "as is necessary to perform the duties required of it by the law which it administers." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985) (citation omitted). That judicial power clearly does not extend to consideration of constitutional questions, as it is a "well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board." *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); *see also State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 673-74, 446 S.E.2d 332, 341-42 (1994); *Gulf Oil Corp. v. Clayton*, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966); *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961), *overruled on other grounds by Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Similar to the limited judicial power of the Industrial Commission, the North Carolina Utilities Commission is "deemed to exercise functions judicial in nature and [to] have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law." *Carolina Util. Customers Ass'n*, 336 N.C. at 673, 446 S.E.2d at 342 (quoting N.C.G.S. § 62-60 (1989)). Such power is properly exercised "[f]or the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath." *Id.* at 673, 446 S.E.2d at 342 (quoting N.C.G.S. § 62-60). When an interested party argued that this judicial power authorized the Utilities Commission to determine the constitutionality of a statute falling within the Utilities Commission's administrative purview, we concluded that "[a]s an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments." *Id.* at 674, 446 S.E.2d at 342.

Although not controlling on this Court, we note with approval the Court of Appeals' reasoning in a similar case. When the Industrial Commission determined in its opinion and award that certain changes to the Workers' Compensation Act violated the Due Process Clause of the United States Constitution, the Court of Appeals vacated the opinion and award, citing the "well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board."

Carolinas Med. Ctr. v. Emp'rs & Carriers, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (quoting *Meads*, 349 N.C. at 670, 509 S.E.2d at 174). In reaching this holding, the court reasoned that a party has at least two avenues to challenge the constitutionality of a statute. *Id.* at 553, 616 S.E.2d at 591. First, the party asserting the constitutional challenge may bring "an action under the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* (2004)." *Id.* at 553, 616 S.E.2d at 591 ("A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein." (quoting *Woodard v. Carteret County*, 270 N.C. 55, 60, 153 S.E.2d 809, 813 (1967))). "Alternatively, pursuant to N.C. Gen. Stat. § 97-86 the Industrial Commission of its own motion could have certified the question of the constitutionality of the statute to this Court before making its final decision." *Id.* at 553, 616 S.E.2d at 591.

Section 97-86 states: "The Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court." N.C.G.S. § 97-86 (2015). Although this provision is part of the Workers' Compensation Act, and is not implicated in the statutes creating the Compensation Program, it is instructive as to the limitations of the Commission's judicial authority. Correctly recognizing that it did not have authority to rule on claimant's constitutional challenge in this case, but acting in accord with its status as an administrative agency with a process of appeal to the Court of Appeals encompassing a broad spectrum of subject matters, *see id.* § 97-86 (providing for appeals to the Court of Appeals from final awards of the full Commission pursuant to the Workers' Compensation Act); *id.* § 143-293 (2015) (providing for appeals to the Court of Appeals from decisions and orders of the full Commission pursuant to the Tort Claims Act); *id.* § 143B-426.53(f) (providing for appeals to the Court of Appeals from decisions of the full Commission pursuant to the Compensation Program), the Industrial Commission certified the question to the Court of Appeals for judicial determination.

In addition, the North Carolina Constitution states that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). The General Assembly has conferred upon the Court of Appeals "jurisdiction to review upon appeal decisions . . . of administrative agencies, upon matters of law or legal inference." N.C.G.S. § 7A-26 (2015). There is no doubt that a question as to the constitutionality of an act of the General Assembly is a "matter[ ] of law or legal inference." This Court also has recognized that

"[i]n 'double appeal' states, including North Carolina . . . , cases involving a substantial constitutional question are appealable in the first instance to the intermediate appellate court." *State v. Colson*, 274 N.C. 295, 302-03, 163 S.E.2d 376, 381 (1968), *cert. denied*, 393 U.S. 1087 (1969). The General Assembly has provided specifically that "appeal as of right lies directly to the Court of Appeals" from "any final order or decision of . . . the North Carolina Industrial Commission." N.C.G.S. § 7A-29 (2015). The appeal in this case arises from a "decision and order" of the full Commission denying claimant's claim based on the application of subsection 143B-426.50(1)—the statutory provision that is the subject of claimant's constitutional question.

In its opinion below, the Court of Appeals relied on N.C.G.S. § 1-267.1(a1) to conclude that its appellate jurisdiction has been limited by the General Assembly in the context of this case. *See In re Hughes*, ___ N.C. App. at ___, 785 S.E.2d at 116. Subsection 1-267.1(a1) provides in part that "any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel." N.C.G.S. § 1-267.1(a1) (2015). According to North Carolina Rule of Civil Procedure 42(b)(4), when "a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State . . . . the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel." *Id.* § 1A-1, Rule 42(b)(4) (2015).

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575, 573 S.E.2d 118, 121 (2002) (alterations in original) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)). By the plain language of subsection 1-267.1(a1), the General Assembly confined the scope of the statute to the requirements of Rule 42(b)(4). In this case claimant filed a *claim* with the Commission pursuant to section 143B-426.52 of the Compensation Program, and not a "complaint or amended complaint in any court in this State." *See* N.C.G.S. § 1A-1, Rule 42(b)(4). Moreover, the Commission "is not a court" as contemplated in Rule 42(b)(4), but "primarily is an administrative agency of the state." *Hogan*, 315 N.C. at 137, 337 S.E.2d at 483. Consequently, subsection 1-267.1(a1), read in conjunction with Rule 42(b)(4), does not require that claimant's constitutional challenge

be heard by a three-judge panel of the Superior Court of Wake County. Therefore, subsection 1-267.1(a1) does not limit the appellate jurisdiction of the Court of Appeals with respect to this matter.

That the Commission is not a court, but an administrative agency of the State with statutorily limited judicial authority, also makes distinguishable our prior reasoning in cases like *City of Durham v. Manson*, 285 N.C. 741, 743, 208 S.E.2d 662, 664 (1974) ("[I]n conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." (italics omitted) (quoting *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955))), and *State v. Cumber*, 280 N.C. 127, 132, 185 S.E.2d 141, 144 (1971) ("Having failed to show involvement of a substantial constitutional question which was raised and passed upon in the trial court and properly brought forward for consideration by the Court of Appeals, no legal basis exists for this appeal to the Supreme Court, and it must therefore be dismissed."). As we have established already, the Commission has no authority to decide constitutional questions, making the rule announced in these cases inapplicable to whether the Court of Appeals may consider the constitutional question raised in this case.

Inasmuch as our prior decision in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau* applied cases like *Manson*, *Cumber*, and *Jones* in the context of an appeal from an administrative agency, *see* 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980), that case is distinguishable from the present case because it involved an appeal from the Commissioner of Insurance's denial of a rate increase that was subject to judicial review pursuant to the Administrative Procedure Act (APA), *see id.* at 394-96, 269 S.E.2d at 559. Although petitions for judicial review of final agency decisions governed by the APA ordinarily are "filed in the superior court of the county where the person aggrieved by the administrative decision resides," N.C.G.S. § 150B-45(a) (2015), in *Rate Bureau*, appeal was taken directly from the Commissioner of Insurance to the Court of Appeals. 300 N.C. at 392, 269 S.E.2d at 557. In that case, no constitutional challenge regarding rate-making was considered by the Court of Appeals. *See generally State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 41 N.C. App. 310, 255 S.E.2d 557 (1979). Moreover, in *Rate Bureau*, this Court reasoned:

> [T]he Commissioner's original order denying the Reinsurance Facility rate increase stated only that such rates are "unfairly discriminatory" presumably in the statutory sense. He never held that any of the statutes or

> actions were unconstitutional. In his brief, however, he does make vague assertions that it would be "constitutionally suspect" to interpret the statutes contrary to his findings and conclusions. He states, "The governing statutes should be construed so as to avoid serious doubts as to constitutionality."

300 N.C. at 429, 269 S.E.2d at 577.

Citing a holding by the Supreme Court of Michigan in *Shavers v. Attorney General Kelley*, 402 Mich. 554, 267 N.W.2d 72, *cert. denied*, 442 U.S. 934, 99 S. Ct. 2869 (1978), the Commissioner argued that "certain ratemaking mechanisms were constitutionally deficient in failing to provide due process." *Rate Bureau*, 300 N.C. at 429, 269 S.E.2d at 578. This Court noted:

> However, the Michigan court unquestionably based its holding on constitutional due process considerations. Indeed, the Michigan action was a declaratory judgment action specifically brought to determine the constitutionality of the Michigan No-Fault Insurance Act. The constitutional question was the basis for the action from trial court to final appellate adjudication. This is completely unlike the case before us where the record discloses no constitutional question presented or passed in the Commissioner's original order.

Id. at 429, 269 S.E.2d at 578.

We believe that the decision regarding the issue of a constitutional challenge before this Court in *Rate Bureau* was incorrect. When an appeal lies directly to the Appellate Division from an administrative tribunal, in the absence of any statutory provision to the contrary, *see, e.g.*, N.C.G.S. § 150B-45(a), a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice. As in this case, a claim made pursuant to the Compensation Program is appealed from a final decision of the Commission directly to the Court of Appeals without judicial review by a trial court. *See id.* § 143B-426.53(f).

Here, the Commission necessarily deemed claimant ineligible for the Compensation Program pursuant to subsection 143B-426.50(1), as required by the General Assembly. Claimant ultimately appealed the Commission's decision to the Court of Appeals on the basis that denial of her claim pursuant to 143B-426.50(1) was unconstitutional—a question

of law outside the scope of the Commission's limited judicial authority but within the purview of the General Court of Justice. Furthermore, subsection 1-267.1(a1) does not modify the Court of Appeals' jurisdiction to review decisions of the Commission on "matters of law or legal inference" pursuant to section 7A-26, final decisions of the Commission pursuant to section 7A-29, or final decisions of the full Commission regarding eligibility for the Compensation Program pursuant to subsection 143B-426.53(f). Consequently, we hold that claimant's appeal based on a constitutional challenge was properly before the Court of Appeals and that the Court of Appeals has appellate jurisdiction over claimant's appeal. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court to consider the merits of claimant's constitutional challenge to subsection 143B-426.50(1).

REVERSED AND REMANDED.

IN THE MATTER OF TOMMIE JUNIOR SMITH, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program

No. 88A16

Filed 17 March 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 111 (2016), dismissing an appeal from a decision and order filed on 7 May 2015 by the North Carolina Industrial Commission and remanding the matter to the Commission for transfer to the Superior Court, Wake County, under N.C.G.S. § 1-267.1(a1). On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 13 February 2017.

UNC Center for Civil Rights, by Elizabeth Haddix and Mark Dorosin; and Pressly, Thomas & Conley, PA, by Edwin A. Pressly, for claimant-appellant/appellee.

Joshua H. Stein, Attorney General, by Elizabeth A. Fisher, Assistant Solicitor General, and Amar Majmundar, Special Deputy Attorney General, for defendant-appellant/appellee State of North Carolina.

PER CURIAM.

For the reasons stated in *In re Redmond*, ___ N.C. ___, ___ S.E.2d ___ (Mar. 17, 2017) (No. 86A16), the decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals.

REVERSED AND REMANDED.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY AND UNITED BANK & TRUST COMPANY, VERSAILLES, KY., F/K/A FARMERS BANK & TRUST COMPANY (GEORGETOWN, KY.)

v.

HARTFORD FIRE INSURANCE COMPANY, SHRIJEE LLC, HELM BUILDERS, LLC, AND MICHAEL D. ANDREWS, IN HIS OFFICIAL CAPACITY AS SHERIFF OF DURHAM COUNTY, NORTH CAROLINA

No. 155A16

17 March 2017

Estoppel—judicial—collateral attack—inconsistent position

The trial court did not abuse its discretion by invoking the doctrine of judicial estoppel to dismiss counterclaims arising from a failed hotel development project. In a prior related case, defense counsel had assured a federal court that defendant would not collaterally attack the federal judgment by relitigating claims from the same facts. The trial court found that defendant essentially took the action which defense counsel had stated it would not take, thereby adopting an inconsistent position.

Justice ERVIN dissenting.

Justices HUDSON and BEASLEY join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 185 (2016), affirming an order on summary judgment entered on 30 September 2014 by Judge Henry W. Hight, Jr., and reversing and remanding an order granting judgment on the pleadings entered on 14 August 2014 by Judge G. Wayne Abernathy, both in Superior Court, Durham County. Heard in the Supreme Court on 14 February 2017.

Manning Fulton & Skinner, P.A., by Judson A. Welborn, J. Whitfield Gibson, and Natalie M. Rice, for plaintiff-appellant United Bank & Trust Company.

Lewis & Roberts, PLLC, by James A. Roberts, III and Jessica E. Bowers, for defendant-appellee Hartford Fire Insurance Company.

NEWBY, Justice.

The doctrine of judicial estoppel preserves the integrity of judicial proceedings by preventing a party from taking inconsistent positions before the court, thus safeguarding the rule of law and securing public confidence in the court system. Here the trial court found that, in a prior related case, defense counsel assured a federal court that defendant Hartford Fire Insurance Company (defendant or Hartford) would not collaterally attack the federal judgment post hoc by relitigating its related claims arising from the same facts. Defendant declined to join that federal litigation, but nonetheless raises substantially similar tort claims here. As such, the trial court found that defendant essentially takes the action which defense counsel stated it would not take, thereby adopting an inconsistent position. Affording the appropriate deference to the trial court, we conclude that the trial court did not abuse its discretion by invoking the doctrine of judicial estoppel to bar defendant from proceeding with its tort counterclaims. Accordingly, we reverse the decision of the Court of Appeals.

This case arises from a bonding dispute, which stems from a failed hotel development project. Four suits involving various parties, including the property owner, general contractor, lender, and bonding company, ensued, the last of which is before this Court. The third suit arose in federal court, which Hartford, the bonding company, declined to join, and during which the bonding company's counsel made declarations to the federal court, which may reasonably be interpreted as contravening the bonding company's actions sub judice.

On 14 November 2007, Shrijee LLC (owner and developer) contracted with Helm Builders, LLC (general contractor) for the construction of a Durham hotel project, known as Hotel Indigo. Under the contract Helm agreed to furnish labor and materials for a total cost of $13,050,000, and Helm was required to obtain a payment and performance bond.

On 20 December 2007, United Bank & Trust Company (lender) issued a construction loan to Shrijee in the amount of $13,600,000 for use on the project,[1] and Shrijee executed a "deed of trust, assignment and security agreement" on the underlying hotel real property for the benefit of the Bank, which was recorded on 21 December 2007 with the Durham County Register of Deeds. At Helm's request, on 22 February 2008, United Bank sent a letter (the 2008 Letter) to Helm "confirm[ing] that the financing is available for the Hotel Indigo," that "[t]he minimum

1. Farmers Bank & Trust was the original issuer of the loan and merged with United Bank in November 2008. For purposes of this opinion, actions by Farmers Bank before the merger are referred to as those of United Bank, its undisputed successor in interest.

of $13,050,000 has been allocated for the contract amount to Helm Builders, LLC for the construction of the project," and that "payment authorizations will be determined and conducted by a third-party architect." The Bank further stated: "We understand this letter is to be used to release the Payment and Performance bonds for the construction of this project."

On 8 July 2008, Hartford issued a labor and material payment bond and a performance bond "to guarantee HELM's faithful performance of HELM's obligations under the Contract." Helm had executed various general indemnity agreements beforehand, dating back to 15 August 2005, which assigned to Hartford all of its rights under the construction contract, including tort claims, and which also gave Hartford the discretion to "assert and pursue all of the assigned . . . rights, actions, causes of action, claims, and/or demands."

Over the next two years, Helm substantially completed the Hotel Indigo project, which received a conditional certificate of occupancy in August of 2009, but Shrijee withheld payment for certain work. Hartford subsequently made payments under the bonds to various subcontractors whom Helm had failed to pay. On 28 January 2010, Helm sued Shrijee in Superior Court, Durham County (*Helm I*), and ultimately obtained a judgment for the unpaid work in the amount of $1,074,163.20, plus interest of $352,796.40 and $278,287.05 in attorneys' fees, on 20 October 2011 (the Shrijee Judgment).

During the pendency of the *Helm I* suit, on 31 January 2011, Helm sued United Bank in the United States District Court for the Middle District of North Carolina (the federal action), alleging that the 2008 Letter, which "confirmed in writing . . . that financing was being made available," contained fraudulent "misrepresentations made by the Bank," namely, that the monies were not actually allocated to pay Helm. Helm asserted claims of, *inter alia*, fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive trade practices, all of which relied upon the alleged misrepresentations in the 2008 Letter.

On 14 November 2012, counsel for Hartford contacted United Bank to "reaffirm" that "Hartford was the lawful owner of the Shrijee Judgment" under its previous general indemnity agreements. On 20 November 2012, Helm re-memorialized the agreement by executing an "Assignment of Judgment," filed with the Durham County Clerk of Superior Court, which stated that "HELM Builders, LLC does hereby further assign, transfer and grant to Hartford all of its rights to sue . . . and all other legal processes necessary to the enforcement of the [Shrijee]

Judgment and all proceeds recovered," and that "the [previous indemnity agreements] shall remain in full force and effect."

Nonetheless, on 4 June 2013, Helm filed a complaint in Superior Court, New Hanover County, against Hartford (*Helm II*) seeking, *inter alia*, a declaratory judgment that Helm's "Assignment is null and void," that Hartford "has no rights or interest in the [federal action]," and that "Helm's claims asserted in the [federal action] are not subject to the assignment provisions of the Hartford Indemnity Agreements."

In light of Helm's apparent assignment to Hartford of the Shrijee Judgment and tort claims, United Bank became "concern[ed] over the possibility of inconsistent verdicts should United Bank be forced to litigate the same issues against Helm and Hartford in separate actions." Furthermore, faced with "Hartford's alleged ownership of all claims arising from or related to the [Hotel Indigo] Project," the Bank became concerned about not only the claims arising in Helm's name, but those arising in the name of Hartford. Ultimately, on 7 June 2013, the Bank moved the federal court to substitute Hartford as the plaintiff or, in the alternative, to join Hartford as a necessary party, noting that "it is undisputed that Hartford claims an interest in the subject of this [federal] action," and thus any related claims arising therefrom.

On 21 June 2013, in the action sub judice United Bank filed its complaint in Superior Court, Durham County, against Hartford seeking, *inter alia*, a declaratory judgment that the Bank's deed of trust securing the construction loan has priority over Helm's lien against Shrijee for "labor performed or materials furnished."[2]

On 3 July 2013, counsel for Helm, United Bank, and Hartford appeared before the federal court regarding the Bank's motion to include Hartford as a plaintiff or necessary party in the federal action. Noting the recently filed state court litigation, the *Helm II* suit and the suit sub judice, the court inquired about the "purported dispute between the plaintiff here [Helm] and Hartford with regard to what rights Hartford may or may not have in this litigation." The court expressed concerned about

> who would be the real party in interest in this case, who owns this action, and whether or not if Helm pursues this case, Hartford would have some right to come along at a later time and say we're not bound by that, we own this, and we think Helm should have pursued a different

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2. Old Republic National Title Insurance Company, as the title insurer for the deed of trust, is a co-plaintiff.

> course, we don't think they waived anything that would effect [sic] us. That bothers me. So my question to you is, are Helm and Hartford on the same page with regard to our proceeding ahead with this lawsuit?

Counsel for Hartford responded: "Hartford has no objection with this case moving forward without Hartford . . . , and that Hartford does not—will not seek to collaterally attack any judgment entered in this action with Hartford not as a named party." Counsel acknowledged concerns regarding the possible estoppel of its claims in the related actions, stating to the court: "To the extent there are—there is evidence brought to the Court's attention in this case, it would be Hartford's position that there would be no issue preclusion as to Hartford in that related litigation."

The court responded: "I don't know that I can make any ruling with regard to issue preclusion that would be applied by the state court, . . . [and] anything I say or do would be only advisory with regard to what the state court may find to be precluded." In other words, if Hartford declined to join the federal action, it would assume the risk that its claims may be estopped in the related state court litigation.

Counsel for Hartford acquiesced, stating:

> [I]t is clear from Hartford's perspective that it is not a necessary party to this litigation. To the extent Your Honor does have concerns as to any purported assignments of the general agreements indemnity as they are brought to the Court's attention, or issues of equitable subrogation, I think that that could be essentially be handled post-litigation through interpleader action.

The court agreed. Hartford ultimately declined to join the federal action.

After extensive discovery and deposition testimony, Helm's claims arising from the 2008 Letter were tried before a jury in the federal action. As described by United Bank, "Counsel for Hartford sat through the majority of the trial and never advised the court of any reason to add Hartford to the case." On the verdict sheet the jury expressly concluded that the February 2008 Letter did not contain "false information" and that Helm did not suffer harm therefrom. Following adjudication of Helm's claims, on 16 July 2013, the federal court ordered that Helm "have and recover nothing from [United Bank]" and dismissed the case with prejudice.

On 17 October 2013, Hartford answered United Bank's complaint sub judice and filed, *inter alia*, tort counterclaims based on the alleged falsity of the 2008 Letter, which are the only claims at issue before this Court.[3] Based on that alleged falsity, Hartford raises strikingly similar tort counterclaims as those raised by Helm in the federal action, consisting of fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive trade practices. Hartford alleges that United Bank acted fraudulently by "ma[king] false and misleading representations" in the 2008 Letter and that "Hartford would not have issued both the Payment and Performance Bonds absent the Bank's express representations" therein. In response, United Bank points to the related federal action and raises affirmative defenses of "res judicata and/or collateral estoppel" because the same tort claims "were litigated to final judgment" by Hartford's assignor Helm. The Bank asserted other defenses as well, including waiver, unclean hands, and "judicial estoppel/estoppel by inconsistent positions" based on Hartford's counsel's declarations to the federal court.

On 25 February 2014, United Bank successfully moved for judgment on the pleadings as to the tort counterclaims. *See* N.C.G.S. § 1A-1, Rule 12(c) (2016). The trial court found that "Hartford is in privity with Helm" due to Helm's prior assignment. Given "Hartford's counsel's representations to [the federal court]" and "Hartford's decision not to participate in the [federal action]," which would have afforded Hartford "a full and fair opportunity to litigate its claims," the trial court found that "Hartford is bound by the judgment entered in the [federal action]." Citing *Whitacre Partnership v. BioSignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), the trial court concluded that "Hartford is judicially estopped from asserting the counterclaims against United Bank." In addition to finding judicial estoppel, the trial court found that Hartford's counterclaims were also barred by the doctrines of collateral estoppel and res judicata because the "central issue to the Counterclaims all revolves around the truth or falsity of the statements in the February 2008 Letter," which statements the federal jury had already determined "to be true." Hartford appealed to the Court of Appeals.

In a divided opinion, the Court of Appeals reversed the dismissal of Hartford's tort counterclaims. *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, ___ N.C. App. ___, 785 S.E.2d 185, 2016 WL 1321139 (2016) (unpublished). The majority concluded that, though

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3. On 13 October 2014, the trial court entered a consent judgment, which the parties concede resolved all other remaining claims.

"Hartford was in privity with respect to [Helm's] claims in the federal action," *Old Republic*, 2016 WL 1321139, at *4, such participation "only bars any claim Hartford might otherwise have (as assignee of [Helm's] claims) to recover for [*Helm's*] damages based on [Helm's] reasonable reliance on representations made by United Bank," *id.* The dissent opined that Hartford had "numerous opportunities" to join the federal action and that the doctrines of res judicata and collateral estoppel bar its tort counterclaims. *Id.* at *12 (Hunter, Jr., J., dissenting). Neither the majority nor the dissent, however, addressed the trial court's implementation of judicial estoppel, despite arguments made by the parties. United Bank appeals as a matter of right.

North Carolina has long recognized the importance of candor with the trial court. *See Whitacre P'ship*, 358 N.C. at 12, 591 S.E.2d at 878 (citing *Kannan v. Assad*, 182 N.C. 77, 78, 108 S.E. 383, 384 (1921)). The doctrine of "judicial estoppel seeks to protect the integrity of the judicial process," *id.* at 16, 591 S.E.2d at 880, "which 'lies at the foundation of all fair dealing . . . and without which, it would be impossible to administer law as a system,' " *id.* at 27, 591 S.E.2d at 887 (quoting *Armfield v. Moore*, 44 N.C. (Busb.) 157, 161 (1852)).

A party is generally not "allowed to change his position with respect to a material matter, during the course of litigation, nor should he be allowed to 'blow hot and cold in the same breath.' " *Id.* at 12, 591 S.E.2d at 878 (quoting *Kannan*, 182 N.C. at 78, 108 S.E. at 384); *see id.* at 29, 591 S.E.2d at 888 (Judicial estoppel is proper when "a party's subsequent position . . . [is] ' "clearly inconsistent" with its earlier position.' " (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 1815, 149 L. Ed 2d 968, 978 (2001))). Unlike its "closely related" cousins, the doctrines of collateral estoppel and res judicata, judicial estoppel is "dissimilar in critical respects." *Id.* at 16, 591 S.E.2d at 880 (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)). Judicial estoppel seeks to protect the judicial process itself and does not require " 'mutuality' of the parties," detrimental reliance, or that an issue have been "actually litigated in a prior proceeding." *Id.* at 16-18, 591 S.E.2d at 880-82 (citations omitted).

As a "discretionary equitable doctrine," *id.* at 26, 591 S.E.2d at 887, judicial estoppel empowers the court with the necessary "means to protect the integrity of judicial proceedings where [other] doctrines . . . might not adequately serve that role," *id.* at 26, 591 S.E.2d at 887 (citations omitted). Because judicial estoppel "protect[s] the courts rather than the litigants, . . . a court, even an appellate court, may raise [judicial]

estoppel on its own motion." *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir.) (footnote omitted) (citing *Allen*, 667 F.2d at 1168 n.5)), *cert. denied*, 498 U.S. 812, 111 S. Ct. 48, 112 L. Ed. 2d 24 (1990).

We review de novo the trial court's order granting judgment on the pleadings. *See CommScope Credit Union v. Butler & Burke, LLP*, ___ N.C. ___, ___, 790 S.E.2d 657, 659 (2016). The trial court's implementation of judicial estoppel as a basis to grant the order, however, is reviewed for abuse of discretion, *Whitacre P'ship*, 358 N.C. at 38, 591 S.E.2d at 894 (citing *New Hampshire*, 532 U.S. at 750, 121 S. Ct. at 1814-15, 149 L. Ed 2d at 977-78), and will only be overturned "upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision," *In re Foreclosure of Lucks*, ___ N.C. ___, ___, 794 S.E.2d 501, 506 (2016) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

Though the parties have primarily focused their briefing on the companion doctrines of collateral estoppel and res judicata, we proceed no further than judicial estoppel. Hartford argues that it is not prosecuting its "Assigned Claims" from Helm but rather "its own, independent Tort Claims." Such a factual inquiry, however, reaches beyond the appropriate standard of review for judicial estoppel. Presented with Hartford's counsel's apparently contradictory declarations before the federal court and the substantial similarities of its tort claims to those of Helm, as revealed in the pleadings, the trial court reasonably invoked judicial estoppel to prevent Hartford from taking an inconsistent position, and therefore, did not abuse its discretion.

By filing its similar tort counterclaims, the trial court could reasonably conclude that Hartford takes the action that it stated to the federal court it would not take. *See Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 888. The federal court expressed concerns that Hartford might "come along at a later time and say we're not bound by [the federal action]" and further advised Hartford that it could not rule regarding its state-court estoppel concerns. Despite knowing of the estoppel risk, Hartford declined to join the federal action and stated that it "will not seek to collaterally attack any judgment entered in this action with Hartford not as a named party." *See Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 47-48 (1857) ("The law . . . will not . . . suffer a man to contradict or gainsay, what, under particular circumstances, he may have previously said or done."); *see also Collateral Attack*, *Black's Law Dictionary* (10th ed. 2014) ("[A]n attempt to undermine a judgment through a judicial proceeding in which the ground . . . is that the judgment is ineffective.").

Nonetheless, Hartford seeks to raise similar fraud claims to those of its assignor Helm, all of which contest the same adjudicated facts in the federal action—the very situation about which the federal court expressed concern. Moreover, United Bank moved to join Hartford as a necessary party in that action, seeking to avoid such relitigation.

Allowing Hartford to proceed in the face of its own contravening assertions made before the federal court poses a significant threat of inconsistent court determinations. *See Whitacre P'ship*, 358 N.C. at 13-14, 591 S.E.2d at 879; *Jones v. Sasser*, 18 N.C. (1 Dev. & Bat.) 452, 464 (1836) (Estoppel is "*founded* upon the great principles of morality and public policy . . . to prevent that which deals in duplicity and inconsistency."); *see also Cates v. Wilson*, 321 N.C. 1, 18, 361 S.E.2d 734, 744 (1987) (Mitchell, J., concurring in result) ("A lawsuit is not a parlor game . . . ."). Permitting such a conflicting position and inconsistency would serve to undermine public confidence in the judicial process.

In sum, Hartford had ample opportunity to litigate all of its related claims, including those attributable to its assignor Helm and to Hartford individually, by joining the federal action. Hartford elected not to do so. Given the statements made by Hartford's counsel before the federal court and the substantial similarity of its counterclaims, which contest prior adjudicated facts, we conclude that the trial court reasonably invoked judicial estoppel to restrain Hartford from adopting an inconsistent position. *See Whitacre P'ship*, 358 N.C. at 26-27, 591 S.E.2d at 887 (Judicial estoppel serves "as a gap-filler" and is appropriate "where the technical requirements of" its companion estoppel doctrines may not be met.). The trial court did not abuse its discretion and therefore, properly dismissed Hartford's tort counterclaims. Accordingly, we reverse the decision of the Court of Appeals, which reversed the trial court's dismissal of the tort counterclaims.

REVERSED.

Justice ERVIN dissenting.

The majority has resolved this case based upon judicial estoppel considerations instead of the collateral estoppel and res judicata principles upon which the dissenting opinion in the Court of Appeals relied in determining that the trial court's order should be upheld. Moreover, in holding that Hartford is judicially estopped from seeking relief from United Bank separate and apart from Helm, the majority assumes, without demonstrating, that (1) Hartford "collaterally attack[ed] the federal

judgment *post hoc*" and (2) attempted to "re-litigat[e] its related claims arising from the same facts." On the contrary, the fact that two different parties have asserted that the same defendant committed the same torts in connection with the same overall transaction does not, at least in my opinion, mean that these parties have asserted identical claims in the event that those claims are supported by different facts. As a result, given that the dissenting opinion in the Court of Appeals, which provides the basis for our jurisdiction over this case, did not rely on judicial estoppel principles in upholding the trial court's decision and my belief that the claims that Hartford seeks to assert against United Bank are fundamentally different from the claims that Helm asserted against that financial institution, I respectfully dissent from the Court's decision with respect to the judicial estoppel issue.

Neither the majority nor the dissenting opinions in the Court of Appeals make any mention of judicial estoppel. *Old Republic Nat'l. Title Ins. Co. v. Hartford Fire Ins. Co.*, — N.C. App. —, 785 S.E.2d 185 (2016). "When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) . . . . N.C. R. App. P. 16(b). Although " '[t]his Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice,' and may do so to 'consider questions which are not properly presented according to [its] rules,' " *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007) (brackets in original) (quoting *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975)), I am not persuaded that we should do so in this case given the limited extent to which the parties addressed this subject in their briefs. As I read the record, United Bank mentioned the subject of judicial estoppel in an eight line footnote found on the last page of its principal brief in which it made the conclusory assertion that Hartford was not entitled to "represent to the court in the Prior Action that it was not a necessary party and would not collaterally attack the judgment entered in that action and then – three months after the jury verdict – assert identical claims premised on the same facts and issues actually litigated to a final judgment in the Prior Action." (Citing *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 21, 591 S.E.2d 870, 884 (2004)). Although Hartford addressed the judicial estoppel issue in more detail, it did little more than point out that the judicial estoppel issue had not been addressed in the dissenting opinion in the Court of Appeals and was not, for that reason, properly before the Court and to assert that,

since it was "prosecuting its own, independent Tort Claims," it was not judicially estopped from pursuing those claims in this case. (Citing *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005), and *Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 888-89)). As a general proposition, deciding an issue that has not been fully briefed and argued by the parties involves risks that I see no reason for the Court to take in this case. In addition, I am not persuaded, and the majority has not demonstrated, that a decision to address and resolve the judicial estoppel issue when it is not properly before us promotes the "expeditious administration of justice." *Ellis*, 361 N.C. at 205, 639 S.E.2d at 428. As a result, I do not believe that we should deviate from our usual practice of refraining from deciding issues that are not properly before us. However, in light of the fact that I disagree with the majority's decision with respect to the judicial estoppel issue as well, I will discuss the merits of the Court's determination that Hartford is judicially estopped from pursuing the claims that it has asserted against United Bank.

The matter before the Court stems from the trial court's decision to grant United Bank's motion for judgment on the pleadings. "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citation omitted). "The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.* at 137, 209 S.E.2d at 499 (citing, *inter ali*a, *Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 61 S. Ct. 418, 85 L. Ed. 577 (1941); *Austad v. United States*, 386 F.2d 147 (9th Cir. 1967)). A trial court order granting a motion for judgment on the pleadings is reviewed de novo. *See CommScope Credit Union v. Butler & Burke, LLP*, __N.C. __, __, 790 S.E.2d 657, 659 (2016) (citation omitted). "Under the *de novo* standard of review, the [Court] 'consider[s] the matter anew[ ] and freely substitut[es] its own judgment for' [that of the lower court]." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, __ N.C.__, __, 794 S.E.2d 785, 791 (2016) (brackets in original) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004)).

Judicial estoppel is "customarily used to promote the fairness and integrity of judicial proceedings." *Whitacre P'ship*, 358 N.C. at 13, 591 S.E.2d at 879. "A party is not permitted to take a position in a subsequent

judicial proceeding which conflicts with a position taken by him in a former judicial proceeding, where the latter position disadvantages his adversary." *Id.* at 21, 591 S.E.2d at 884 (quoting *Rand v. Gillette*, 199 N.C. 462, 463, 154 S.E. 746, 747 (1930)). However, "a party may not be judicially estopped to assert 'inconsistent positions with respect to issues that are only superficially similar.' " *Id.* at 16, 591 S.E.2d at 880 (quoting 18 James Wm. Moore et al., *Moore's Federal Practice* § 134.30, at 134–69 (3d ed. 1997)). In other words, "judicial estoppel is limited to the context of inconsistent factual assertions." *Id.* at 32, 591 S.E.2d at 890. For that reason, in order to invoke judicial estoppel, a party must show that (1) the opposing party "advanced an inconsistent factual position in a prior proceeding, and (2) the prior inconsistent position was adopted by the first court in some manner." *AXA Marine & Aviation Ins. (UK) Ltd. v. Seajet Indus. Inc.*, 84 F.3d 622, 628 (2d Cir. 1996); *see also Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000) (same). In other words, "there must be a true inconsistency between the statements in the two proceedings"; "[i]f the statements can be reconciled there is no occasion to apply an estoppel." *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72-73 (2d Cir. 1997) (citing, *inter alia*, *AXA Marine & Aviation*, 84 F.3d at 628). As a general proposition, "a trial court's application of judicial estoppel is reviewed for abuse of discretion." *Whitacre P'ship*, 358 N.C. at 38, 591 S.E.2d at 894 (citation omitted). "Where the essential element of inconsistent positions is not present, it is an abuse of discretion to bar plaintiff's claim on the basis of judicial estoppel." *Estate of Means ex rel. Means v. Scott Elec. Co. Inc.*, 207 N.C. App. 713, 719, 701 S.E.2d 294, 299 (2010) (citation omitted). Thus, the issues before us in this instance are: (1) whether the allegations and admissions in the parties' pleadings, considered in the light most favorable to Hartford, demonstrate that Hartford took inconsistent positions in the related federal case and in this case; and (2) whether the trial court abused its discretion in invoking judicial estoppel to bar the assertion of Hartford's claims. In view of my belief, after reviewing the allegations and admissions in the pleadings in the light most favorable to Hartford, that Hartford has not made inconsistent assertions in the related federal case and this case, I believe that the trial court erred by dismissing Hartford's claims on judicial estoppel grounds.

In the related federal action, Helm asserted claims against United Bank for (1) fraudulent and deceptive conduct, including the intentional misrepresentation and concealment of material facts from Helm, that constituted unfair and deceptive trade practices; (2) fraud, based upon representations made to Helm by Michael Schornick in a February 2008 letter, by Judy Tackett in July 2009 telephone conversations, and by

Kermin Fleming in both a voice mail and telephone conference in July 2009; (3) fraud in the inducement based upon these same representations to Helm; (4) unjust enrichment; and (5) negligent misrepresentation based upon these same representations to Helm.

On 7 June 2013, United Bank filed a motion in the related federal action seeking to have Hartford substituted for Helm as the party plaintiff on the grounds that Hartford, which owned any judgment that Helm might obtain, was the real party in interest. At a hearing held for the purpose of considering various pretrial motions held on 3 July 2013, United States District Judge N. Carlton Tilley, Jr., expressed concern that "Hartford would have some right to come along at a later time and say we're not bound by [the federal court judgment], we own this, and we think Helm should have pursued a different course, we don't think they waived anything that would [a]ffect us." In response, counsel for Hartford informed the federal district court that: (1) "Hartford has no objection with *this case* moving forward without Hartford as a named party to *this litigation*"; and (2) "Hartford . . . will not seek to collaterally attack any judgment entered in *this action*." (Emphases added.) In other words, as the italicized statements make clear, the representations made by Hartford's counsel to the federal district court were strictly limited to the issues currently before that forum. Shortly thereafter, Hartford's counsel told United Bank's counsel in an e-mail that the representations that she had made to the district court in the federal proceeding did not include any separate claims that Hartford might have against United Bank. More specifically, Hartford's counsel informed counsel for United Bank that, while it "will not seek to re-litigate those claims brought by HELM Builders in" the federal action, "Hartford did not represent to the [federal district court] that it was waiving and/or in any way releasing any claim that it may possess against United Bank from this date until the end of time, whether known or unknown."

About three months after the conclusion of the federal trial, in which the jury returned a verdict in United Bank's favor, Hartford asserted claims against United Bank for (1) fraud, based upon a contention that the 22 February 2008 letter contained representations and omitted material facts that had the effect of making that letter false and misleading so as to deceive *Hartford*; (2) fraud in the inducement, based upon a contention that United Bank had induced Hartford to provide bonding services for the Hotel Indigo project based upon misleading representations and omissions to *Hartford* associated with the 22 February 2008 letter; (3) unfair trade practices, based upon the misleading representations and omissions to *Hartford* associated with the 22 February 2008

letter; and (4) negligent misrepresentation, based upon a contention that United Bank had failed to exercise ordinary care in its communications with *Hartford*. In determining that Hartford is judicially estopped from asserting these claims based upon the representations that it had made to the district court during the related federal case, the majority has failed to analyze the claims that Hartford has asserted against United Bank in order to ascertain whether they are the same as those that Helm asserted against United Bank. When such an analysis is undertaken, it is clear to me that the claims that Hartford seeks to assert against United Bank in this case are not identical to the claims that Helm asserted against United Bank in the related federal action.

In seeking relief from United Bank, Hartford alleged that, "[p]rior to the issuance of the performance and payment bond," it "required verification and written assurance from the Bank that the Bank had allocated funds from the Construction Loan sufficient to cover and pay to HELM Builders the base scope of the Shrijee Contract—i.e. $13,050,000.00" and that, "prior to February 22, 2008, the Bank knew and understood that HELM Builders' surety had refused to issue the performance and payment bond in the amount of $13,050,000.00 for the Hotel Indigo Project based solely upon the Bank's issuance of the Bank Commitment Letter" and that Hartford "required the Bank to provide assurances that it had allocated funds from the Construction Loan sufficient to cover the base scope of the Shrijee Contract—i.e., $13,050,000.00 in order for Hartford to issue the performance and payment bond." In light of that understanding, United Bank provided a letter from Michael E. Schornick, Jr., an Executive Vice President, to Scott McAllister, who served as Helm's President, dated 22 February 2008 in which Mr. Schornick stated that:

> This letter is to confirm that the financing is available for the Hotel Indigo, Durham, NC project. The minimum of $13,050,000 has been allocated for the contract amount to Helm Builders, LLC for the construction of the project. Direct funding to Helm Builders LLC is contingent upon Shrijee LLC authorization, draw percentages must be commensurate with completion percentage and the standard lien waivers from both Helm and all subcontractors including vendors. Inspections & payment authorizations will be determined and conducted by a third-party architect.
>
> We understand this letter is to be used to release the Payment and Performance bonds for the construction of this project.

According to Hartford, United Bank "provided the February 2008 Bank Letter to Har[t]ford, in care of HELM Builders, to obtain Hartford's issuance of the requested performance and payment bonds for the construction of the Hotel Indigo Project." However, as Hartford discovered during the trial of the related federal action, United "Bank had not allocated at least $13,050,000 of the Construction Loan for the Shrijee Contract;" "never intended to allocate at least $13,050,000.00 of the Construction Loan for the Shrijee Contract;" and did not "include within the February 2008 Bank Letter sufficient information to put Hartford on notice that the Bank was not financing one hundred percent (100%) of the construction costs for the Hotel Indigo Project" or "to put Hartford on notice that the Bank had not allocated at least $13,050,000 of the Construction Loan for the Shrijee Contract." Hartford contended that it "would not have issued both the Payment and Performance Bonds absent the Bank's express representations to Hartford, set forth in the February 2008 Bank Letter." As a result, Hartford alleged that it was entitled to recover damages from United Bank for fraud, fraud in the inducement, unfair and deceptive trade practices, and negligent misrepresentation.

The essence of the claim that Hartford seeks to assert against United Bank is that Hartford could have reasonably understood the statements contained in the 22 February 2008 letter to indicate that the bank had committed sufficient funds from the construction loan to pay for the construction of the Hotel Indigo project; that no such commitment had, in fact, been made; and that Hartford would not have provided bonding services for the project had it understood that the bank had not allocated sufficient funds from the construction loan to pay for the construction of the Hotel Indigo. Although Helm had asserted that the 22 February 2008 letter contained misrepresentations as to Helm and that Helm would not have commenced construction had it known that sufficient funds had not been committed from the construction loan to pay the costs that Helm anticipated occurring in connection with the construction of the Hotel Indigo, I do not believe that there is any inconsistency between a representation to a federal district court that Hartford did not intend to collaterally attack or otherwise seek to relitigate claims based upon representations that were allegedly false as to Helm, which Hartford owned by virtue of an assignment that it had received from Helm, and the assertion of claims based upon misrepresentations that were alleged to have been made directly to Hartford, particularly given that this issue is being resolved at the pleading stage without the benefit of further factual development. As a result, given that the statements made by Hartford to the federal district judge prior to the federal trial

were limited to a commitment that Hartford would not attempt to relitigate the claims that Helm had asserted against United Bank and given that the claims that Hartford has asserted against United Bank rest upon alleged misrepresentations made to Hartford rather than to Helm, I do not believe that the undisputed information in the present record provides any basis for a determination that Hartford's representations to the federal district court conflict with the position that Hartford has taken in this case. As a result, since the allegations set out in the parties' pleadings, viewed in the light most favorable to Hartford, provide ample justification for a determination that Hartford did not make inconsistent representations in the related federal case and in this case, I respectfully dissent from the Court's decision to uphold the dismissal of Hartford's claims against United Bank on judicial estoppel grounds.[1]

Justices HUDSON and BEASLEY join in this dissenting opinion.

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1. In view of the fact that the Court has not reached the issue of whether Hartford is precluded from asserting its claims against United Bank on collateral estoppel or res judicata grounds, I express no opinion concerning the manner in which that issue should be decided.

STATE OF NORTH CAROLINA
v.
MORRIS LEAVETT STITH

No. 173A16

Filed 17 March 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 40 (2016), finding no error after appeal from a judgment entered on 24 September 2014 by Judge Claire V. Hill in Superior Court, Johnston County. Heard in the Supreme Court on 15 February 2017.

Joshua H. Stein, Attorney General, by Charles G. Whitehead, Special Deputy Attorney General, for the State.

Kimberly P. Hoppin for defendant-appellant.

PER CURIAM.

AFFIRMED.

CYNTHIA WALKER, D.D.S., Petitioner
v.
THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Respondent

No. 95PA16

Filed 17 March 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 518 (2016), affirming an order entered on 23 October 2014 by Judge Elaine Bushfan in Superior Court, Wake County. Heard in the Supreme Court on 13 February 2017.

Smith Moore Leatherwood LLP, by Elizabeth Brooks Scherer and Ryan McKaig, for petitioner-appellant.

Ellis & Winters LLP, by Matthew W. Sawchak, Stephen D. Feldman, Troy D. Shelton, and Paul M. Cox; and Carolin Bakewell for respondent-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clinton R. Pinyan, for North Carolina Board of Pharmacy, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

REGINA RADFORD DOSS and AMY RADFORD BARRETT, as the Co-Administrators of the ESTATE OF TONY MARIE PRIDGEN RADFORD	)	
v.	)	From Nash County
BRENTON D. ADAMS, BRENT ADAMS LAW OFFICES, PC, d/b/a BRENT ADAMS & ASSOCIATES	)	

No. 1P17

ORDER

The petition for discretionary review is allowed for the purpose of addressing the issues set forth in the petition and the following additional issue: "Is plaintiffs' second claim for relief ('Breach of Fiduciary Duty and Constructive Fraud') barred by the statute of limitations or statute of repose?"

By Order of the Court in Conference, this 16th day of March, 2017.

s/Michael R. Morgan
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of March, 2017.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

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

STATE v. GANN

[369 N.C. 519 (2017)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Buncombe County
	)	
JIMMY LEE GANN	)	

No. 243P16

ORDER

The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals in order to consider any of the challenges to the trial court's judgments advanced in defendant's brief before that Court that the Court did not address in its original opinion and, in the event that the Court of Appeals determines that none of defendant's additional challenges to the trial court's judgments have any merit, to modify its original decision so as to provide for a further remand to the trial court for entry of judgment and resentencing on the lesser included offense of second degree arson.

By order of the Court, this the 16th day of March, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of March, 2017.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
JESUS MARTINEZ	)	

No. 25P17

ORDER

Upon consideration of the Petition for Discretionary Review filed by the State of North Carolina on 19 January 2017, the Court enters the following order:

"The Court allows the State's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for the purpose of determining whether the trial court's instruction held to have been erroneous by the Court of Appeals constituted plain error as required by *State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 366 N.C. 548, 742 S.E.2d 798 (2013)."

By order of the Court, this the 16th day of March, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of March, 2017.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

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

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

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001P17	Regina Radford Doss and Amy Radford Barrett, as the Co-Administrators of the Estate of Tony Marie Pridgen Radford v. Brenton D. Adams, Brent Adams Law Offices, PC, d/b/a Brent Adams & Associates	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-446)	Special Order
004P17	State v. Leonard Paul Schalow	1. State's Motion for Temporary Stay (COA16-330) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/6/2017** 2. Allowed 3. Allowed
005P17	Gary Warren Spruill v. Westfield Insurance Company, Allstate Property and Casualty Insurance Company	Def's (Westfield Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA15-1329)	Denied
008P17	Mina Kompani Hashemi v. Ali Reza Hashemi-Nejad	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-358) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
009P17	State v. Eliazar Juan Mendoza	Def's PDR Under N.C.G.S. § 7A-31 (COA16-224)	Denied
011P17	State v. Royal Spencer Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-567)	Denied
012P17	Eli Global, LLC and Greg Lindberg v. James A. Heavner	1. Def's Notice of Appeal Based on a Constitutional Question (COA16-186) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plts' Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed

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015P17	Marlow Williams v. Frank L. Perry, in His Official Capacity as Secretary, North Carolina Department of Public Safety, and Paul G. Butler, Jr., in His Official Capacity as Chairman of the North Carolina Post-Release Supervision and Parole Commission	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-372) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
016P17	Timothy R. Poole v. State of North Carolina	Plt's *Pro Se* Motion for *Writ of Mandamus*	Denied
017P17	Settlers Edge Holding Company, LLC; Mountain Air Development Corporation; Virginia A. Banks; William R. Banks; Jeani H. Banks; Michael R. Watson; Sheree B. Watson; Virginia A. Banks, William R. Banks, and Sheree B. Watson in Their Capacity as Trustees of William A. Banks Revocable Trust; Morris Atkins in His Capacity as Trustee of William Banks Family Irrevocable Trust Number 1; and Morris Atkins in His Capacity as Trustee of William Banks Family Irrevocable Trust Number 2 v. RES-NC Settlers Edge, LLC	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA15-1055) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
018P17	State v. Daniel Edward Palacios	Def's Petition for *Writ of Certiorari* to Review Order of COA	Dismissed
019P17	State v. Susan Annette Allen	Def's PDR Under N.C.G.S. § 7A-31	Denied

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021P17	James Townsend and Lucretia Townsend v. N.C. Department of Transportation	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-478)	Denied
023P15-2	State v. Jackie Emmitt Moorehead	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Halifax County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
024P17	State v. Calvin Lamar Adams	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-1384)	Denied
025P17	State v. Jesus Martinez	1. State's Motion for Temporary Stay (COA16-374) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/19/2017** Dissolved **03/16/2017** 2. Dismissed as moot 3. Special Order
027A17	Karen Head v. Gould Killian CPA Group, P.A., G. Edward Towson, II, CPA	1. Defs' Notice of Appeal Based Upon a Dissent (COA16-525) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed
029P17	Harry A. Wiley and Gerald D. Gilman v. L3 Communications Vertex Aerospace, LLC	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-460) 2. M. Nan Alessandra's Motion for Admission *Pro Hac Vice*	1. Denied 2. Allowed
031P17	State v. Jarvis Montrale Bell	Def's PDR Under N.C.G.S. § 7A-31 (COA16-326)	Denied
033P17	State v. William Davis Whitaker	Def's PDR Under N.C.G.S. § 7A-31 (COA16-521)	Denied
037P17	State v. Kevin John Kirkman	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-407)	Denied

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038P17	State v. Anton Christen	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
041P16	E. Brooks Wilkins Family Medicine, P.A. v. WakeMed; WakeMed d/b/a Falls Pointe Medical Group; Inam Rashid, MD; Michele Casey, MD; Monica Oei, MD; and Leslie Robinson, MD	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-217)	Denied
042P17	Maria Vaughan v. Lindsey Mashburn, M.D. and Lakeshore Women's Specialists, PC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1230) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Denied
043P17	State v. John Phillip Locklear	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA16-179)	Denied
047P17	State v. Avery Joe Lail, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-608) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
050P17	State v. Robert Wayne Smith	Def's *Pro Se* Motion to the Denial of *Writ of Mandamus*	Denied **Ervin, J., recused** **Hudson, J., recused**
051P17	In the Matter of Mary Ellen Brannon Thompson	Appellant's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-1380)	Denied

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052P17	Roy A. Cooper, III, in His Official Capacity as Governor of the State of North Carolina v. Philip E. Berger, in His Official Capacity as President *Pro Tempore* of the North Carolina Senate; and Timothy K. Moore, in His Official Capacity as Speaker of the North Carolina House of Representatives	1. Plt's Motion for Temporary Stay (COAP17-101) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **02/13/2017** 2. Dismissed as moot 3. Dismissed as moot
053P17	State v. Billy Joe Edwards	Def's *Pro Se* Motion for Writ of Supervisory Control	Dismissed **03/03/2017**
054P17	State v. David Felton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 2. Def's *Pro Se* Motion to Proceed I*n Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
056P17	Dr. Robert Corwin as Trustee for the Beatrice Corwin Living Irrevocable Trust, on Behalf of a Class of Those Similarly Situated v. British American Tobacco, PLC; Reynolds American, Inc.; Susan M. Cameron; John P. Daly; Neil R. Withington; Luc Jobin; Sir Nicholas Scheele; Martin D. Feinstein; Ronald S. Rolfe; Richard E. Thornburgh; Holly K. Koeppel; Nana Mensah; Lionel L. Nowell, III; John J. Zillmer; and Thomas C. Wajnet	1. Def's (British American Tobacco, PLC) Motion for Temporary Stay (COA15-1334) 2. Def's (British American Tobacco, PLC) Petition for *Writ of Supersedeas* 3. Def's (British American Tobacco, PLC) PDR Under N.C.G.S. § 7A-31 4. Gary A. Bornstein's Motion to be Admitted *Pro Hac Vice*	1. Allowed **02/20/2017** 2. 3. 4.

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063A17	State v. Antwarn Lee Rogers	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/23/2017** 2. Allowed **03/15/2017**
065P17	State v. Jeffrey Robert Parisi	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/24/2017** 2.
066P17	State v. Rocky Kurt Williamson	1. State's Motion for Temporary Stay (COA16-631) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **02/27/2017** 2. 3. 4.
068P17	Arkeem Hakim Jordan v. State of North Carolina	1. Petitioner's *Pro Se* Motion for Notice of Appeal 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Motion to Proceed as a Man Without Proper Funds	1. Dismissed 2. Denied 3. Allowed **Ervin, J., recused**
074P17	Nathaniel Bryant and Joseph L. Gillespie v. Charles Wilbur Bryant and Carl Bryant	1. Plt's (Nathaniel Bryant) *Pro Se* Motion for Temporary Stay 2. Plt's (Nathaniel Bryant) *Pro Se* Petition for *Writ of Supersedeas*	1. Denied **03/13/2017** 2. Denied **03/14/2017**
078P17	In the Matter of the Foreclosure of a Deed of Trust Executed by Bruce J. Adams Dated December 28, 2004 and Recorded in Book 18194 at Page 265 in the Mecklenburg County Public Registry, North Carolina	1. Appellant's Motion for Temporary Stay (COA16-653) 2. Appellant's Petition for *Writ of Supersedeas*	1. Allowed **03/13/2017** 2.
081P17	State v. Gregory Alan Adams, Jr.	Def's *Pro Se* Motion to Stay and Legal Notice (COA16-397)	Dismissed **03/14/2017**

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082P15-2	In the Matter of A.E.C.	Petitioner's Petition for *Writ of Certiorari* to Review Order of COA (COA16-495)	Allowed
083P17	State v. Thomas Stout, Jr.	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Denied **03/14/2017**
083P17-2	State v. Thomas Stout, Jr.	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Denied **03/16/2017**
084P15-5	State v. Curtis Louis Sangster	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
131P16-4	State v. Somchai Noonsab	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/23/2017**
131P16-5	State v. Somchai Noonsab	Petitioner's *Pro Se* Motion to Default in the Matters of Denied Writ of Habeas Corpus	Denied **03/10/2017**
152PA16	Catawba County, by and through its Child Support Agency, *ex rel.* Shawna Rackley v. Jason Loggins	Plt's Motion to Allow Amicus Curiae to Participate in Oral Argument	Allowed **03/09/2017**
158P06-10	State v. Derrick D. Boger	1. Def's *Pro Se* Motion for Tort Claim 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
164P16-2	State v. David Michael Wilson	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-759) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
190P16-2	Joseph Earl Clark, II v. North Carolina Department of Public Safety	Petitioner's *Pro Se* Motion for PDR	Dismissed

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211PA16	SED Holdings, LLC v. 3 Star Properties, LLC, James Johnson, TMPS LLC, Mark Hyland, and Home Servicing, LLC	1. Defs' Motion to Appear 2. Plt's Motion to Stay Proceedings Against 3 Star Properties, LLC Due to Bankruptcy 3. Plt's Motion that Plaintiff be Permitted to Proceed Now in the Trial Court Against the Remaining Defendants 4. Plt's Motion to Lift Stay Order 5. Defs' Motion to Allow Time to Respond to Motion of Plaintiff to Dissolve the PDR Allowed by this Court	1. Allowed **11/01/2016** 2. Special Order **11/01/2016** 3. Special Order **11/01/2016** 4. 5. Allowed **02/02/2017**
212P16	Brian Blue v. Mountaire Farms, Inc., Mountaire Farms of North Carolina Corp., Mountaire Farms, LLC, Charles Branton, Daniel Pate, James Lanier, Robert Garroutte, a/k/a Robert Garroutte, Jr., Christopher Smith, Halley Ondona, Thomas Saufley, Detra Swain, as Executrix of the Estate of Clifton Swain, the Estate of Clifton Swain, and Bradford Scott Hancox, Public Administrator of Cumberland County, North Carolina, and as Successor or Substitute Personal Representative and/or Administrator and/or Collector of the Estate of Clifton Swain	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-791)	Denied
237P16-2	Avery M. Riggsbee v. W. Baine Jones, Jr., Judge Government	Employees Plt's *Pro Se* Motion for Enforcement Orders	Dismissed
240P16	Mary Ponder v. Mark Ponder	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA15-1277) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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243P16	State v. Jimmy Lee Gann	1. State's Motion for Temporary Stay (COA15-1344) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/27/2016** Dissolved **03/16/2017** 2. Dismissed as moot 3. Special Order 4. Dismissed as moot
245A08-2	State v. Terrance Lowell Hyman	1. State's Motion for Temporary Stay (COA16-398) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/10/2017** 2.
247P16-2	Jonathan Eugene Brunson v. North Carolina Department of Public Safety's Superintendent Felix Taylor of Pasquotank Correctional Institution and State of North Carolina, *et al.*	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/15/2017**
247P16-3	Jonathan Eugene Brunson v. North Carolina Department of Public Safety's Superintendent Felix Taylor of Pasquotank Correctional Institution and State of North Carolina, *et al.*	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/10/2017**
297P16	In the Matter of the Adoption of C.H.M., a minor child	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA15-1057)	Allowed

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314P16	Davidson County Broadcasting Company, Inc., Larry W. Edwards, and Wife, Shirley Edwards v. Iredell County v. Wayne McConnell, Rusty N. McConnell, Ann and Don Scott, Bill Mitchell, and David Lowery, Intervening Respondents	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA15-959) 2. N.C. Association of Broadcasters' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot
324A16	State v. Antwan Anthony (DEATH)	Def's Motion for Stay of Appellate Proceedings in Light of Pending Racial Justice Act Motion	Allowed **02/01/2017**
326P15-5	Burl Anderson Howell v. North Carolina Wayne County Department of Health and Human Services, by and through, Reese Phelps; Lou Jones	Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	Dismissed
330A16	Allscripts Healthcare, LLC v. Etransmedia Technology, Inc.	W. Swain Wood's Motion to Withdraw as Counsel for Petitioner-Appellant	Allowed
333P16-2	State of North Carolina *ex rel.* Commissioner of Insurance v. North Carolina Rate Bureau In the Matter of the Filing Dated January 3, 2014 by the North Carolina Rate Bureau for Revised Homeowners' Insurance Rates and Homeowners' Insurance Territory Definitions	North Carolina Rate Bureau's Petition for Reconsideration	Denied **02/14/2017**
335P16	State v. Gyrell Shavonta Lee	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1352)	Allowed

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341P12-4	State v. Donald Durrant Farrow	1. Def's *Pro Se* Motion for PDR (COAP16-888) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed **Ervin, J., recused**
349P16	KB Aircraft Acquisition, LLC v. Jack M. Berry, Jr., and Goforth Road, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-823)	Allowed
352P16	State v. Jeral Thomas Ore, Jr.	1. State's Motion for Temporary Stay (COA16-100) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/29/2016** Dissolved **03/16/2017** 2. Denied 3. Denied
363A14-2	Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, North Carolina, Hans J. Miller, in His Official Capacity; State of North Carolina, Governor Patrick Lloyd (Pat) McCrory, in His Official Capacity; Secretary of the North Carolina Department of Public Safety, Frank Perry, in His Official Capacity; Director of the North Carolina State Bureau of Investigation, Bernard W. (B.W.) Collier, II, in His Official Capacity; Director or Branch Head of the Alcohol Law Enforcement Branch of the State Bureau of Investigation, Mark J. Senter, in His Official Capacity	1. Def's (Sheriff of Onslow County) PDR Under N.C.G.S. § 7A-31 (COA16-390) 2. Def's (Sheriff of Onslow County) Motion for Leave to Withdraw PDR	1. --- 2. Allowed **Ervin, J., recused**

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368P14-2	State v. Kirk James Keller	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **02/17/2017** 2. Allowed **02/17/2017** 3. Dismissed as moot **02/17/2017**
368P16	Animaw Azige, Tewodros Abebe, Meseret Tefera, Zenash Abey, Tadese Gebregiorgis, Dawit Getahun, Edom A. Geru, Azemerawu Getaneh, Tsige Kibret, Tewodrose G. Tirfe, Hailu Afro, Mequanint Tsegaw, Zebene Mesele, Meaza Jembere, Nigatu Kassa, Almaz Mekonen, Aster Mles, Addisu Fentahum Ayalwe, Askale Yeshanew, and Haimonot Gedamu v. Holy Trinity Ethiopian Orthodox Tewahdo Church, Solomon Gugsa, Luleseged Deribe, Tesfa Gashareba, Samuel Agonafer, Samson Kassaye, Gedewon Kassa, Yohannes Assefa, Tassew Kassahun, and Eyoel Mulugeta	1. Plts' Notice of Appeal Based on a Constitutional Question (COA15-760) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's (Kassahun) Motion to Dismiss Plaintiff Azige's Claims Against All Defendants Without Prejudice 4. Def's (Kassahun) Motion to Dismiss Plts' Claims Against Defendant Kassahun Without Prejudice	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Dismissed as moot **Ervin, J., recused**
375P09-7	State v. Avenger Ridgeway	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Supplement 3. Def's *Pro Se* Motion to Amend	1. Denied 2. Dismissed as moot 3. Dismissed as moot **Ervin, J., recused**

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387P05-4	State v. Earl James Watson	1. Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP16-688) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Catawba County 3. State's Motion to Strike Reply to State's Response to Petition for *Writ of Certiorari*	1. Dismissed 2. Dismissed 3. Dismissed as moot **Ervin, J., recused**
388P16	Tawoos Bazargani, MD v. Dr. David Morris Marks, Duke University Hospital, Duke University, and Infectious Disease Control Association	1. Plt's *Pro Se* Motion for Notice of Appeal (COA16-176) 2. Plt's *Pro Se* Petition for Rehearing 3. Plt's *Pro Se* Motion to Supplement Notice of Appeal	1. Dismissed *ex mero motu* 2. Dismissed 3. Allowed
395P13-2	State v. John Lewis Wray, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cleveland County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
401P16	State v. Gary Arthur Metzger	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1093)	Denied
402P14-2	State v. Bobby Lee Rawlings	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wayne County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
407P13-3	State v. Shawn Germaine Fraley	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/14/2017** **Ervin, J., recused**
407P14-5	State v. Dwain Cornelius Ferrell	1. Def's *Pro Se* Motion for Notice of Appeal (COA16-627) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Dismissed
411A94-6	State v. Marcus Reymond Robinson	Def's Motion for Extension of Time to File Petition for *Writ of Certiorari*	Allowed

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421P16	State v. Kendra Potts Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA16-236)	Denied
426A16	The North Carolina State Bar v. David C. Sutton, Attorney	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-1198) 2. Plt's Motion to Dismiss Appeal 3. Def's Motion to Amend Notice of Appeal	1. --- 2. Allowed 3. Denied
427A16	Abrons Family Practice and Urgent Care, P.A.; Nash OB-GYN Associates, P.A.; Highland Obstetrical-Gynecological Clinic, P.A.; Children's Health of Carolina, P.A.; Capital Nephrology Associates, P.A.; Hickory Allergy & Asthma Clinic, P.A.; Halifax Medical Specialists, P.A. and Westside OB-GYN Center, P.A., Individually and on Behalf of All Others Similarly Situated v. North Carolina Department of Health and Human Services and Computer Sciences Corp.	1. Motion to Admit Bryant C. Boren, Jr. *Pro Hac Vice* 2. Motion to Admit Van H. Beckwith *Pro Hac Vice*	1. Allowed **01/31/2017** 2. Allowed **01/31/2017**
428P16	State v. Ottis McGill	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-296) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
436P16	State v. Howard Franklin Eubanks	1. Def's Motion for Temporary Stay (COA16-251) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/05/2016** Dissolved **03/16/2017** 2. Denied 3. Denied
437P16	Johnnie M. Darden, Sr. v. North Carolina Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-377)	Denied

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439P16	State v. Twyan Kenneth Coleman	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-305) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **12/09/2016** Dissolved **03/16/2017** 3. Denied
440P16	State v. Christopher Glenn Turner	1. State's Motion for Temporary Stay (COA16-656) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/06/2016** 2. Allowed 3. Allowed
441P16	State v. Marian Olivia Curtis	1. State's Motion for Temporary Stay (COA16-458) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/06/2016** 2. Allowed 3. Allowed
445P16	Jamestown Pender, L.P. v. NC Department of Transportation and Wilmington Urban Area Metropolitan Planning Organization	1. Def's (NCDOT) PDR Under N.C.G.S. § 7A-31 (COA15-925) 2. Def's (Wilmington Urban Area Metropolitan Planning Organization) Conditional PDR Under N.C.G.S. § 7A-31 3. Def's (Wilmington Urban Area Metropolitan Planning Organization) Motion for Leave to Withdraw as Counsel of Record and Notice of Appearance of Substitute Counsel 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot 3. Allowed 4. Dismissed as moot
447P16	Sheila McLean v. Bank of America, N.A., Nationstar Mortgage LLC, and Wells Fargo Bank, N.A., Solely in Its Capacity as Trustee for the Securitized Asset Backed Receivables, LLC, 2005-FR5 Mortgage Pass-Through Certificates, Series 2005-FR5	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-97)	Denied

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449P11-15	State v. Charles Everette Hinton	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **Ervin, J., recused**
452P16	State v. John Eddie Mangum	1. Def's Motion for Temporary Stay (COA16-344) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **12/16/2016** Dissolved **03/16/2017** 2. Denied 3. --- 4. Denied 5. Allowed
455P16	State v. William Sheldon Howell	1. State's Motion for Temporary Stay (COA16-303) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/20/2016** 2. Allowed 3. Allowed
456P16	In the Matter of W.C.D.	Respondent-Mother's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-351)	Denied
457P16	State v. Eric Scott Turner	Def's PDR Under N.C.G.S. § 7A-31 (COA16-214)	Denied
459P16	State v. James Howard Killian	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-268) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas* 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Allowed **12/22/2016** Dissolved **03/16/2017** 3. Denied 4. Dismissed as moot
463P16	State v. Dwayne Hoyte Dockery	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Buncombe County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

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

16 MARCH 2017

506P08-2	State v. Antwan Terrell Murphy	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Pitt County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
514PA11-2	State v. Harry Sharod James	1. Def's Motion for Temporary Stay (COA15-684) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal 6. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **05/20/2016** 2. Allowed 3. --- 4. Allowed 5. Allowed 6. Allowed
514P13-6	State v. Raymond Dakim Harris Joiner	Def's *Pro Se* Motion for Notice of Appeal	Dismissed *ex mero motu*
669P03-5	State v. Tony Robert Jones	Def's *Pro Se* Motion for Rehearing of Motion to Dismiss	Dismissed **Ervin, J., recused**

IN RE: INQUIRY CONCERNING A JUDGE, NO. 15-222

DAVID Q. LaBARRE, Respondent

No. 370A16

Filed 5 May 2017

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 26 September 2016 that Respondent David Q. LaBarre, an Emergency Judge of the General Court of Justice, be censured for conduct in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 22 March 2017, but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission (2015).

No counsel for Judicial Standards Commission or Respondent.

ORDER

The issue before this Court is whether Judge David Q. LaBarre (Respondent) should be censured for violations of Canons 1 and 2A of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be censured by this Court.

On 25 April 2016, the Commission Counsel filed a Statement of Charges against Respondent alleging that he had

> engaged in conduct inappropriate to his judicial office when, on December 16, 2015, he drove his vehicle recklessly and while substantially impaired, putting at risk his own life and the lives of others [and that] Respondent's belligerent, offensive, and denigrating behavior towards the responding law enforcement officers and emergency personnel was outrageous and unbecoming of a judicial officer, bringing into question whether it is

> appropriate for the Respondent to continue to serve as an Emergency Judge.

According to the allegations in the Statement of Charges, Respondent's driving while substantially impaired and belligerent behavior towards law enforcement officers and emergency personnel violated Canons 1 and 2A of the North Carolina Code of Judicial Conduct. As a result, Commission Counsel asserted that Respondent's actions "constitute[d] conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or otherwise constitutes grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina."

On 3 June 2016, Respondent filed an answer in which he admitted the factual allegations in the Statement of Charges and expressed remorse "for this uncharacteristic lapse in judgment." On 2 August 2016, Respondent and Commission Counsel filed a number of joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to censure Respondent. Also, Respondent "voluntarily resigned his commission as an Emergency Judge, and agree[d] not to seek another commission in the future." On 12 August 2016, the Commission heard this matter.

On 26 September 2016, the Commission filed a Recommendation of Judicial Discipline, in which it made the following findings of fact:

> 1. Respondent served honorably as a District Court Judge in Durham County from 1978 until 1994. He was appointed Chief District Court Judge on 3 January 1985 and served as Chief District Court Judge of Durham County from 3 January 1985 through 12 January 1990. Respondent was elected and served honorably as a Superior Court Judge in Durham County from 1994 until his retirement in 2002. Respondent was commissioned by the Governor as an Emergency Superior Court Judge and an Emergency District Court Judge in January 2003 and January 2004 respectively.
>
> 2. Shortly before 11:00 p.m. on 16 December 2015, the Durham Police Department received a call from a concerned driver reporting a suspected drunk driver. The caller provided the license plate number and indicated that the vehicle was driving northbound on Hillandale Road in Durham, North Carolina. The caller also reported that this vehicle had nearly hit four (4) other vehicles.

3. After checking the license plate number provided by the caller, Durham Police Officer J. A. Alcala determined that the vehicle was registered to Respondent, whose address was listed as near where the vehicle had been observed. In response, Officer Alcala drove to the registered address for the vehicle. Upon arriving at the apartment complex where the vehicle was registered, Officer Alcala observed a vehicle with the license plate number that matched the number reported to the police.

4. As Officer Alcala approached the vehicle, he noticed that the engine was still running and noted the only occupant, later identified as Respondent, was a male slumped over in his seat and who appeared to be sleeping at the wheel. The officer also noticed that the vehicle was still in drive with Respondent's foot on the brake. After knocking on the window and waking him, Respondent opened the vehicle's window, at which time Officer Alcala detected a strong odor of alcohol emanating from Respondent. Because of Respondent's level of impairment, another officer who arrived at the scene had to put the car in park as Respondent was unable to do so himself.

5. When Respondent finally exited his vehicle, he was unable to stand on his own without leaning against the vehicle, his speech was slurred, and he was unable to comprehend many of the officer's questions or follow basic instructions necessary for the officer to perform several field sobriety tests.

6. At approximately 11:25 p.m., at the officer's request, Respondent submitted to an initial portable breath test, which registered a positive result for the presence of alcohol. When asked to provide the requisite second sample, however, Respondent became belligerent, used offensive and vulgar expletives towards the officer, and refused to submit to a second test. Officer Alcala called Durham County Emergency Medical Services (EMS) to the scene to evaluate Respondent for a possible medical emergency. While waiting for Durham County EMS to arrive, Respondent continued to use vulgar language and expletives towards the police officers at the scene as they attempted to help him remain steady.

7. While at the scene, Officer Alcala examined Respondent's vehicle and noticed fresh damage and paint transfer on the right corner of the front bumper. The officer also observed the rear left tire rim was cracked and the front right tire had grey marks consistent with being scraped on a curb. While the officer was inspecting the vehicle, Respondent again directed expletives and rude statements towards the officer. Respondent's use of vulgar language and expletives towards law enforcement officers at the scene continued as they asked him routine questions and attempted to help him contact a family member.

8. When EMS arrived, Respondent refused to cooperate as they tried to take his vital signs, and he directed the same vulgar language and expletives towards EMS personnel as he had towards the police officers. Respondent was transported by ambulance to the local hospital after concerns were raised about his health and level of impairment. Respondent's offensive language continued throughout the ride to the local hospital.

9. The ambulance carrying Respondent arrived at the hospital at approximately 12:20 a.m. on 17 December 2015. After his admission, Respondent continued to use vulgar language and expletives towards police officers who were present. In addition, Respondent refused to submit to a blood draw to determine his level of impairment, forcing Officer Alcala to secure a search warrant to obtain a sample of Respondent's blood. During the interim period, Respondent again continued to direct expletives towards other officers and workers trying to assist him.

10. Officer Alcala returned to the hospital with a search warrant for Respondent's blood, and at approximately 2:20 a.m., a sample of Respondent's blood was taken by a nurse and submitted to the N.C. State Crime Laboratory for analysis. After the blood draw, Respondent was issued a citation for driving while impaired and released into the care of his family.

11. A true and correct copy of the Durham County Police Report detailing this incident and Respondent's arrest is attached to the Stipulation as Exhibit 1.

> 12. The matter of State v. David Q. LaBarre, Durham County file number 15CR3988, was heard on 5 February 2016. On that date, Respondent appeared with counsel, and entered a plea of guilty to driving while impaired. Respondent was placed on twelve (12) months of unsupervised probation, ordered to obtain a substance abuse assessment and complete any recommended education or treatment, pay a $100.00 fine, court costs and community service fee, to complete twenty-four (24) hours of community service, and comply with other conditions of probation.
>
> 13. Respondent has paid all court ordered financial obligations, completed the court ordered substance abuse assessment and recommended education/treatment, and has completed the court ordered community service.

(Citations omitted.) Based upon these findings of fact, the Commission concluded as a matter of law that:

> **A. <u>Driving While Impaired</u>**
>
> 1. Canon 1 of the Code of Judicial Conduct sets forth the broad principle that "[a] judge should uphold the integrity and independence of the judiciary." To do so, Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."
>
> 2. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
>
> 3. The clear, cogent and convincing evidence supporting the Commission's findings of fact show[s] that Respondent violated the criminal laws of the State of North Carolina by driving while impaired, thereby putting the lives of others and himself at risk.

4. Respondent agrees that by driving while impaired in violation of the criminal laws of the State of North Carolina, he acted in violation of Canon 1 of the North Carolina Code of Judicial Conduct and Canon 2A of the North Carolina Code of Judicial Conduct, and engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376.

5. Based upon the agreement of Respondent and the clear, cogent and convincing evidence supporting the Commission's findings of fact that Respondent violated the laws of the State of North Carolina by driving while impaired, the Commission concludes that Respondent: (1) failed to personally observe standards of conduct to ensure the integrity and independence of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct; and (2) failed to respect and comply with the law and to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.

6. The Commission further concludes that the facts and circumstances aggravate this misconduct to a level warranting more than a private letter of caution. Accordingly, Respondent's violations of Canon 1 and Canon 2A of the Code of Judicial Conduct also amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § 7A-376(b).

B. Belligerent, Offensive and Denigrating Behavior Towards Law Enforcement and Emergency Personnel

7. The clear, cogent and convincing evidence supporting the Commission's findings of fact show[s] that Respondent engaged in belligerent, offensive and denigrating behavior towards local law enforcement and emergency personnel as they executed their official duties and attempted to assist Respondent during the incident underlying these proceedings.

> 8. Respondent agrees that by his belligerent, offensive, and denigrating behavior towards law enforcement and emergency personnel, he acted in violation of Canon 1 and Canon 2A of the North Carolina Code of Judicial Conduct, and engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. §[ ]7A-376.
>
> 9. Based upon the agreement of Respondent and the clear, cogent and convincing evidence supporting the Commission's findings of fact, the Commission concludes that Respondent: (1) failed to personally observe standards of conduct to ensure the integrity and independence of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct and (2) failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.
>
> 10. The Commission further concludes that the facts and circumstances aggravate this misconduct to a level warranting more than a private letter of caution. Accordingly, Respondent's violations of Canon 1 and Canon 2A of the Code of Judicial Conduct also amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § 7A-376(b).

(Citations omitted.) Based upon these findings of fact and conclusions of law, the Commission recommended that this Court censure Respondent for "driving while impaired in violation of the laws of the State of North Carolina" and "engaging in belligerent, offensive and denigrating behavior towards law enforcement and emergency personnel of the State of North Carolina." The Commission based this recommendation on the Commission's earlier findings and conclusions and the following additional dispositional determinations:

> 1. Respondent agreed to enter into the Stipulation to bring closure to this matter and because of his concern for protecting the integrity of the court system. Respondent understands the negative impact his actions have had on the integrity and impartiality of the judiciary. Even after an esteemed judicial career spanning thirty-seven (37)

years, Respondent acknowledges his behavior during this single incident has jeopardized the public's confidence in his ability to continue to serve fairly and impartially.

2. Respondent has voluntarily resigned his commission as an Emergency Judge, and agrees not to seek another commission in the future, in lieu of facing a more severe disciplinary recommendation.

3. Respondent has an excellent reputation in his community. The actions identified by the Commission as misconduct by Respondent appear to be isolated and do not form any sort of recurring pattern of misconduct. Respondent has been fully cooperative with the Commission's investigation, voluntarily providing information about the incident and fully and openly admitting error and remorse.

4. Respondent's record of service to the judiciary, the profession and the community at large is otherwise exemplary. Respondent has been active in community and civic affairs, including service as chairman of the Deacons and chairman of the Trustees at Greystone Baptist Church.

5. Respondent agrees to accept a recommendation of **censure** from the Commission and acknowledges that the conduct set out in the stipulation establishes by clear and convincing evidence that his conduct is in violation of the North Carolina Code of Judicial Conduct and is prejudicial to the administration of justice that brings the judicial office into disrepute in violation of North Carolina General Statute § 7A-376(b).

6. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all seven Commission members present at the hearing of this matter concur in this recommendation to **censure** Respondent.

(Citations omitted.)

When reviewing a recommendation from the Commission in a judicial discipline proceeding, "the Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court.' " *In re Mack*, ___ N.C. ___, ___, 794 S.E.2d 266, 273 (2016) (order) (quoting

In re Hartsfield, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order)). In conducting an independent evaluation of the evidence, "[w]e have discretion to 'adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or [we] may make [our] own findings.' " *Id.* at ___, 794 S.E.2d at 273 (quoting *In re Hartsfield*, 365 N.C. at 428, 722 S.E.2d at 503 (alterations in original)). "The scope of our review is to 'first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law.' " *Id.* at ___, 794 S.E.2d at 274 (quoting *In re Hartsfield*, 365 N.C. at 429, 722 S.E.2d at 503).

After careful review, this Court concludes that the Commission's findings of fact, including the dispositional determinations set out above, are supported by clear, cogent, and convincing evidence in the record. In addition, we conclude that the Commission's findings of fact support its conclusions of law. As a result, we accept the Commission's findings and conclusions and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that Respondent should be censured.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that Respondent David Q. LaBarre be CENSURED for violations of Canons 1 and 2A of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

By order of the Court in Conference, this the 3rd day of May, 2017.

s/Michael R. Morgan
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of May, 2017.

Clerk of the Supreme Court

s/J. Bryan Boyd
Clerk

STATE OF NORTH CAROLINA
v.
ROBERT TIMOTHY WALSTON, SR.

No. 392PA13-3

Filed 5 May 2017

Witnesses—expert—repressed memory and suggestibility of memory

The trial court did not err in a prosecution for child sex offenses by excluding the testimony of a defense expert regarding repressed memory and the suggestibility of memory. A defense expert is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues concerning the prosecuting witness at trial. Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony, and the record here demonstrated sufficient evidence to support the trial court's decision to exclude the testimony.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 780 S.E.2d 846 (2015), reversing judgments entered on 17 February 2012 by Judge Cy A. Grant in Superior Court, Dare County, and ordering that defendant receive a new trial, after the Supreme Court of North Carolina remanded the Court of Appeals' prior unpublished decision in this case, *State v. Walston*, 239 N.C. App. 468, ___ S.E.2d ___, 2015 WL 680240 (2015). Heard in the Supreme Court on 13 February 2017.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Assistant Attorney General, for the State-appellant.

Mark Montgomery for defendant-appellee.

BEASLEY, Justice.

In this case we consider whether the trial court abused its discretion in excluding defense expert testimony regarding repressed memory and the suggestibility of memory. We find that the trial court did not abuse its discretion, and we reverse the decision of the Court of Appeals and reinstate defendant's convictions.

On 14 November 2011, Robert Timothy Walston, Sr. (defendant) was indicted for a number of child sex offenses. After a trial in February 2012, the jury found defendant guilty of one count of first-degree sexual offense, three counts of first-degree rape of a child, and five counts of taking indecent liberties with a child. Defendant appealed his convictions arguing, *inter alia*, that the trial court erred in excluding his expert's testimony.[1] *See State v. Walston*, ___ N.C. App. ___, ___,780 S.E.2d 846, 849-50 (2015). The Court of Appeals agreed with defendant and granted him a new trial. *Id.* at ___, ___, 780 S.E.2d at 857-58, 862. The State petitioned this Court for discretionary review, arguing that the trial court did not abuse its discretion in excluding defendant's proffered expert testimony and that exclusion of the expert testimony was not prejudicial. We agree, and thus, we reverse the Court of Appeals.

Before trial defendant notified the State that he planned to introduce expert testimony from Moina Artigues, M.D. regarding repressed memory and the suggestibility of children. The State successfully moved to suppress Dr. Artigues's testimony. The State argued that the testimony was not relevant or admissible pursuant to Evidence Rules 702 and 403 because the case did not involve "repressed" or "recovered" memories; that the expert was not qualified under Rule 702 to testify regarding "false" memories, specifically because she had not examined or evaluated the two alleged victims; and that the testimony should be excluded under Rule 403 because its potential to prejudice or confuse the jury would substantially outweigh its probative value.[2]

At the pretrial hearing, the trial court expressed doubt that this case concerned repressed or recovered memories and indicated that if the case did not concern repressed or recovered memories, Dr. Artigues's testimony about that subject would be irrelevant or misleading. In response, defense counsel contended that even if Dr. Artigues was not permitted to testify about repressed or recovered memories, she should be allowed to testify about the suggestibility of memory in children based on certain statements the victims made during discovery, which

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1. This case has been before this Court and the Court of Appeals a number of times on other issues. The history of this case is detailed in the most recent Court of Appeals opinion and is not discussed here. *See State v. Walston*, ___ N.C. App. ___, ___, 780 S.E.2d 846, 848-49 (2015).

2. The State also requested that the court prohibit the testimony because of defendant's late disclosure of the expert witness. *See* N.C.G.S. § 15A-910 (2016). At the pretrial hearing, the court did not rule on the State's request to exclude Dr. Artigues's testimony on this ground.

indicated the children's relatives may have pressured them to say they had been abused. The State countered this argument by asserting that the trial court should exclude the expert testimony because, *inter alia*, the expert had not interviewed or examined the victims or anyone else involved in the case. The State relied on *State v. Robertson*, 115 N.C. App. 249, 260-61, 444 S.E.2d 643, 649 (1994), for this proposition. The State noted that *Robertson* was similar to the case at bar in that the defendant in *Robertson* sought to introduce expert testimony concerning suggestibility of children; there the trial court excluded the expert testimony on grounds that its probative value was outweighed by the potential to prejudice or confuse the jury because the expert had never examined or evaluated the victims in any way. *Id.* at 261, 444 S.E.2d at 649. The State also argued here that defendant's expert testimony should be excluded because there was no basis for Dr. Artigues's opinion.

The trial court ruled that Dr. Artigues could not testify, but allowed voir dire to preserve Dr. Artigues's testimony for appellate review. After the conclusion of voir dire, defense counsel requested that the court reconsider its suppression ruling. Defense counsel asserted that Dr. Artigues's opinion was relevant in relation to scientific opinions regarding repressed memory and suggestibility of memory, was relevant to assist the jury in determining credibility, and was not unfairly prejudicial to the State. The State reasserted its arguments that this case does not involve repressed memories and that, as to suggestibility, "this type of expert testimony does not come in when the expert has not evaluated the victim . . . [which] didn't take place in this case." The court stated it was "not inclined to change [its] ruling."

On appeal, as to whether the trial court erred in excluding defendant's proffered expert testimony from Dr. Artigues, defendant argued to the Court of Appeals that Rule 702 does not require that a witness personally interview the person about whom she will testify. Defendant cited to previous cases from this Court and the Court of Appeals in which witnesses were allowed to testify without having interviewed or examined the person about whom they were testifying. *See State v. Daniels*, 337 N.C. 243, 268-71, 446 S.E.2d 298, 314-15 (1994) (concluding that the trial court did not abuse its discretion in allowing an expert who had not personally interviewed a defendant to testify about that defendant's mental condition), *cert. denied*, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995); *State v. Jones*, 147 N.C. App. 527, 541-44, 556 S.E.2d 644, 653-55 (2001) (concluding that the trial court did not abuse its discretion in allowing a developmental and forensic pediatrician to testify about her knowledge of the medical records and behavior of the

deceased victim), *appeal dismissed and disc. rev. denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). Defendant also argued that he was prejudiced by the erroneous exclusion of Dr. Artigues's testimony; he asserted that there was a reasonable possibility the jury would have reached a different result had the trial court admitted Dr. Artigues's testimony.

The State's argument to the Court of Appeals largely relied on the similarities between this case and *Robertson*. The State argued that Dr. Artigues did not examine or evaluate the victims or anyone else involved but rather based her opinion only on an analysis of the discovery material and defense counsel's trial notes. Thus, the State asserted that Dr. Artigues's testimony was properly excluded in compliance with *Robertson*. Additionally, the State noted that Dr. Artigues did not generate a formal report outlining her opinion and the basis of her opinion regarding the suggestibility of child witnesses. The State also argued that Dr. Artigues's testimony was irrelevant.

The Court of Appeals reversed the trial court and remanded for a new trial. The Court of Appeals found that "the trial court improperly excluded Dr. Artigues'[s] testimony based upon the erroneous belief that her testimony was inadmissible as a matter of law" under *Robertson*. *Walston*, ___ N.C. App. at ___,780 S.E.2d at 857-58. The Court of Appeals reasoned that the discussion of *Robertson* during the pretrial motions hearing implied that the trial court relied on *Robertson* to prohibit Dr. Artigues's testimony because Dr. Artigues had not interviewed the prosecuting witnesses.

The Court of Appeals clarified that *Robertson* did not recognize or create a "*per se* rule that expert opinion concerning the general suggestibility of children may only be given at trial if the testifying expert has examined the child or children in question." *Id.* at ___, 780 S.E.2d at 853. Rather, "expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 . . . are met." *Id.* at ___, 780 S.E.2d at 853. Thus, Dr. Artigues's expert opinion should not be excluded as a matter of law on grounds that she did not examine the children and may be admissible if in compliance with the Rule 702 and Rule 403 requirements.

The Court of Appeals noted that the trial court did not make "any findings of fact or conclusions of law explaining the rationale" for "excluding Dr. Artigues'[s] testimony." *Id.* at ___, 780 S.E.2d at 857. Specifically, there was no evidence in the record that the trial court had conducted a Rule 702 analysis, *id.* at ___, ___, ___, 780 S.E.2d at 858, 860, 862, nor did the trial court "make any findings or conclusions related to Rule 403," *id.*

at ___, 780 S.E.2d at 862. Therefore, the Court of Appeals panel found itself unable to "make any determination concerning whether the trial court would have abused its discretion in excluding Dr. Artigues'[s] testimony pursuant to either Rule 702 or Rule 403." *Id.* at ___, 780 S.E.2d at 862. Thus, the Court of Appeals reversed defendant's convictions and remanded for a new trial. *Id.* at ___, ____, 780 S.E.2d at 858, 862.

The State petitioned this Court for discretionary review. The only issue currently before this Court is whether the Court of Appeals erred in concluding that the trial court improperly excluded Dr. Artigues's testimony. We conclude that it did and hold that the trial court did not abuse its discretion in excluding Dr. Artigues's testimony.

"In reviewing trial court decisions relating to the admissibility of expert testimony evidence, this Court has long applied the deferential standard of abuse of discretion." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012). Trial courts act as a gatekeeper in determining admissibility of expert testimony, and a trial court's decision to admit or exclude expert testimony "will not be reversed on appeal unless there is no evidence to support it." *Id.* at 75, 733 S.E.2d at 540 (quoting *State v. King*, 287 N.C. 645, 658, 215 S.E.2d 540, 548-49 (1975), *judgment vacated in part per curiam*, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976)).

North Carolina Rule of Evidence 702 controls the admission of expert testimony. N.C.G.S. § 8C-1, Rule 702 (2016). Rule 702(a) states:

> (a) If scientific, technical or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (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.

Id. (emphases added). A Rule 702 analysis takes into consideration the qualifications of the expert as well as the reliability and relevance of

the expert testimony. *See State v. McGrady*, 368 N.C. 880, 884-93, 787 S.E.2d 1, 5-11 (2016) (providing a thorough analysis of Rule 702 requirements).

> Rule 702(a), as amended in 2011, *does not mandate particular procedural requirements for exercising the trial court's gatekeeping function over expert testimony. The trial court has the discretion to determine whether or when special briefing or other proceedings are needed to investigate reliability.* A trial court may elect to order submission of affidavits, hear voir dire testimony, or conduct an *in limine* hearing. More complex or novel areas of expertise may require one or more of these procedures. In simpler cases, however, the area of testimony may be sufficiently common or easily understood that the testimony's foundation can be laid with a few questions in the presence of the jury. The court should use a procedure that, given the circumstances of the case, will secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Id. at 893, 787 S.E.2d at 11 (emphasis added) (internal citations and quotation marks omitted).[3]

If expert testimony meets the requirements of Rule 702, it may still be inadmissible under Rule of Evidence 403 if the "probative value [of the testimony] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.G.S. § 8C-1,

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3. Here both parties made their arguments to the Court of Appeals under the former Rule 702 standard. The Court of Appeals determined that the new 702 standard should apply to this case based on the date of the superseding indictment. *State v. Walston*, 229 N.C. App. 141, 151-52, 747 S.E.2d 720, 728 (2013), *rev'd*, 367 N.C. 721, 766 S.E.2d 312 (2014).

In a previous opinion in this case, the Court of Appeals determined that because the new Rule 702 requirements are more stringent than the former requirements, defendant was not prejudiced by the trial court's application of the incorrect standard in excluding Dr. Artigues's testimony. In making that determination, however, the Court of Appeals failed to address the merits of defendant's argument that the exclusion of Dr. Artigues's testimony was improper because it was based on an incorrect understanding of the law. *State v. Walston*, 239 N.C. App. 468, ___ S.E.2d ___, 2015 WL 680240 (2015) (unpublished).

In the most recent Court of Appeals opinion in this case, the Court of Appeals did address the merits of defendant's argument, as discussed above, and agreed with defendant that Dr. Artigues's testimony was improperly excluded. *Walston*, ___ N.C. App. ___, 780 S.E.2d 846.

Rule 403 (2016); *see King*, 366 N.C. at 75-76, 733 S.E.2d at 540. In *State v. King* this Court upheld the trial court's exclusion of the State's proffered expert testimony; even though Rule 702 requirements had been met, "the expert testimony was inadmissible under Rule 403" because "the probative value of the evidence was outweighed by its prejudicial effect." 366 N.C. at 76, 733 S.E.2d at 540. "Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court." *Id.* at 76, 733 S.E.2d at 540 (quoting *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986)). "If all other tests are satisfied, the ultimate admissibility of expert testimony in each case will still depend upon the relative weights of the prejudicial effect and the probative value of the evidence in that case." *Id.* at 76-77, 733 S.E.2d at 541. "[W]hen a judge concludes that the possibility of prejudice from expert testimony has reached the point where the risk of the prejudice exceeds the probative value of the testimony, Rule 403 prevents admission of that evidence." *Id.* at 77, 733 S.E.2d at 541.

Under the abuse of discretion standard applicable to this case, our role is to decide whether the trial court's decision to exclude Dr. Artigues's testimony was "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Though the trial court did not explicitly state or demonstrate its Rule 702 or Rule 403 analysis,[4] "[a] correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (citation omitted), *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

Here the Court of Appeals was correct to clarify that a defendant's expert witness is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial. We agree with and affirm the Court of Appeals' legal analysis on this issue. Such a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts. *See State v. Fletcher*, 322 N.C. 415, 419, 368 S.E.2d 633, 635 (1988).

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4. When specific findings of fact and conclusions of law are not required, it is within the trial court's discretion to make fact findings "if a party does not choose to compel a finding through the simple mechanism of so requesting." *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987). We have previously stated that "[w]hen the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment." *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986) (citations omitted).

We disagree, however, with the Court of Appeals' determination that the trial court based its decision to exclude defendant's proffered expert testimony solely on an incorrect understanding of the law. Based on the discussion of *Robertson* during the pretrial motions hearing, as well as the parties' briefs on appeal, the Court of Appeals presumed that the trial court excluded Dr. Artigues's testimony based on an erroneous belief that *Robertson* created a per se rule of exclusion when an expert has not interviewed the victims. The trial court, however, never stated that *Robertson* created such a rule nor that it based its decision to exclude Dr. Artigues's testimony solely on *Robertson*.

Furthermore, as this Court notes in *McGrady*, Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony. *See* 368 N.C. at 893, 787 S.E.2d at 11. Here the record demonstrates that the trial court heard arguments from both parties regarding the subject matter of Dr. Artigues's proffered testimony, conducted voir dire and considered the testimony that defendant wished to elicit from Dr. Artigues, and considered the parties' Rule 403 balancing arguments. Moreover, during voir dire the trial court at times engaged Dr. Artigues directly concerning possible confusion over how the victims used specific words in their deposition—such as being "grilled"[5] by an adult and "flashbacks"[6]—and Dr. Artigues's use of the clinical definitions of these words in her evaluation. Thus, the record demonstrates that there is evidence to support the trial court's decision to exclude Dr. Artigues's testimony and that the trial court properly acted as a gatekeeper in determining the admissibility of expert testimony. Therefore, we find that the trial court did not abuse its discretion in excluding

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5. [PROSECUTOR] So you're assuming that this grilling was implanting or suggesting memories to the young girls?

[DR. ARTIGUES] I don't see how it could be otherwise.

. . . .

[THE COURT] You don't see how? You can't think of any situation where grilling can be otherwise?

. . . .

[THE COURT] Grilling to you may be different from what grilling means to the mother, to me or anyone else?

[DR. ARTIGUES] Right, that is true.

6. [PROSECUTOR] You would agree, would you not, that ordinary lay people who don't live in the psychiatry world, when they use the word flashback they're using it like what you're defining as memory cues?

[DR. ARTIGUES] That is very possible, yes.

Dr. Artigues's testimony.[7] We reverse the decision of the Court of Appeals and reinstate defendant's convictions.

REVERSED.

UNITED COMMUNITY BANK (GEORGIA)
v.
THOMAS L. WOLFE AND BARBARA J. WOLFE, TRUSTEES OF THE THOMAS L. WOLFE AND BARBARA J. WOLFE IRREVOCABLE TRUST, THOMAS L. WOLFE, INDIVIDUALLY, AND BARBARA J. WOLFE, INDIVIDUALLY

No. 289PA15

Filed 5 May 2017

Mortgages—foreclosure—anti-deficiency statute—true value of property—evidence not sufficient

The trial court did not err by granting summary judgment for plaintiff-bank in an action under N.C.G.S. § 45-21.36, North Carolina's anti-deficiency statute. The borrower must show that the creditor's successful foreclosure bid was less that the property's true value; merely reciting the statutory language or asserting an unsubstantiated opinion is not sufficient.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 775 S.E.2d 677 (2015), reversing an order on summary judgment entered on 30 June 2014 by Judge Marvin P. Pope, Jr. in Superior Court, Transylvania County, and remanding for further proceedings. Heard in the Supreme Court on 20 March 2017.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Robert A. Mays, Mark A. Pinkston, and Esther E. Manheimer, for plaintiff-appellant.

Donald H. Barton, P.C., by Donald H. Barton; and Matthew J. Barton for defendant-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse and Robert A. Singer, for North Carolina Bankers Association, amicus curiae.

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7. Because we find no abuse of discretion, it is unnecessary to conduct a prejudice analysis and we decline to do so.

NEWBY, Justice.

North Carolina's anti-deficiency statute, N.C.G.S. § 45-21.36, affords protection to a borrower following a nonjudicial power-of-sale foreclosure by accounting for the "true value" of the foreclosed property, thereby potentially reducing the borrower's remaining indebtedness. To assert this statutory protection, however, the borrower must allege and show that the creditor's successful foreclosure bid was substantially less than the property's "true value" by presenting substantial competent evidence of such value. The borrower's own unsupported opinion, standing alone, is insufficient. Because defendants here failed to forecast substantial competent evidence sufficient to create a genuine issue of material fact as to the foreclosed property's "true value," we reverse the decision of the Court of Appeals and reinstate the trial court's order granting summary judgment in favor of plaintiff.

In August 2008, shortly before the collapse of the real estate market, plaintiff United Community Bank (Georgia) loaned defendants $350,000 to purchase certain real property situated in Transylvania County, North Carolina. The loan was secured by a deed of trust.[1] Sometime later defendants defaulted. Ultimately, in August 2013, the Bank foreclosed by nonjudicial power of sale under the deed of trust. At the sale the Bank bought the property for $275,000 as the highest and only bidder. The Bank had based its bid on an independent appraisal of the property dated March 2013, which valued the property at $275,000. The net proceeds realized from the foreclosure sale ($275,000 minus expenses) failed to satisfy the outstanding debt, resulting in a deficiency of over $50,000. The Bank then listed the property for sale at $279,000. After receiving no suitable market response, the Bank lowered the asking price to $244,500 in October 2013, before eventually selling the property in December 2013 for $205,000.

The Bank filed the instant action in Superior Court, Transylvania County, to collect the deficiency plus interest, attorneys' fees, and costs. In their answer defendants denied plaintiff's allegations and asserted the protection of the anti-deficiency statute. The Bank moved for summary judgment and, relying primarily on the appraisal and resale price of the property, maintained that the price it paid for the property at foreclosure was reasonable. Defendants' affidavit in opposition stated:

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1. The "credit agreement" indicates that defendants Thomas L. Wolfe and Barbara J. Wolfe borrowed the money acting both individually and as trustees of the "Thomas L. Wolfe and Barbara J. Wolfe Irrevocable Trust under the provisions of a Trust Agreement dated June 29, 2004."

> [A]ffiants verily believes [sic] that the residence and real property sold that is the subject of this Complaint was at the time of its sale fairly worth the amount of the debt it secured and affiants believe the amount bid for the property was substantially less than its fair market value at the time of the sale.

While the affidavit tracks the statutory language and asserts defendants' opinion that the property was "fairly worth the amount of the debt," the affidavit does not assign a specific dollar value to the property or specify any supporting evidence. Following a hearing, the trial court granted summary judgment in favor of the Bank and awarded $57,737.74 for the deficiency and accrued interest, plus attorneys' fees and costs. Defendants appealed.

The Court of Appeals reversed, concluding that defendants' affidavit created a genuine issue of material fact as to the "true value" of the foreclosed property under section 45-21.36. *United Cmty. Bank (Ga.) v. Wolfe*, ___ N.C. App. ___, ___, 775 S.E.2d 677, 680 (2015). Because defendants personally knew the loan balance at the time of the foreclosure sale, and their affidavit, as the property owners, stated that the foreclosed property was "fairly worth the amount of the debt," the Court of Appeals reasoned that defendants were not only competent to testify but that their unsupported opinion created a genuine issue of material fact. *Id.* at ___, 775 S.E.2d at 680 (citing *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006); *N.C. State Highway Comm'n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974)). The Court of Appeals reversed the trial court's grant of summary judgment for the Bank and remanded for trial. *Id.* at ___, 775 S.E.2d at 681. This Court allowed discretionary review.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2015). Supporting affidavits and affidavits in opposition to summary judgment

> shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . [A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this

> rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id., Rule 56(e) (2015). The nonmoving party survives a motion for summary judgment by presenting substantial evidence that creates a genuine issue of material fact. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278-79 (2015) (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)). This Court reviews appeals from summary judgment de novo. *Id.* at 334-35, 777 S.E.2d at 278.

Foreclosure by power of sale arises under the contract between the borrower and the creditor, allowing the creditor to sell the mortgaged property upon the borrower's default. *In re Foreclosure of Lucks*, ___ N.C. ___, ___, 794 S.E.2d 501, 504 (2016). Following a foreclosure sale, the amount of the borrower's debt is reduced by the net proceeds from the sale. N.C.G.S. § 45-21.31(a)(4) (2015). Generally, a borrower is liable for the deficiency. When the creditor is also the high bidder at the nonjudicial power-of-sale foreclosure, however, the borrower may assert the protection of section 45-21.36:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part . . . . [T]his section shall not

> apply to foreclosure sales made pursuant to an order or decree of court . . . .

Id. § 45-21.36 (2015).

In a creditor's action to collect the deficiency, this "anti-deficiency statute" provides the method of calculating a borrower's remaining indebtedness by deducting from the total debt owed the "true value" of the foreclosed property, rather than the amount paid by the creditor at the foreclosure sale. *See High Point Bank & Tr. v. Highmark Props., LLC*, 368 N.C. 301, 307, 776 S.E.2d 838, 843 (2015); *see also Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr.*, 210 N.C. 29, 34, 185 S.E. 482, 485 (1936) ("[The creditor] shall not recover judgment against his debtor for any deficiency . . . without first accounting to his debtor for the fair value of the property at the time and place of the sale . . . . In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property."), *aff'd*, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 338 (1937). When the statutory protection is asserted, the "true value" of the property becomes a material fact. *Wachovia Realty Invs. v. Hous., Inc.*, 292 N.C. 93, 112, 232 S.E.2d 667, 679 (1977). The borrower's remaining liability may be eliminated altogether or reduced by way of "offset" if the borrower shows that the foreclosed property "was fairly worth the amount of the debt" or that the foreclosure bid "was substantially less than [the foreclosed property's] true value." N.C.G.S. § 45-21.36.

A borrower opposing summary judgment must forecast substantial competent evidence by way of specific facts to show the property's "true value" is genuinely at issue. *See id.* (requiring the borrower to "*allege and show* as matter of defense and offset" (emphasis added)); *see also* N.C.G.S. § 1A-1, Rule 56(e). Only "[u]pon such [a] showing" can a borrower defeat or offset a deficiency judgment against him or her. *Id.* § 45-21.36; *see Wachovia Realty Invs.*, 292 N.C. at 112-13, 232 S.E.2d at 679 (considering resale price after foreclosure as an indication of the true value of the property at foreclosure); *Blue Ridge Savs. Bank v. Mitchell*, 218 N.C. App. 410, 412-13, 721 S.E.2d 322, 324-25 (considering appraisal value, foreclosure price, and resale price as competent evidence of true value), *aff'd per curiam*, 366 N.C. 331, 734 S.E.2d 572 (2012).

In opposing summary judgment here, defendants relied on their status as the property owners and their joint affidavit "made on [defendants'] personal knowledge," stating that they "verily believe[ ] that the . . . property sold . . . was at the time of [the foreclosure] sale fairly worth the amount of the debt it secured." Defendants' conclusory statement

without any supporting facts is insufficient to create a genuine issue of material fact. *See* N.C.G.S. § 1A-1, Rule 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); *Lowe v. Bradford*, 305 N.C. 366, 370, 289 S.E.2d 363, 366 (1982) ("[W]hen the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him.").

Once the Bank produced substantial competent evidence of value, Rule 56 required even the property owners to provide more than a conclusory statement. *See Lexington State Bank v. Miller*, 137 N.C. App. 748, 753-54, 529 S.E.2d 454, 457 (characterizing the defendant property owner's affidavit, which stated that the property "was worth substantially more than the amount which was bid and paid by [the bank]," as "unsupported allegations" rather than the "specific facts" needed to survive summary judgment), *disc. rev. denied*, 352 N.C. 589, 544 S.E.2d 781 (2000); *see also N.C. Dep't of Transp. v. Haywood County*, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006) (land condemnation case excluding "experts' testimony about [their] feelings and personal opinions" on valuation because the trial court found the testimony "unsupported by objective criteria," "based on hunches and speculation," and therefore "lack[ing] sufficient reliability"). Simply restating the statutory language in affidavit form is inadequate. The Court of Appeals' reliance on the land condemnation cases *Department of Transportation v. M.M. Fowler, Inc.* and *North Carolina State Highway Commission v. Helderman* is misplaced. Here the issue is not a landowner's competency to testify but whether the landowners' affidavit presented substantial competent evidence under Rule 56(c) regarding the "true value" of the foreclosed property.

In sum, defendants failed to present substantial competent evidence to create a genuine issue of material fact regarding the "true value" of the foreclosed property. Under Rule 56, merely reciting the statutory language or asserting an unsubstantiated opinion regarding the foreclosed property's value is insufficient. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's grant of summary judgment in favor of the Bank.

REVERSED.

[369 N.C. 561 (2017)]

EDWARD F. WILKIE AND DEBRA T. WILKIE	)	
v.	)	From Brunswick County
CITY OF BOILING SPRING LAKES	)	

No. 44P17

ORDER

Plaintiffs' petition for discretionary review is allowed only as to the first and third issues listed in plaintiffs' petition. Plaintiffs' discretionary review petition is denied as to any remaining issues.

By order of the Court, this the 3rd day of May, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of May, 2017.

J. BRYAN BOYD
Clerk, Supreme Court of
North Carolina

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

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

3 MAY 2017

006P17	In the Matter of A.H., C.H.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA16-581)	Denied
013P17	State v. Kalmeaice Kawanna Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA16-432)	Denied
024P17-2	State v. Calvin Lamar Adams	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA15-1384)	Dismissed
030P17	State v. Napoleon Richard Cooper	Def's PDR Under N.C.G.S. § 7A-31 (COA16-483)	Denied
036P17	State v. Constance Michelle Sheperd	Def's PDR Under N.C.G.S. § 7A-31 (COA16-270)	Denied
039P12-2	State v. Ray Lee Ross	Def's Petition for *Writ of Certiorari* to Review Order of COA (COA17-56)	Dismissed **Beasley, J., recused**
044P17	Edward F. Wilkie and Debra T. Wilkie v. City of Boiling Spring Lakes	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA16-652) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
048P17	Estate of Regina Cecylia Johnson v. Fundacja Jasmin Reginy Elandt I Normana Lloyda Johnsonow, Ewa Violetta Elandt-Jankowska, and Hanna Elandt-Pogodzinska	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-528)	Denied **Morgan, J., recused**
052P17	Roy A. Cooper, III, in his Official Capacity as Governor of the State of North Carolina v. Philip E. Berger, in his Official Capacity as President *Pro Tempore* of the North Carolina Senate; and Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives	1. Plt's Motion for Temporary Stay (COAP17-101) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Petition for *Writ of Certiorari* to Review Order of COA 4. Plt's PDR Prior to a Decision of COA	1. Allowed **02/13/2017** Dissolved **05/03/2017** 2. Dismissed as moot 3. Dismissed as moot 4. Denied

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

3 May 2017

055P17	Harry Williams v. Advance Auto Parts, Inc., and Advance Stores Company, Incorporated, d/b/a Advance Auto Parts	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-625)	Denied
057P17	State v. Bobby Johnson	1. State's PDR Under N.C.G.S. § 7A-31 (COA16-491) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
058P17	Priscilla Gayle Brookbank v. Heather DiLorenzo Williams and Trenton Blake Williams	1. Def's (Trenton Blake Williams) Notice of Appeal Based Upon a Constitutional Question (COA16-312) 2. Def's (Trenton Blake Williams) PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
059P17	Southern Shores Realty Services, Inc. v. William G. Miller, The Miller Family Limited Partnership, II, LLC, Old Glory III, LLC, Old Glory IV, LLC, Old Glory V, LLC, Old Glory VI, LLC, Old Glory VII, LLC, Old Glory IX, LLC, Old Glory XI, LLC, Old Glory XII, LLC, Old Glory XIII, LLC	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA16-557) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
060P17	State v. Jesse Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA16-229)	Denied
062P17	State v. David Campbell Sutton	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-405) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed *ex mero motu* 2. Denied

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

3 May 2017

069P17	In the Matter of the Foreclosure of Real Property Under a Deed of Trust Executed by Robert C. Collins and Rhonda B. Collins Dated June 20, 2006 and Recorded on June 23, 2006 in Book K-30 at Page 975 in the Macon County Public Registry, North Carolina	Respondents' PDR Under N.C.G.S. § 7A-31 (COA16-655)	Denied
071P17	State v. Perry Lyn Dupree	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Dismissed
072P17	State v. Lequan Fox	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Dismissed **03/24/2017**
073P17	State v. Laurice D. Boston	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Pitt County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
075P17	Ocwen Loan Servicing, Bank of New York Mellon v. Margaret Ann Reaves	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-927) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Extend Time	1. Denied 2. Dismissed as moot 3. Dismissed as moot
076P17	George Burns, Mark McCann, and Charles Bartlett, Trustees of Park's Chapel Free Will Baptist Church v. Kingdom Impact Global Ministries, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-1313)	Denied

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

3 MAY 2017

080P17	State v. Samuel Allen Taylor	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Dismissed as moot 3. Allowed
082P17	State v. Michael Sheridan	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County	Denied
084P17	In the Matter of S.C.H. and J.A.H., Jr.	Respondent-Father's PDR Under N.C.G.S. § 7A-31	Denied
086P17	State v. Tara May Frazier	State's PDR Under N.C.G.S. § 7A-31 (COA16-449)	Denied
090P17	State v. Gregory Monroe	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
092P17	State v. Samuel Baker	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-645)	Denied
093P17	State v. Henry Arthur Little	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-480) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
094P17	State v. Edward Charles Green	Def's *Pro Se* Motion for Voter Fraud Dismissal	Dismissed
096P17	State v. Darryll Douglas Clay	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-564) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
098P17	State v. Almedeo Eugene Stewart	Def's PDR Under N.C.G.S. § 7A-31 (COA16-347)	Denied
100P17	State v. Christopher Jason Hudson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-431)	Denied
101P17	State v. Caleb J. Lucky, III	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied

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

3 May 2017

103P17	State v. Earl Wayne Flowers	Petitioner's *Pro Se* Petition for a *Writ of Habeas Corpus*	Denied **04/07/2017**
104P11-9	State v. Titus Batts	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-705)	Dismissed **Ervin, J., recused**
105P17	State v. Jimmy Reid	Def's *Pro Se* Motion for Notice of Appeal (COAP17-172)	Dismissed *ex mero motu* **Ervin, J., recused**
108P17	State v. Jesse C. Santifort	1. State's Motion for Temporary Stay (COA17-202) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for *Writ of Certiorari* to Review Order of COA 4. State's Motion to Amend Petition for *Writ of Certiorari*	1. Denied **04/18/2017** 2. Denied **04/18/2017** 3. Denied **04/18/2017** 4. Allowed **04/18/2017**
109P17	In Re Olander R. Bynum	Petitioner's *Pro Se* Petition for W*rit of Mandamus*	Dismissed
111P17	Grace Justice Johnson v. Glenwood F. Johnson	1. Def's *Pro Se* Motion for PDR (COAP16-840) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
112P17	State v. Anthonio Shontari Farrar	1. State's Motion for Temporary Stay (COA16-679) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **04/10/2017** 2.
115P17	State v. Dean Michael Varner	1. State's Motion for Temporary Stay (COA16-591) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/12/2017** 2. 3.

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

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117P17	Yahudah Washitaw of East Terra Indians, David Hopskins, Kerklon Stackhouse, Maurice Stackhouse (Deceased), Shawn Singletary, and Betty Singletary v. PHH Mortgage Corporation, JP Morgan Chase BK NA, Nations Star, CIT Group/Sales Financing Inc., and State of North Carolina	Petitioners' *Pro Se* Motion for Removal from State Court	Dismissed
124P17	State v. Byron Bernard Sadler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
129A96-2	State v. Carlton Eugene Anderson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Jackson County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
132P17	State v. Eddie Levord Taylor	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/24/2017**
135P17	Celia A. Bell, Employee v. Goodyear Tire and Rubber Company, Employer, Liberty Mutual Insurance Company, Carrier	1. Def's Motion for Temporary Stay (COA15-1299) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **04/26/2017** 2.
155A16	Old Republic National Title Insurance Company, et al. v. Hartford Fire Insurance Company, et al.	Def's (Hartford Fire Insurance Company) Petition for Rehearing	Denied
158P06-11	State v. Derrick D. Boger	Def's *Pro Se* Motion for Appeal for Writ of Parole	Dismissed
223PA16	North Carolina Department of Public Safety v. Chauncey John Ledford	Petitioner's Motion to Withdraw Appeal	Allowed **04/03/2017**

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

3 MAY 2017

232P01-4	State v. Michael Eugene Reed, II	Def's *Pro Se* Motion for PDR (COAP17-66)	Dismissed **Hudson, J., recused**
237P16-3	Avery M. Riggsbee v. W. Baine Jones, Jr., Judge Government Employees	Plt's *Pro Se* Motion for Grant of Non-Stop Payout by Defendants	Dismissed
245A08-2	State v. Terrance Lowell Hyman	1. State's Motion for Temporary Stay (COA16-398) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. State's Petition for *Writ of Certiorar*i to Review Decision of COA 6. Def's Motion to Dismiss Appeal	1. Allowed **03/10/2017** 2. Allowed 3. --- 4. Dismissed 5. Allowed 6. Denied
254P04-2	State v. Charles Francis Graham	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
266P16-2	State v. Timothy Terrell Crandell	1. Def's *Pro Se* Petition for Writ of Certiorari to Review Decision of COA (COAP17-41) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
315PA15-2	Quality Built Homes Incorporated and Stafford Land Company, Inc. v. Town of Carthage1.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-115-2) 2. N.C. Water Quality Association and Seven Municipalities' Conditional Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed
330A16	Allscripts Healthcare, LLC v. Etransmedia Technology, Inc.	Motion to Admit Dana L. Salazar *Pro Hac Vice*	Allowed **03/24/2017**

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330A16	Allscripts Healthcare, LLC v. Etransmedia Technology, Inc.	Plt's Motion to Withdraw Appeal	**Allowed 04/20/2017**
344P16	State v. Richard Pridgen	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-75) 2. State's Motion for Withdrawal and Substitution of Counsel	1. Denied 2. Allowed
345P16-3	State v. Dwayne Demont Haizlip	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/13/2017** **Ervin, J., recused**
346P16	Gurney B. Harris v. Southern Commercial Glass, Auto Owners Insurance, and Southeastern Installation, Inc., Cincinnati Insurance Company	1. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) Motion for Temporary Stay (COA15-1363) 2. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) *Writ of Supersedeas* 3. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) PDR Under N.C.G.S. § 7A-31 4. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) Motion to Hold PDR in Abeyance 5. Defs' (Southeastern Installation, Inc. and Cincinnati Insurance Company) Motion for Leave to Withdraw PDR	1. Allowed **09/20/2016** Dissolved **03/16/2017** 2. Dismissed as moot 3. --- 4. Allowed **01/26/2017** 5. Allowed
350P16	TD Bank, N.A. v. Eagles Crest at Sharp Top, LLC, John W. Holdsworth, and John H. Seats	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-807)	Allowed
356P16	Virginia Radcliffe v. Avenel Homeowners Association, Inc., Carmelo (Tony) Buccafurri, Stephen Murray, Thomas Dinero, David Hull, Richard Progelhof, and Ron Zanzarella	1. Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-884) 2. Plt's Motion to Treat Petition for *Writ of Certiorari* as a PDR 3. Defs' Joint Response to Plt's Motion to Treat Petition for *Certiorari* as Motion for Discretionary Review and Defs' Motion in the Alternative to File Supplemental Response to Plt's Petition	1. Denied 2. Allowed 3. Denied

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

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382P10-6	State v. John Lewis Wray, Jr.	Def's *Pro Se* Motion for Review	Dismissed **Beasley, J., recused**
382P16	Desiree King, by and through Her Guardian ad Litem, G. Elvin Small, III; and Amber M. Clark, Individually v. Albemarle Hospital Authority d/b/a Albemarle Health/ Albemarle Hospital; Sentara Albemarle Regional Medical Center, LLC d/b/a Sentara Albemarle Medical Center; Northeastern Ob/ Gyn, Ltd.; Barbara Ann Carter, M.D.; and Angela McWalter, CNM	1. Defs' (Albemarle Hospital Authority d/b/a Albemarle Health/Albemarle Hospital and Sentara Albemarle Regional Medical Center, LLC, d/b/a Sentara Albemarle Medical) PDR Under N.C.G.S. § 7A-31 (COA15-1190) 2. Defs' (Northeastern Ob/Gyn, Ltd., Barbara Ann Carter, M.D., and Angela McWalter, CNM) PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
386P16	State v. Quentin Lee Dick	1. State's Motion for Temporary Stay (COA15-1400) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/14/2016** 2. Allowed 3. Allowed
395P14	Lois A. Sauls v. Roland Gary Sauls	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-41) 2. Plt's Motion for Sanctions 3. Def's Motion for Issuance of Stay 4. Def's Motion to Withdraw PDR 5. Plt's Motion for Leave to Withdraw Response to PDR and Motion for Sanctions	1. --- 2. --- 3. Dismissed as moot 4. Allowed 5. Allowed
407P03-3	State v. Phillip Vance Smith, II	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
410P16	State v. Joshua Sanchez	1. State's Motion for Temporary Stay (COA15-1401) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/07/2016** 2. Allowed 3. Allowed

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449P11-16	State v. Charles Everette Hinton	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Full Evidentiary Hearing and Trial *De Novo* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion for Trial *De Novo* 5. Def's *Pro Se* Motion for Trial By Jury	1. Dismissed 2. Dismissed 3. Dismissed as moot 4. Dismissed 5. Dismissed **Ervin, J., recused**
454P16	State v. Andrew Robert Holloway	1. State's Motion for Temporary Stay (COA16-381) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/20/2016** Dissolved **05/03/2017** 2. Denied 3. Denied
460P16	In the Matter of D.P. and B.P.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA16-529) Denied	
462P16	State v. David Lee Applewhite	Def's PDR Under N.C.G.S. § 7A-31 (COA16-335)	Denied
505P96-3	State v. Melvin Lee White (DEATH)	Def's Motion for Extension of Time to File Petition for *Writ of Certiorari*	Allowed **04/13/2017**
538P13-2	State v. Ronald Wayne Spann	1. Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP16-909) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Caldwell County	1. Dismissed 2. Dismissed **Ervin, J., recused**

KERRY RAY HARRISON, Employee
v.
GEMMA POWER SYSTEMS, LLC, Employer,

TRAVELERS INSURANCE COMPANY, Carrier

No. 216A16

Filed 9 June 2017

Workers' Compensation—permanent partial disability—findings and conclusions—insufficient

The Industrial Commission in a workers' compensation case did not carry out a 2014 mandate of the Court of Appeals on remand that it make additional findings of fact and conclusions of law on the issue of plaintiff's entitlement to permanent partial disability benefits under N.C.G.S. § 97-31. The case was remanded for compliance with the 2014 mandate.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 433 (2016), affirming an amended opinion and award filed on 4 March 2015 by the North Carolina Industrial Commission. Heard in the Supreme Court on 22 March 2017.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson, for plaintiff-appellant.

Orbock, Ruark & Dillard, P.C., by Jessica E. Lyles and Roger L. Dillard, Jr., for defendant-appellees.

HUDSON, Justice.

In the Court of Appeals, plaintiff employee challenged the Industrial Commission's determination that he is not entitled to any compensation for permanent partial disability under N.C.G.S. § 97-31. The Court of Appeals, in a divided opinion, affirmed the denial, and plaintiff appealed to this Court on the basis of the dissenting opinion. We reverse the decision of the Court of Appeals and remand this case for further proceedings.

This summary of facts is based on the stipulations of the parties as well as the forms in the record and the unchallenged findings of fact in the most recent opinion and award filed on 4 March 2015. On 2 March

2001, plaintiff, a pipefitter, suffered a compensable accident and sustained injuries to his left upper leg, neck, and other areas of his body when a heavy valve fell on his head, while he was walking at his job site. Defendants, his employer at the time and its workers' compensation insurance carrier, accepted plaintiff's claim as compensable under the Workers' Compensation Act (Act). Plaintiff received medical treatment for his injuries for a period of several years, but defendants eventually refused to authorize additional medical treatment. Defendants have handled the claim as medical only from its onset, and plaintiff has never received indemnity payments.

After his work-related accident, plaintiff immediately complained of neck pain and headaches, and he received prompt treatment from an authorized medical provider, who documented plaintiff's complaints of headaches and neck pain. Plaintiff was referred to chiropractor Larry Stogner for care. Plaintiff attempted to return to work for defendant employer by doing light duty tasks, but he was laid off on 22 April 2001. On 27 June 2001, Dixon Gerber, M.D., an orthopaedic surgeon, saw plaintiff for a second opinion examination and found that plaintiff "was at maximum medical improvement and had no permanent partial disability." Dr. Gerber's medical record also reflected plaintiff's impression that he "could probably return to work at any time." Dr. Gerber released plaintiff from treatment without restrictions as of 2 July 2001, four months after plaintiff's work-related accident.

Defendant employer re-hired plaintiff but shortly thereafter terminated him for missing work and tardiness. After that, plaintiff worked for other employers, also as a pipefitter. Plaintiff testified that he had to stop working as a pipefitter in February 2003 because of his ongoing neck pain. Plaintiff then worked in other occupations until May 2009, and he received unemployment benefits when he was not working during that time. Plaintiff became a full-time community college student in May 2009.

During the years after his work-related accident, plaintiff continued to have neck pain, and in October 2002, defendants referred him for an independent medical examination by Robert Lacin, M.D., at Goldsboro Neurological Surgery. Dr. Lacin opined that he "certainly ha[d] no doubt that [plaintiff's] symptoms are related to this incident of March 2, 2001."

In December 2003, plaintiff began treatment with Hemanth Rao, M.D., at Neurology Consultants of the Carolinas. An MRI in November 2006 showed that plaintiff had evidence of a continuing injury, for which he was referred for a surgical opinion. Plaintiff received an independent

medical evaluation from Alfred Rhyne, M.D., at OrthoCarolina in April 2009, after which Dr. Rhyne recommended another MRI. Dr. Rhyne later testified that if plaintiff had no complaints of pain or problems before his March 2001 workplace injury, that injury "precipitated the onset of his symptoms." Defendants did not authorize the MRI as recommended by Dr. Rhyne.

Plaintiff subsequently received an MRI at the Veterans Affairs Medical Center in Fayetteville, North Carolina. A medical record from that facility dated 9 August 2010 diagnosed "[m]ultilevel cervical spondylosis seen in the lower cervical spine, most prominent at C5 and C6." Chiropractor Stogner, who had treated plaintiff since shortly after his injury, also opined that it was "more probable than not" that the 2 March 2001 workplace accident caused plaintiff's neck problems and stated that he does "not expect to see any significant improvement with [plaintiff's] injury status [as he] suspect[s] that [plaintiff's] condition is permanent."

Defendants' last payment of medical compensation to plaintiff was on 18 May 2009. Plaintiff enrolled in college full time in May 2009, graduated with an associate's degree in May 2012, and at the time his case was heard before the deputy commissioner, was a full-time student pursuing a bachelor's degree in business. Plaintiff worked part time at a desk job while he was a student.

On 25 January 2012, plaintiff filed a Form 33 with the Industrial Commission, asserting that defendants "ha[d] failed to authorize plaintiff's request for further treatment with Dr. Rhyne" and contending that there was also "an issue with indemnity benefits." In their response to this filing, defendants stated that the claim "is barred by the statute of limitations [in] G.S. §97-24. Plaintiff's claim is a no lost time claim. This claim was medical only and it has been more than two years since the last payment of medical compensation."

On 7 February 2013, a deputy commissioner ordered that, to the extent they had not done so, defendants provide (pay for) all medical treatment for plaintiff's neck condition for the period between the date of injury through 18 May 2009. The deputy denied plaintiff's claim for additional benefits under the Act. Plaintiff appealed to the Full Commission (Commission), which affirmed the deputy commissioner's opinion and award on 16 September 2013.

Plaintiff appealed the Commission's opinion and award to the North Carolina Court of Appeals, arguing, *inter alia*, that the Commission's

findings of fact were inadequate and that the record evidence entitled him to permanent impairment indemnity benefits. *Harrison v. Gemma Power Sys., LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 2014 WL 2993853 (2014) (unpublished) (*Harrison I*). Specifically, plaintiff argued that Finding of Fact 22 was not supported by competent evidence and that it irreconcilably conflicted with Finding of Fact 25. *Harrison I*, 2014 WL 2993853, at *10.

Finding of Fact 22 reads:

> 22. Dr. Rhyne testified that plaintiff's probable permanent partial disability would be three percent (3%), or if plaintiff had to have surgery, the rating would be in the range of five to fifteen percent (5-15%). The Commission assigns greater weight to the testimony of Dr. Gerber regarding plaintiff's permanent partial disability rating as Dr. Gerber was plaintiff's authorized treating physician and Dr. Rhyne only performed a one time independent medical evaluation. Therefore, based on Dr. Gerber's testimony, the Commission finds plaintiff has no permanent partial disability.

In Finding of Fact 5, the Commission noted that "Dr. Gerber found that plaintiff was at maximum medical improvement and has no permanent partial disability" and "released plaintiff from treatment without restrictions as of 2 July 2001."

Finding of Fact 25 reads:

> 25. Based upon the preponderance of the evidence in view of the entire record, the medical treatment plaintiff received for his neck condition, on or before 18 May 2009, was reasonable and medically necessary, and was reasonably calculated to effect a cure and give relief from plaintiff's 2 March 2001 compensable injury by accident.

Based on these findings, the Commission reached Conclusion of Law 2, that "[p]laintiff is entitled to the provision of medical treatment for his neck condition for the period from 2 March 2001 through 18 May 2009."

In a unanimous, unpublished opinion filed on 1 July 2014, the Court of Appeals, *inter alia*, reversed the Commission's denial of indemnity benefits, concluding that the Commission's findings and conclusions on that issue were "inadequate." *Id.* at *1. Specifically, the Court of Appeals agreed with plaintiff that Finding of Fact 22 lacked evidentiary

support but disagreed that Findings of Fact 22 and 25 are irreconcilable. *Id.* at *10. With respect to Findings of Fact 22 and 25, the Court of Appeals stated:

> [A] finding that Plaintiff is at maximum medical improvement with no permanent partial disability denotes that Plaintiff's compensable injury has healed and/or stabilized, with no permanent functional loss to his neck and/or back. The fact that Plaintiff has no *permanent* functional impairment, however, does not mean, *ipso facto*, that ongoing medical treatment will not be necessary to "effect a cure and give relief" to the underlying injury.

Id. The Court of Appeals instructed: "[I]f, on remand, the Full Commission again finds Plaintiff to have no permanent partial impairment, the Full Commission is instructed to enter additional findings reconciling that finding with Finding of Fact 25." *Id.* The Court of Appeals remanded the case to the Commission "for additional findings of fact and conclusions of law on the issue of Plaintiff's entitlement to permanent partial impairment benefits under N.C. Gen. Stat. § 97-31." *Id.* at *11.

On 4 March 2015, the Commission filed an amended opinion and award that made no change to its ultimate decision, including denying all additional benefits to plaintiff under the Act. In the amended opinion and award, however, the Commission modified Findings of Fact 22 and 25 (listed as Findings of Fact 23 and 26 in the amended opinion and award), as well as Conclusion of Law 2. It also added Conclusion of Law 6.

In Finding of Fact 23 of the amended opinion and award (amending Finding of Fact 22), the Commission bolstered its reasoning for assigning greater weight to the opinion of Dr. Gerber over that of Dr. Rhyne regarding the permanent partial disability rating. Finding of Fact 23 (amending Finding of Fact 22) now reads:

> 23. Dr. Rhyne testified that plaintiff's probable permanent partial disability would be three percent (3%), or if plaintiff had to have surgery, the rating would be in the range of five to fifteen percent (5-15%). The Commission assigns greater weight to the opinion of Dr. Gerber regarding plaintiff's permanent partial disability rating as detailed in Dr. Gerber's 27 June 2001 medical record. The Commission bases the decision to assign more weight to Dr. Gerber's opinion regarding the permanent partial disability rating on the fact that Dr. Gerber was able to

> examine plaintiff in close temporal proximity to plaintiff's compensable injury and also provided his opinion on plaintiff's permanent partial disability at the time of his examination. Dr. Gerber's record noted plaintiff's statement to him that plaintiff felt he could probably return to work, and found plaintiff to be at maximum medical improvement with no permanent disability and to have no work restrictions. Dr. Gerber's examination was on 27 June 2001, less than four months after plaintiff's injury, as compared to Dr. Rhyne, who did not examine plaintiff until 27 April 2009, more than eight years after plaintiff's injury and gave his opinion on plaintiff's permanent partial disability rating more than three years after his examination of plaintiff in October of 2012. Therefore, based on Dr. Gerber's 27 June 2001 medical record, the Commission finds that plaintiff reached maximum medical improvement on 27 June 2001 and that plaintiff has no permanent partial disability.

Also, the Commission reconciled Findings of Fact 22 and 25. In the amended opinion and award, Finding of Fact 26 (amending Finding of Fact 25) now reads:

> 26. Based upon the preponderance of the evidence in view of the entire record, the medical treatment plaintiff received for his neck condition, on or before 18 May 2009, was reasonable and medically necessary, and was reasonably calculated to give relief from plaintiff's 2 March 2001 compensable injury by accident. The Commission notes that even though plaintiff is determined to have reached maximum medical improvement on 27 June 2001, that determination is not inconsistent with plaintiff continuing to receive additional medical treatment to provide relief from his compensable injury by accident.

Conclusion of Law 2 in the amended opinion and award now reads:

> 2. Plaintiff is entitled to the provision of medical treatment for his neck condition for the period from 2 March 2001 through 18 May 2009. N.C. Gen. Stat. §§ 97-25; 97-25.1. The Commission further concludes that even though the medical treatment plaintiff received subsequent to his full duty release could not lessen his period of disability, the medical treatment he did receive

> provided relief. The Supreme Court of North Carolina has instructed:
>
> > N.C.G.S. § 97-25 does not, however, limit an employer's obligation to pay future medical expenses to those cases in which such expenses will lessen the period of disability. The statute also requires employers to pay the expenses of future medical treatments even if they will not lessen the period of disability as long as they are reasonably required to (1) effect a cure or (2) give relief.
>
> *Little v. Penn Ventilator Co.*, 317 N.C. 206, 210, 345 S.E.2d 204, 207 (1986). Therefore, the Commission concludes that plaintiff is entitled to the provision of medical treatment following his full duty release through 18 May 2009 as the medical treatment he received provided relief from his compensable injury.

Newly added Conclusion of Law 6 reads: "Based upon Dr. Gerber's assignment of a zero percent (0%) permanent partial disability rating, plaintiff is not entitled to any compensation for permanent partial disability."

These excerpts demonstrate the Commission's attempts to bolster its reasoning for assigning greater weight to the opinion of Dr. Gerber over that of Dr. Rhyne regarding the permanent partial disability rating and to reconcile the determination that plaintiff is entitled to medical treatment for his neck condition for the period from 2 March 2001 through 18 May 2009 (Finding of Fact 26, Conclusion of Law 2) with the determination that plaintiff is not entitled to any compensation for permanent partial disability (Finding of Fact 23, Conclusion of Law 6).

In the amended opinion and award, the Commission also added Finding of Fact 29, which reads in pertinent part: "[O]n 30 January 2009, plaintiff was assigned work restrictions of no lifting greater than twenty (20) pounds and no reaching overhead. Those restrictions rendered plaintiff's pre-injury job unsuitable as it would exceed both the lifting restriction and the prohibition on reaching overhead."

Plaintiff again appealed the Commission's decision to the Court of Appeals, which, in an unpublished, divided opinion filed on 3 May 2016, affirmed the amended opinion and award. *Harrison v. Gemma Power Sys., LLC*, ___ N.C. App. ___, 786 S.E.2d 433, 2016 WL 1744423 (2016) (unpublished) (*Harrison II*). The majority considered plaintiff's

argument that the Commission made an additional finding of fact in the amended opinion and award that plaintiff was assigned work restrictions on 30 January 2009, and therefore, the Commission's finding "recogniz[ed] a loss of functional ability due to injury" that amounted to a " 'functional abnormality' after maximum medical improvement because he can no longer perform his pre-injury job due to accident-related restrictions." *Harrison II*, 2016 WL 1744423, at *5. Therefore, according to plaintiff, the Commission's new finding establishes that he "has permanent partial impairment due to his injury," which finding is "irreconcilable with" a finding of fact and conclusion of law in the original opinion and award of the Commission. *Id.*

The majority found plaintiff's arguments unconvincing. *Id.* at *6. The majority concluded that although "competent record evidence . . . support[ed] the finding that" an examining physician imposed work restrictions on plaintiff on 30 January 2009, "the evidence does not indicate whether these restrictions were related to his 2 March 2001 injury in any way." *Id.*

The majority also noted that the Commission made an amended finding that "assigned greater weight to the opinion of Dr. Gerber regarding plaintiff's permanent partial disability, as opposed to the opinion of Dr. Rhyne." *Id.* at *7. Recognizing that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony," the majority held that the Commission "was entitled to place greater weight on the substance of Dr. Gerber's opinion." *Id.* Therefore, the Court of Appeals affirmed the amended opinion and award, holding that the Commission did not err in concluding that plaintiff is not entitled to any compensation for permanent partial disability. *Id.*

In contrast, the dissenting opinion concluded that the Commission again failed to properly determine whether plaintiff is entitled to compensation under N.C.G.S. § 97-31. *Id.* (Geer, J., dissenting). The dissent observed that the Commission found as fact that "as of 30 January 2009, plaintiff had a loss of function—a substantial limitation on his ability to lift a relatively modest weight and an inability to reach overhead." *Id.* at *8. The dissent did not agree "that the record contains no evidence that the 30 January 2009 restrictions were due to the 2 March 2001 compensable neck injury." *Id.* Rather, the dissent would conclude that, when read as a whole, the Commission's opinion and award establishes that "the Commission understood that the restrictions . . . assigned were due to plaintiff's compensable neck condition." *Id.* The dissent agreed with plaintiff that "the Commission's findings of fact do not support its

conclusion that plaintiff suffers no permanent partial disability within the meaning of [section] 97-31"; therefore, the dissent would reverse the Commission's opinion and award on this issue and, to the extent necessary, remand this case "so that the Commission can clarify its findings" "regarding the source of the physical restrictions" placed on plaintiff. *Id.* at *9.

Plaintiff appealed based on the dissenting opinion. Plaintiff argues that the Commission's detailed findings of fact compel a conclusion that he suffers from permanent partial impairment as a result of his compensable injury and is therefore entitled to collect scheduled benefits under N.C.G.S. § 97-31.

We decline plaintiff's invitation to hold that the findings of fact in the amended opinion and award compel the conclusion that plaintiff retains permanent partial impairment as a result of his injury. "[T]he Commission is the sole judge of the credibility of the witnesses and the weight of the evidence. . . . 'Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight.' " *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citations omitted) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). But, because we conclude that again the Commission has failed to adequately address the Court of Appeals' mandate that it make "additional findings of fact and conclusions of law on the issue of Plaintiff's entitlement to permanent partial impairment benefits under N.C. Gen. Stat. § 97-31," *Harrison I*, 2014 WL 2993853, at *11, we reverse the decision currently on appeal and remand this case to the Court of Appeals for further remand to the Commission to comply with the 2014 mandate of the Court of Appeals.

"In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the [Commission's] legal conclusions are fully reviewable." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000) (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). Moreover, "[t]o enable the appellate courts to perform their duty of determining whether the Commission's legal conclusions are justified, the Commission must support its conclusions with sufficient findings of fact." *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 761, 688 S.E.2d 431, 439 (2010) (citing *Pardue v. Blackburn Bros. Oil & Tire Co.*, 260 N.C. 413, 415-16, 132 S.E.2d 747, 748-49 (1963)). "Although the Commission need not find facts on every issue raised by the evidence, it is 'required to make findings on *crucial* facts upon which the right to compensation depends.' "

Cardwell v. Jenkins Cleaners, Inc., 365 N.C. 1, 2-3, 704 S.E.2d 898, 899 (2011) (per curiam) (quoting *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719 (emphasis added), *aff'd per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005)). "Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Watts*, 171 N.C. App. at 5, 613 S.E.2d at 719 (quoting *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987)).

Under the Workers' Compensation Act, an injured employee who suffers some degree of loss or permanent injury to a body part, as enumerated in N.C.G.S. § 97-31,[1] is entitled to collect permanent disability compensation for a "statutorily-prescribed period of time . . . which begins when the healing period ends and runs for the specific number of weeks set forth in the statute." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11, 562 S.E.2d 434, 442 (2002), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003); *see also* N.C.G.S. § 97-31 (2015). "[T]he healing period . . . ends at the point when the injury has stabilized, referred to as the point of 'maximum medical improvement'. . . ." *Knight*, 149 N.C. App. at 12, 562 S.E.2d at 442 (citations omitted).

At that point, a treating or evaluating physician typically assigns to the injured employee a "permanent partial impairment rating," which corresponds to the degree of permanent impairment to the body part. *See generally North Carolina Workers' Compensation Law: A Practical Guide to Success at Every Stage of a Claim* 167-68 (Valerie A. Johnson & Gina E. Cammarano eds., 3d ed. 2016) [hereinafter *Workers' Compensation Law*]; *see also* N.C.G.S. § 97-31; N.C. Indus. Comm'n, *N.C. Industrial Commission Rating Guide* sec. 1, http://www.ic.nc.gov/ncic/pages/ratinggd.htm http://www.ic.nc.gov/ncic/pages/ratinggd.htm (last updated July 8, 2016) (last visited June 3, 2017) [hereinafter *Indus. Comm'n Rating Guide*] ("Permanent physical impairment is any anatomical or functional abnormality or loss after maximum medical rehabilitation has been achieved and which abnormality or loss the physician considers stable or non-progressive at the time the evaluation is made."). This rating often determines the benefits to which the injured employee is entitled. *See generally Workers' Compensation Law* 167-68; *see also* N.C.G.S. § 97-31; *Indus. Comm'n Rating Guide*.

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1. N.C.G.S. § 97-31 lists a schedule of injuries and the rate and period of compensation for each, and specifically indicates that: "In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation . . . ." N.C.G.S. § 97-31 (2015).

The *N.C. Industrial Commission Rating Guide* is an Industrial Commission publication "made available to the physicians of the State of North Carolina" that is intended to be used "as a guide and basic outline for physicians making rating examinations of individuals who have had industrial injuries." *Indus. Comm'n Rating Guide* sec. 2. In addition to the specific impairment descriptions provided in the *Guide* for various body parts, the *Guide* recognizes that "in many cases there are intangible factors which cannot be stereotyped but must be considered," including but not limited to "pain, weakness, and dexterity." *Id.*

Additionally, an injured employee is eligible for compensation under N.C.G.S. § 97-31 "regardless of whether the employee has, in fact, suffered a loss of wage-earning capacity," because unlike all other types of disability benefits, "disability is presumed from the fact of the injury itself." *Knight*, 149 N.C. App. at 11, 562 S.E.2d at 442 (citation omitted).

Thus, to receive benefits for permanent injury under N.C.G.S. § 97-31, ordinarily, the plaintiff must establish that he or she has reached the point of maximum medical improvement and has a permanent impairment. A showing of maximum medical improvement indicates that the healing period has ended, and the "permanent partial impairment rating" indicates the degree of permanent damage or loss sustained to a body part.

Here the findings of fact are insufficient to enable this Court to determine the plaintiff's right to benefits under N.C.G.S. § 97-31. In *Harrison I* the Court of Appeals remanded this case to the Commission, mandating that the Commission make "additional findings of fact and conclusions of law on the issue of Plaintiff's entitlement to permanent partial impairment benefits under N.C. Gen. Stat. § 97-31." *Harrison I*, 2014 WL 2993853, at *11. Although the Commission bolstered its reasoning for assigning greater weight to the opinion of Dr. Gerber over that of Dr. Rhyne regarding the permanent partial disability rating in Finding of Fact 23 of the amended opinion and award, we conclude that the Commission has still failed to address adequately whether plaintiff retains any permanent impairment compensable under N.C.G.S. § 97-31.

The record here contains indications in medical records and treatment notes that plaintiff's injury may be permanent and ongoing. Various medical providers entered these notes well past the date of Dr. Gerber's 27 June 2001 medical evaluation. The record contains, *inter alia*, the following: (1) in 2003 Dr. Rice indicated that "at this juncture, [he] feel[s] [plaintiff] continues to have symptoms from his injuries which need to be addressed through the VA"; (2) in 2004 an evaluation from Carolina

Complete Rehabilitation Center recommends therapy and indicates that plaintiff has "decreased mobility of [the] cervical region" and "continues to experience neck pain that increases with quick movements of [his] head and forward bending[, with his pain] rated at 7/10 in the scale of 0-10"; (3) in 2006 a report from Neurology Consultants of the Carolinas indicates that plaintiff "is a patient [they] have been following for headaches, neck pain, and painful paresthesias on the right upper extremity resulting from an accident at work," that plaintiff has "a mild disk bulge at the C6-77 level," and that plaintiff "has already been treated for this conservatively, but has not improved" so they will "refer him for a surgical opinion"; (4) in 2009 a medical record by Dr. Rhyne indicates that plaintiff's "MRI was conclusive for a mild broad-based disk bulge at C6-C7 without evidence of spinal stenosis"; (5) in 2010 a progress note from the Fayetteville, North Carolina, Veterans Affairs Medical Center indicates that a "multilevel cervical spondylosis [is] seen in the lower cervical spine"; and (6) in 2012 Chiropractor Stogner's visit note indicates that "it is conclusive that [plaintiff] has some serious neck issues to consider," that "the combination of degenerative changes and ongoing restriction to movement . . . suggest that the accident is the cause of his ongoing problems," and that Chiropractor Stogner does "not expect to see any significant improvement with [plaintiff's] injury status and [he] suspect[s] that [plaintiff's] condition is permanent."

Despite these indications, the amended opinion and award does not contain adequate findings and conclusions on whether plaintiff has a permanent injury, taking into account all pertinent evidence. Without such findings, we are unable to review any determination regarding whether plaintiff is, in fact, entitled to benefits for permanent partial impairment under N.C.G.S. § 97-31.

Additionally, we hold that the Commission must modify Finding of Fact 23 and Conclusion of Law 6. Finding of Fact 23 either fails to adequately address the necessary issue, *Cardwell*, 365 N.C. at 2-3, 704 S.E.2d at 899, or it contains a mere recitation of the evidence rather than true findings. To the extent that the finding is simply a recitation of the evidence, it does not constitute a finding of fact sufficient to comply with the Act. *See*, *e.g.*, N.C.G.S. § 97-84 (2015); *Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) ("This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony." (citations omitted)), *disc. rev. denied*, 362 N.C. 236, 659 S.E.2d 735 (2008); *Davis v. Weyerhaeuser Co.*, 132 N.C. App. 771, 776, 514 S.E.2d 91, 94 (1999) ("Although we 'interpret the Commission's

practice of reciting testimony to mean that it does find the recited testimony to be a fact,' *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 442 n.7, 342 S.E.2d 798, 808 n.7 (1986), it is the Commission's duty to find the ultimate determinative facts, not to merely recite evidentiary facts and the opinions of experts."). Further, the Commission must explain its finding of no permanent impairment, given the nearly eight years of treatment between Dr. Gerber's medical opinion in June 2001 and 18 May 2009, when the condition was found compensable (Findings of Fact 25 and 26).

We conclude that the Commission has failed to carry out the Court of Appeals' mandate that it make additional findings of fact and conclusions of law on the issue of plaintiff's entitlement to benefits under N.C.G.S. § 97-31. For this reason, we reverse the decision of the Court of Appeals and remand this matter to that court for further remand to the Commission to comply with the 2014 mandate of the Court of Appeals in *Harrison I* and enter a new opinion and award not inconsistent with this opinion.

REVERSED AND REMANDED.

JILLIAN MURRAY
v.
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 124A16

Filed 9 June 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 531 (2016), dismissing an appeal from an order entered on 6 November 2014 by Judge Carl R. Fox in Superior Court, Orange County, and remanding the case for further proceedings. On 9 June 2016, the Supreme Court allowed defendant's petition for discretionary review as to an additional issue. Heard in the Supreme Court on 21 March 2017.

Law Firm of Henry Clay Turner, PLLC, by Henry Clay Turner, for plaintiff-appellee.

Joshua H. Stein, Attorney General, by Elizabeth A. Fisher, Assistant Solicitor General, and Laura Howard McHenry, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

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

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
WILLIAM MILLER BAKER

No. 35PA16

Filed 9 June 2017

1. Rape—attempted—evidence sufficient—completed rape

Evidence tending to show that a completed rape occurred in the victim's bedroom was sufficient to support defendant's conviction for attempted rape of a child, and the trial court did not err in denying defendant's motion to dismiss the attempted rape charge for insufficiency of the evidence.

2. Appeal and Error—preservation of issues—appeal by State

Where the State failed to advance an argument prior to filing its discretionary review petition in the Supreme Court, the State did not waive the right to make the argument on appeal. The question was whether the ruling of the trial court was correct rather than whether the reason given was sound or tenable, and the State had consistently maintained its position.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 781 S.E.2d 851 (2016), vacating in part defendant's convictions after appeal from a judgment entered on 8 August 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County, and remanding for resentencing. Heard in the Supreme Court on 22 March 2017.

Joshua H. Stein, Attorney General, by Anne M. Middleton, Special Deputy Attorney General, for the State-appellant.

Jennifer Harjo, Public Defender, New Hanover County, by Brendan O'Donnell, Assistant Public Defender, for defendant-appellee.

ERVIN, Justice.

The issue presented for our consideration in this case is whether the record contains sufficient evidence to support defendant's conviction for attempted first-degree rape of a child in violation of N.C.G.S.

§ 14-27.2A(a).[1] In vacating defendant's attempted rape conviction, the Court of Appeals held that "[t]he State failed to present substantial evidence of all elements of" that offense. *State v. Baker*, ___ N.C. App. ___, ___, 781 S.E.2d 851, 856 (2016). After examining the record in light of the applicable legal standard, we conclude that the evidence adequately supported the jury's determination that defendant had committed the offense of attempted first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a) and reverse the Court of Appeals' decision with respect to this issue.

According to the State, defendant committed two specific sexual assaults against Amanda[2] between the dates of 1 April 2008 and 21 October 2009, one of which allegedly occurred in Amanda's bedroom and the other of which allegedly occurred on a couch in the family residence. At the time of these incidents, defendant, who had been born in 1981, was the boyfriend of Amanda's mother and lived in the family home with Amanda, her mother, and Amanda's two brothers, the younger of whom was defendant's son.

Amanda claimed that, during the summer of 2009, defendant entered her bedroom, in which she was lying on the bed; removed his own shorts and Amanda's shorts and underwear; and began touching her vagina. Although Amanda was "kicking and screaming" as he did so, defendant "put his penis in [her] vagina." Defendant's assaultive conduct ended when Amanda's mother, who had been sleeping downstairs, entered the bedroom and discovered defendant, who was unclothed, with Amanda, whose shorts and underwear were around her knees. After making this discovery, Amanda's mother told Amanda to keep her door locked.

Amanda's mother described the bedroom incident in somewhat different terms. While sleeping on a downstairs couch during the summer of 2009, Amanda's mother heard what she believed to be her youngest child falling out of bed, as he had a habit of doing. After checking on the child and his brother, who were both asleep, Amanda's mother opened the door to Amanda's bedroom, in which she found defendant, who was asleep and clad in nothing other than his underwear, lying partially on Amanda's bed. Amanda's mother could not determine whether Amanda

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1. The General Assembly recodified this offense as N.C.G.S. § 14-27.23(a), effective 1 December 2015. Act of July 29, 2015, ch. 181, secs. 5(a), 48, 2015 N.C. Sess. Laws 460, 461, 472.

2. "Amanda" is a pseudonym that we, like the Court of Appeals, have employed for ease of reading and to protect the identity of the child.

was clothed because she was lying face down on the bed beneath a blanket. According to Amanda's mother, defendant had a history of "blood sugar" problems and would, on occasion, get up in the night, act in an angry or disoriented manner, and pass out. Amanda's mother thought that defendant's presence in Amanda's room on the occasion in question resulted from just such a "low blood sugar" episode. Although Amanda told her mother that defendant had hurt her, she understood Amanda's statement to be focused upon the fact that defendant had collapsed on top of her, and she told Amanda to lock her bedroom door to prevent the recurrence of such an injury. Defendant, on the other hand, told Amanda's mother that he had no memory of what had caused him to be in Amanda's bedroom or what had happened there.

In the autumn of 2009, Amanda arrived home from school to find defendant in an intoxicated condition. As Amanda sat down on the couch to do her homework, defendant began touching Amanda's chest. Although defendant attempted to have Amanda lie down on the couch, she was able to move away from him after he appeared to have fallen asleep. When defendant sat up, Amanda grabbed a phone, fled to her bedroom, entered the closet, and telephoned her mother with a request that her mother have someone come get her. Amanda was subsequently picked up by her grandparents.

Amanda's mother, on the other hand, remembered that Amanda had called her at work in the autumn of 2009 and told her that defendant's conduct was frightening her. Although Amanda did not specify what defendant had done to frighten her, Amanda's mother honored her daughter's request that she be picked up.

Amanda claimed that, prior to the bedroom incident, defendant had committed repeated sexual assaults against her. According to Amanda, defendant had touched her, put his penis in her vagina, and "grabbed [her] from [her] arms and told [her] not to tell anybody." Although Amanda could not recall how old she was when these earlier incidents occurred, she knew that she "was little."

Amanda initially disclosed that she had been sexually abused during a conversation with some school friends during the fall of 2009. Even though a school counselor reported Amanda's allegations to Wake County Child Protective Services, Amanda told both Danielle Doyle, an investigator with Wake County Child Protective Services, and Detective Peggy Marchant of the Cary Police Department that no sexual abuse had occurred. After receiving a new report that defendant had abused Amanda, Ms. Doyle and Detective Marchant spoke with Amanda again.

Although she was initially hesitant to discuss sexual abuse-related issues during this interview, Amanda admitted that she was having nightmares, that she had not been sleeping well, and that her level of nightmares, including flashbacks about being touched, had been increasing as the date upon which defendant was scheduled for release from prison (in which he was serving a sentence based upon an unrelated conviction) neared. When Amanda disclosed incidents involving attempted penile-vaginal contact and the fondling of her breasts and genital area, Ms. Doyle terminated the interview and made an appointment for Amanda to be evaluated by SafeChild Advocacy Center.

On 21 November 2011, Sara Kirk, a child abuse evaluation specialist at the Center, interviewed Amanda. During that interview, Amanda stated that, a couple of years earlier, defendant had touched her in an inappropriate manner and attempted to put his penis in her vagina. In describing the bedroom incident, Amanda replied, "I don't think it did," when asked if defendant's penis had entered her private part. Amanda did not claim that defendant's penis had penetrated her vagina at the time of the bedroom incident until a 14 July 2013 meeting with investigating officers and representatives of the District Attorney's office.

Holly Warner, a nurse practitioner at the Center, found "no signs of acute, meaning recent, or healed trauma to [Amanda's] vaginal area." However, Ms. Warner also stated that such results were not uncommon even if vaginal penetration had occurred.

Jeanine Bolick, a licensed clinical social worker, conducted counseling sessions with Amanda from 8 May 2012 through 11 June 2013. In light of Amanda's reluctance to discuss sexual abuse-related issues and her tearful affect when the subject of sexual abuse was mentioned, Ms. Bolick diagnosed Amanda as suffering from post-traumatic stress disorder. On the other hand, Ms. Bolick admitted that she had not observed specific symptoms of sexual abuse during her sessions with Amanda and that post-traumatic stress disorder can have a number of causes.

Defendant denied that he had ever attempted to insert his penis into Amanda's vagina, that he had ever entered Amanda's bedroom for that purpose, or that he had ever touched Amanda inappropriately. In addition, defendant denied that there had ever been a time in the autumn of 2009 in which Amanda had been alone with defendant after returning home from school. Finally, defendant denied having ever passed out in Amanda's bedroom for reasons relating to his diabetic condition.

On 24 January 2012, the Wake County grand jury returned a bill of indictment charging defendant with attempted first-degree rape of a

child in violation of N.C.G.S. § 14-27.2(a)(1) and taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(1). On 6 August 2013, the Wake County grand jury returned a superseding indictment charging defendant with three counts of attempted first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a), one count of first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a), and three counts of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(1). On 29 October 2013, the Wake County grand jury returned superseding indictments charging defendant with first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a), attempted first-degree rape of a child in violation of N.C.G.S. § 14-27.2A(a), and taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(1), with all three offenses allegedly having occurred on or about 1 April 2008 through 21 October 2009. The charges against defendant came on for trial before the trial court and a jury at the 4 August 2014 criminal session of the Superior Court, Wake County. At the conclusion of the State's evidence and at the close of all of the evidence, defendant unsuccessfully sought to have the charges that had been lodged against him dismissed for insufficiency of the evidence.

At the jury instruction conference, the trial court indicated, without objection from either party, that it intended to inform the jury that, before the jury could convict defendant of any of the three charges that had been lodged against him, it had to find that each charge was supported by evidence relating to a separate, discrete event and that the verdict sheet would set forth "three counts," with there being "no lesser-included offenses that [the court was] aware of." The trial court began and ended its instructions with respect to each of the substantive offenses that defendant had been charged with committing by stating that, in order to find defendant guilty, the jury had to find beyond a reasonable doubt that the conduct supporting the offense in question involved a discrete event that was separate from any of the events upon which the jury relied in convicting defendant of having committed any other offense. For example, the trial court instructed the jury with respect to the issue of defendant's guilt of attempted first-degree rape of a child that:

> The defendant has been charged with attempted rape of a child. For you to find the defendant guilty of attempted rape of a child the state must prove four things beyond a reasonable doubt:
>
> If you have found the defendant guilty of rape of a child in count one and/or indecent liberties with a child in count three, then the state must prove beyond

a reasonable doubt that these four things in count two occurred on an occasion separate from the event you found to have occurred in count one and separate from the event you found to have occurred in count three.

The state must prove beyond a reasonable doubt that, first, defendant intended to engage in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male organ.

Second, that at the time of the act alleged the victim was a child under the age of thirteen years.

Third, that at the time of the act alleged the defendant was at least eighteen years of age.

And fourth, the defendant performed an act that was calculated and designed to accomplish vaginal intercourse with the victim and that such conduct came so close to bringing about vaginal intercourse that in the ordinary course of events the defendant would have completed the act with the victim had he not been stopped or prevented. Mere preparation or planning is not enough to constitute such an act, but the act need not necessarily be the last act required to complete the offense.

If you find from the evidence beyond a reasonable doubt that . . . in or about the period from April 1, 2008 through October 21, 2009 but if you have found the defendant guilty of rape of a child in count one separate from that occasion or if you have found the defendant guilty of indecent liberties with a child in count three separate from that occasion, the defendant intended to engage in vaginal intercourse with the victim and that at that time the victim was a child under the age of thirteen years and that the defendant was at least eighteen years of age and that the defendant performed an act . . . which in the ordinary course of events would have resulted in vaginal intercourse by the defendant with the victim . . . had not the defendant been stopped or prevented from completing this apparent course of action, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

On 8 August 2014, the jury returned a verdict finding defendant guilty of attempted first-degree rape of a child and taking indecent liberties with a child. In light of the jury's inability to reach a unanimous verdict with respect to the issue of defendant's guilt of first-degree rape of a child, the trial court declared a mistrial with respect to that count of the superseding indictment. After accepting the jury's verdict, the trial court consolidated defendant's convictions for judgment and sentenced defendant to a term of 240 to 297 months of imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

[1] In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued, among other things, that the trial court had erred by denying his motion to dismiss the attempted rape charge for insufficiency of the evidence.[3] More specifically, defendant contended that the evidence concerning the couch incident did not suffice to support an attempted rape conviction and that the evidence concerning the bedroom incident, when taken in the light most favorable to the State, showed that defendant had committed a completed, rather than an attempted, rape. In addition, defendant argued that, to the extent that "the trial court's instruction permitted the jury to find the defendant guilty of attempted rape as a lesser included offense of rape," the delivery of that instruction constituted plain error.

Although the State argued that the record contained sufficient evidence to support defendant's attempted rape conviction, it appeared to concede that the testimony regarding the various statements that Amanda had made during the investigative process had not been admitted for substantive purposes and could not be considered in analyzing the sufficiency of the evidence to support defendant's attempted rape conviction. In addition, the State acknowledged that, with respect to the bedroom incident, Amanda "did, in fact, testify to a completed act of vaginal intercourse." Even so, however, the State maintained that the record evidence concerning both the bedroom and the couch incidents was sufficient to support defendant's attempted rape conviction. Finally, the State argued that the trial court had not erred, much less committed plain error, in the course of instructing the jury.

In the course of vacating defendant's attempted rape conviction, the Court of Appeals noted that the parties agreed that defendant's conviction could only be sustained on the basis of evidence concerning either

3. Defendant did not challenge the validity of his conviction for taking indecent liberties with a child before the Court of Appeals.

the bedroom incident or the couch incident. *Baker*, ___ N.C. App. at ___, 781 S.E.2d at 855. Moreover, the Court of Appeals determined that the substantive evidence contained in the present record concerning the bedroom incident "could support a conviction for a completed rape" but did not constitute "substantive evidence of attempted rape." *Id.* at ___, 781 S.E.2d at 855 (citing *State v. Batchelor*, 190 N.C. App. 369, 373-75, 660 S.E.2d 158, 162 (2008)). Finally, the Court of Appeals determined that the evidence concerning the couch incident did not suffice to show that defendant had "intended to rape Amanda." *Id.* at ___, 781 S.E.2d at 856. As a result, the Court of Appeals concluded that the trial court had erred by denying defendant's motion to dismiss the attempted rape charge, declined to address defendant's challenge to the trial court's jury instructions, vacated defendant's attempted rape conviction, and remanded this case to the trial court for resentencing. *Id.* at ___, 781 S.E.2d at 856. On 9 June 2016, we allowed the State's discretionary review petition.

In the brief that it filed before this Court, the State argues that the Court of Appeals erred by vacating defendant's attempted rape conviction on sufficiency of the evidence grounds given that prior decisions from both this Court and the Court of Appeals establish that evidence reflecting a completed rape can support an attempt conviction.[4] In response, defendant argues, among other things, that the decisions upon which the State relies "do not actually stand for the proposition that legally sufficient evidence of a completed crime will necessarily support a verdict of a lesser included crime" and that the State's contention "that evidence of the greater offense supports a verdict of guilt on the lesser offense cannot be squared with" this Court's decisions to the effect that, "where the evidence of the greater offense is positive and there is no evidence of the lesser included offense, the lesser included offense may not be considered by the jury and the defendant may not be convicted of it." In addition, defendant argues that the attempted rape charge was not submitted to the jury as a lesser included offense of rape and that the jury's inability to reach a unanimous verdict with respect to the completed rape charge shows that the jury had doubts about the veracity

4. In addition, the State argued that the non-specific evidence concerning the history of defendant's assaults upon Amanda set out in Amanda's trial testimony and the evidence concerning the couch incident both provide independent support for defendant's attempted rape conviction. However, given our determination that the substantive evidence concerning the bedroom incident adequately supported defendant's attempted rape conviction, we need not address either of these additional arguments any further in this opinion.

of Amanda's testimony. Furthermore, to the extent that the prior decisions of this Court and the Court of Appeals suggest that, despite the absence of any evidence tending to show that an attempted rape had occurred, any error in submitting the issue of a defendant's guilt of a lesser included offense was favorable, rather than adverse to, the defendant, this Court has retreated from such statements in subsequent decisions. In defendant's view, a verdict convicting defendant of a crime for which there is no evidentiary support violates defendant's fundamental rights to due process and a unanimous verdict. Finally, defendant argues that, if the attempted rape charge had not been submitted to the jury, there is a reasonable possibility that the jury would have been unable to reach a unanimous verdict with respect to the completed rape charge or found defendant not guilty of that offense.[5]

> "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.

State v. Mann, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citations omitted) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)),

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5. **[2]** In addition to the arguments discussed in the text of this opinion, defendant has asserted, in reliance upon this Court's decisions in *North Carolina School Boards Ass'n v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005), and *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836 (1934), that the State waived the right to argue that evidence tending to show that a completed rape occurred sufficed to support defendant's attempted rape conviction given that the State failed to advance this argument prior to filing its discretionary review petition. However, neither of the decisions upon which defendant relies provides adequate support for this argument given that *Weil* involved a direct appeal from the trial court to this Court in which the appellant sought to raise an argument which had not been presented for the trial court's consideration, 207 N.C. at 10, 175 S.E. at 838, and *Moore* involved a situation in which the defendant-appellants sought to advance an argument based upon a state constitutional provision that they had failed to present before either the trial court or the Court of Appeals, 359 N.C. at 481, 510, 614 S.E.2d at 508, 526. In this case, however, the State, which was the appellee before the Court of Appeals, is challenging a decision of the Court of Appeals overturning a trial court decision in its favor. As a result of the fact that "[t]he question for review is whether the ruling of the trial court was correct" rather than "whether the reason given therefor is sound or tenable," *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (citing *State v. Blackwel*l, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)), *cert. denied*, 484 U.S. 916, 98 L. Ed.2d 224 (1987), and the fact that the State has consistently taken the position that the record evidence sufficed to support the submission of the issue of defendant's guilt of attempted rape to the jury, we do not believe that the State has waived the right to argue in support of the trial court's decision to deny defendant's dismissal motion that evidence that defendant committed a completed rape sufficed to support his conviction for attempted rape.

cert. denied, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In making this determination:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted).

"A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years." N.C.G.S. § 14-27.2A(a) (2013). " '[V]aginal intercourse' . . . means the slightest penetration of the sexual organ of the female by the sexual organ of the male." *State v. Johnson*, 317 N.C. 417, 435, 347 S.E.2d 7, 18 (1986) (citations omitted), *superseded by statute*, N.C.G.S. § 8C-1, Rule 404(b), *on other grounds as recognized in State v. Moore*, 335 N.C. 567, 594-96, 440 S.E.2d 797, 812-14, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994). "The elements of an attempt to commit a crime are: '(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (quoting *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996), and citing *State v. Ball*, 344 N.C. 290, 305, 474 S.E.2d 345, 354 (1996), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997))).

In *State v. Roy*, defendant Roy was indicted for rape. 233 N.C. 558, 558, 64 S.E.2d 840, 840 (1951). However, the prosecutor elected to proceed against defendant Roy based solely upon a charge of assault with intent to commit rape at the time that the case was called for trial. *Id.* at 558, 64 S.E.2d at 840-41. In rejecting defendant Roy's challenge to the denial of his motion for nonsuit on appeal, which was predicated on the fact that all of the evidence showed a completed rape rather than an attempt, *id.* at 559, 64 S.E.2d at 841, we noted that "it is well settled that an indictment for an offense includes all the lesser degrees of the same crime," *id.* at 559, 64 S.E.2d at 841 (citations omitted); indicated that, "although all the evidence may point to the commission of the graver crime charged in a bill of indictment, the jury's verdict for an offense of a lesser degree will not be disturbed, since it is favorable to

the defendant," *id.* at 559, 64 S.E.2d at 841 (citations omitted); and concluded that "[t]he evidence adduced in the trial below was ample to support the verdicts rendered," *id.* at 560, 64 S.E.2d at 841. As a result, this Court clearly held in *Roy* that evidence of a completed rape sufficed to support an attempted rape conviction.

Similarly, in *State v. Canup*, the prosecuting witness testified at trial that the defendant had "stuck his penis in her vagina" despite the fact that the grand jury had indicted the defendant for attempted second-degree rape. 117 N.C. App. 424, 426, 451 S.E.2d 9, 10 (1994). In response to the defendant's argument that the evidence did not suffice to support his attempted rape conviction, the Court of Appeals stated that "[e]vidence that this defendant continued to pursue his malevolent purpose and achieved penetration does not decriminalize his prior overt acts" since "[t]he completed commission of a crime must of necessity include an attempt to commit the crime." *Id.* at 428, 451 S.E.2d at 11. According to the Court of Appeals, "nothing in the philosophy of juridical science requires that an attempt must fail in order to receive recognition." *Id.* at 428, 451 S.E.2d at 11 (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 612 (3d ed. 1982) [hereinafter *Criminal Law*]). However,

> [a] successful attempt to commit a crime will not support two convictions and penalties,[—]one for the attempt and the other for the completed offense. This is for the obvious reason that whatever is deemed the appropriate penalty for the total misconduct can be imposed upon conviction of the offense itself, but <u>this does not require the unsound conclusion that proof of the completed offense disproves the attempt to commit it</u>.

Id. at 428, 451 S.E.2d at 11-12 (quoting *Criminal Law* 612 (emphasis added and footnotes omitted)). As a result, the Court of Appeals determined that the record evidence "would have supported the defendant's being charged with either second degree rape or attempted second degree rape and convicted of either offense." *Id.* at 428, 451 S.E.2d at 12.

Approximately two decades later, the Court of Appeals held, in reliance upon *Canup*, that the evidence sufficed to preclude allowance of the defendant's motion to dismiss an attempted larceny charge for insufficiency of the evidence in a case in which the State had indicted the defendant for attempted larceny while all the evidence tended to show that a completed larceny had occurred. *State v. Primus*, 227 N.C. App. 428, 430-32, 742 S.E.2d 310, 312-13 (2013). In doing so, the court rejected the defendant's argument that guilt of the crime of attempted larceny

requires that the defendant's act supporting the attempt charge fall short of the competed offense in order to be sufficient to support an attempt conviction, *id.* at 429-32, 742 S.E.2d at 312-13, a conclusion that accords with the modern view concerning criminal liability for attempt. 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5, at 230 (2d ed. 2003) (stating that, "[a]lthough the crime of attempt is sometimes defined as if failure were an essential element, the modern view is that a defendant may be convicted on a charge of attempt even if it is shown that the crime was completed"). As a result, a careful review of the relevant decisions of this Court and the Court of Appeals demonstrates that evidence of a completed rape is sufficient to support an attempted rape conviction.

As defendant emphasizes, this Court has held that

> [w]here there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense s*upported by any version of the evidence*. If the lesser included offense is not supported by the evidence, it should not be submitted, regardless of conflicting evidence.

State v. Jones, 304 N.C. 323, 331, 283 S.E.2d 483, 488 (1981). For that reason, in the event that the State has elicited positive evidence of every element of the completed crime of rape and the defendant claims that his encounter with the alleged victim was consensual or never occurred, the trial court should not allow the jury to consider the issue of the defendant's guilt of the lesser included offense of attempted rape. *State v. Nelson*, 341 N.C. 695, 698, 462 S.E.2d 225, 226 (1995). "The rule that a jury can believe all, part, or none of a party's evidence," *id.* at 698, 462 S.E.2d at 226 (citing *State v. Faircloth*, 297 N.C. 388, 255 S.E.2d 366 (1979), *superseded by statute*, N.C.G.S. § 15A-924, *on other grounds as recognized in State v. Silas*, 360 N.C. 377, 627 S.E.2d 604 (2006)), "does not apply when to let it do so could result in the jury's finding of guilt of a crime which is not supported by the evidence of either party," *id.* at 698, 462 S.E.2d at 226. However, the decisions upon which defendant relies, including *Nelson*, 341 N.C. at 698, 462 S.E.2d at 226; *State v. Smith*, 315 N.C. 76, 102, 337 S.E.2d 833, 850 (1985); *State v. Horner*, 310 N.C. 274, 283, 311 S.E.2d 281, 287-88 (1984); *State v. Strickland*, 307 N.C. 274, 287, 298 S.E.2d 645, 654 (1983), *abrogated in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); and *State v. Jones*, 249 N.C. 134, 139, 105 S.E.2d 513, 517 (1958), address whether the defendant was entitled to the submission of the issue of his or her guilt of a lesser included offense to the jury rather than the entirely separate issue

of whether the evidence sufficed to support the defendant's conviction. For that reason, the proper resolution of defendant's challenge to the sufficiency of the evidence to support his attempted rape conviction hinges upon cases such as *Roy*, *Canup*, and *Primus* rather than upon the decisions on which defendant relies.

Defendant's reliance upon this Court's opinions in *State v. Ray*, 299 N.C. 151, 261 S.E.2d 789 (1980), and *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991), which deal with the extent to which the erroneous submission of the issue of the defendant's guilt of a lesser included offense that lacked adequate evidentiary support constituted prejudicial error, is equally misplaced. As was the case with defendant's argument in reliance upon *Nelson*, *Smith*, *Horner*, *Strickland*, and *Jones*, the present case involves the issue of whether evidence of the defendant's guilt of the completed offense suffices to support an attempt conviction rather than the issue of whether the jury should have been allowed to consider the issue of the defendant's guilt of a lesser included offense that lacked adequate evidentiary support. As if that were not enough to render this case distinguishable from *Ray* and *Arnold*, neither of those decisions involved a situation in which the issue of the defendant's guilt of attempt was erroneously submitted to the jury despite the fact that all of the evidence showed the commission of a completed offense. Finally, although its decision is obviously not binding upon us, the Court of Appeals held in *State v. Wade*, 49 N.C. App. 257, 271 S.E.2d 77 (1980), *cert. denied*, 315 N.C. 596, 341 S.E.2d 37 (1986), that the defendant was not entitled to relief on appeal based upon the trial court's erroneous decision to instruct the jury concerning the issue of the defendant's guilt of the lesser included offense of attempted rape in a case in which all the evidence tended to show that the defendant was guilty of a completed rape on the grounds that, "[i]f there were error from the instruction complained of, such was favorable to [the] defendant and harmless." *Id.* at 261-62, 271 S.E.2d at 80. As a result, *Ray* and *Arnold*, which address an issue that is not before the Court in this instance, have no bearing on the proper resolution of this case either.

Thus, for all these reasons, we conclude that the record evidence tending to show that a completed rape had occurred in Amanda's bedroom sufficed to support defendant's conviction for attempted rape and that the trial court did not, for that reason, err in denying defendant's motion to dismiss the attempted rape charge for insufficiency of the evidence. In addition, given the fact that the issue of defendant's guilt of attempted rape was not submitted to the jury as a lesser included offense of first-degree rape of a child, there is no need for further consideration

of defendant's argument that the trial court committed plain error by allowing the jury to convict him of attempted rape as a lesser included offense of first-degree rape of a child. As a result, the Court of Appeals' decision vacating the judgment that the trial court entered based upon defendant's conviction for attempted first-degree rape of a child is reversed.

REVERSED.

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL

No. 252PA14-2

Filed 9 June 2017

Appeal and Error—Rule of Appellate Procedure 2—invoked by Court of Appeals without discussion of merits

The Court of Appeals erred in this case (*Campbell II*) by invoking Rule 2 of the Rules of Appellate Procedure to review defendant's fatal variance argument. The panel in *Campbell II* merely noted that a previous panel of that court had, for the same case (*Campbell I*), invoked Rule 2 to review a similar fatal variance argument and then, without further discussion or analysis regarding Rule 2, the *Campbell II* panel addressed the merits of defendant's argument. The panel failed to exercise its discretion when it did not consider whether defendant's case was one of the rare instances meriting exercise of the court's supervisory power under Rule 2. The case was reversed and remanded to the Court of Appeals for an independent determination of whether the facts and circumstances merited the exercise of the court's discretion to review the case under Rule 2.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 525 (2015), finding no error in part, but vacating in part and remanding a judgment entered on 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County, after the Supreme Court of North Carolina reversed and remanded the Court of Appeals' prior decision in this case, *State v. Campbell*, 234 N.C. App. 551, 759 S.E.2d 380 (2014). Heard in the Supreme Court on 20 March 2017.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Hannah Hall Love, Assistant Appellate Defender, for defendant-appellee.

MORGAN, Justice.

This is the second time that this case has made its way to this Court, and yet our resolution of the present appeal does not represent a final ruling on the merits. Instead, for the reasons discussed herein, we reverse and remand this case to the Court of Appeals for an independent assessment of whether that court need and should invoke its discretion under Rule 2 of the North Carolina Rules of Appellate Procedure in order to reach the merits of one of defendant's substantive issues on appeal.

In light of the several previous opinions from this Court and the Court of Appeals in this matter, we will not recount the factual background of this case in detail. The evidence at trial tended to show the following: Overnight on 15 August 2012, certain sound equipment disappeared from Manna Baptist Church in Shelby, North Carolina, and defendant's wallet was found in the area of the church near where some of the missing equipment was kept. Defendant testified that, in the throes of a personal crisis, he entered the unlocked church seeking comfort and sanctuary, spent the night there praying and sleeping, and left the following morning without taking anything except some water. After defendant left the church, he experienced symptoms that led him to believe he was having a heart attack, so he called for emergency services. The emergency medical technician (EMT) who responded to defendant's call for help testified that defendant did not have any sound equipment with him when the EMT arrived. Nonetheless, defendant was subsequently indicted for (1) breaking or entering a place of religious worship with intent to commit a larceny therein and (2) larceny after breaking or entering.

The procedural history of this case warrants lengthier review. The matter came on for trial at the 10 June 2013 session of Superior Court, Cleveland County, the Honorable Linwood O. Foust, Judge presiding. Defendant moved to dismiss the charges against him at the close of the State's evidence and again at the close of all the evidence. The trial court denied each motion, and the jury returned guilty verdicts on both charges. Defendant appealed, making six arguments of error. The Court of Appeals addressed only two of defendant's contentions, but vacated

his larceny conviction and reversed his conviction for breaking or entering. *See State v. Campbell*, 234 N.C. App. 551, 759 S.E.2d 380 (2014), *rev'd and remanded*, 368 N.C. 83, 772 S.E.2d 440 (2015). The bases for the Court of Appeals' holdings were its determinations that: (1) when a larceny "indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment," such that the larceny indictment was "fatally flawed" for failing to "allege that Manna Baptist Church is a legal entity capable of owning property;" and (2) the State presented insufficient evidence of an essential element of felony breaking or entering a place of worship, to wit: intent to commit larceny. *Id.* at 555-56, 759 S.E.2d at 384. This Court allowed the State's first petition for discretionary review. *See State v. Campbell*, 367 N.C. 792, 766 S.E.2d 635 (2014).

In that initial appeal, this Court held

> that the larceny indictment alleging ownership of stolen property of Manna Baptist Church sufficiently alleged ownership in a legal entity capable of owning property[,] . . . . that the State presented sufficient evidence of defendant's criminal intent to sustain a conviction for felony breaking or entering a place of religious worship, and [thus] the trial court properly denied defendant's motions to dismiss.

State v. Campbell, 368 N.C. 83, 88, 772 S.E.2d 440, 444-45 (2015). Accordingly, we reversed the decision below and remanded the case to the Court of Appeals for consideration of defendant's four remaining issues on appeal. *Id.* at 88, 772 S.E.2d at 445.

Defendant's remaining issues were that

> he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; [that] the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; [that] insufficient evidence supports his larceny conviction; and [that] the trial court violated his constitutional right to a unanimous jury verdict with respect to the larceny charge.

See State v. Campbell, ___ N.C. App. ___, 777 S.E.2d 525, 528 (2015) (*Campbell II*). The court found "that the trial court committed no error in convicting defendant of breaking or entering a place of religious

worship with intent to commit a larceny therein[,]" *id.* at ___, 777 S.E.2d at 534. After rejecting defendant's ineffective assistance of counsel claim, the court turned to defendant's contention that a fatal variance existed between the allegations in the indictment and the evidence at trial regarding who owned the sound equipment that was stolen.[1]

The Court of Appeals first observed that, because his trial counsel had failed to raise the fatal variance issue in the trial court, defendant sought review under North Carolina Rule of Appellate Procedure 2. *Id.* at ___, 777 S.E.2d at 530. Ordinarily, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Nevertheless, "[t]o prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of [the appellate] rules in a case pending before it." *Id.* at R. 2. The court in *Campbell II* noted that a previous panel of that court had "invoked Rule 2 to review a similar fatal variance argument and held that this type of error is 'sufficiently serious to justify the exercise of our authority under [Rule 2].' " *Campbell*, ___ N.C. App. at ___, 777 S.E.2d at 530 (alteration in original) (quoting *State v. Gayton – Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009), *appeal denied sub nom. Gayton – Barbosa v. Sapper*, No. 5:10-HC - 2218 BO, 2012 WL 174 299 (E.D.N.C. Jan. 20. 2012)). Without further discussion or analysis regarding Rule 2, the court then addressed the merits of defendant's argument, determining that a fatal variance indeed existed between the indictment—which alleged the stolen sound equipment was owned by both the church and its pastor—and the evidence at trial—which showed that the equipment belonged to the church alone. *Id.* at ___, 777 S.E.2d at 534. Accordingly, the court vacated defendant's larceny conviction.[2] The State again petitioned this Court for discretionary review, and on 9 June 2016, the State's petition was allowed "only as to whether the Court of Appeals erred in invoking Rule 2 of the North Carolina Rules of Appellate Procedure under the

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1. As has already been discussed, defendant previously raised, and this Court rejected, a different challenge to the larceny indictment, to wit: whether that indictment sufficiently alleged ownership in a legal entity capable of owning property. For clarity, we refer to the current challenge to the larceny indictment as the "fatal variance" issue or argument.

2. In light of this result, the court did not address defendant's final two arguments of error in connection with the larceny conviction. *Id.* at ___, 777 S..2d at 534.

circumstances of this case." *See State v. Campbell*, 368 N.C. 904, 794 S.E.2d 800 (2016).

As this Court has repeatedly stated, "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)) (emphases added); *see also Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). This assessment—whether a particular case is one of the rare "instances" appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether "substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citing, *inter alia*, *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam) ("*In view of the gravity of the offenses for which defendant was tried and the penalty of death which was imposed*, we choose to exercise our supervisory powers under Rule 2 of the Rules of Appellate Procedure and, in the interest of justice, vacate the judgments entered and order a new trial." (emphasis added)). In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.[3] *See Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 196, 657 S.E.2d at 364; *Hart*, 361 N.C. at 315-17, 644 S.E.2d at 204-06; *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.

Here, the Court of Appeals did not reach the merits of defendant's fatal variance argument after an independent determination of whether the specific circumstances of defendant's case warranted invocation of Rule 2, but rather, based upon a belief that "this type of error" automatically entitles an appellant to review via Rule 2. *See Campbell*, ___ N.C. App. at ___, 777 S.E.2d at 530. The court thus acted under the erroneous belief that, because defendant presented a fatal variance argument, the court lacked the ability to act otherwise than to reach the merits of

3. Notably, the Court of Appeals panel in *Gayton–Barbosa*, the case cited by the *Campbell II* panel, employed exactly such an individualized analysis in deciding to invoke Rule 2. *Gayton–Barbosa*, 197 N.C. App. 129, 135 & n.4, 676 S.E.2d 586, 590 & n.4 (discussing the specific circumstances and then determining that, "*given the peculiar facts of this case*, it is appropriate to address [the] defendant's variance-based challenge on the merits"(emphasis added)).

defendant's contention. In doing so, the lower court failed to recognize its discretion to refrain from undertaking such a review if it so chose. Because the Court of Appeals proceeded under this misapprehension of law, it failed to exercise the discretion inherent in the "residual power of our appellate courts." *See Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.

Accordingly, we reverse and remand this case to the Court of Appeals so that it may independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rule 10(a)(1), and consider the merits of defendant's fatal variance argument. The remaining issue addressed by the Court of Appeals is not before this Court, and that court's decision as to that matter remains undisturbed.

REVERSED and REMANDED.

STATE OF NORTH CAROLINA
v.
WILLIAM EDWARD GODWIN III

No. 167PA16

Filed 9 June 2017

1. Witnesses—expert—officer implicitly qualified

The trial court did not err in an impaired driving prosecution by allowing a police officer to testify about the Horizontal Gaze Nystagmus (HGN) test and about defendant's impairment even though the officer was not explicitly qualified as an expert. The trial court implicitly found that the officer was qualified to give expert testimony. Moreover, it is evident that the General Assembly envisioned this scenario and made clear provision to allow testimony from an individual who has successfully completed training in HGN and meets the criteria set forth in Rule of Evidence 702(a).

2. Motor Vehicles—driving while impaired—instructions

The standard jury instruction on credibility was sufficient in an impaired driving prosecution, and the trial court adequately conveyed the substance of defendant's requested instructions.

Defendant's proposed instructions were meant to ensure that the jury realized it could consider the evidence presented by defendant of his lack of impairment, notwithstanding the evidence provided by the chemical analysis.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 34 (2016), finding prejudicial error in a judgment entered on 15 November 2013 by Judge Gary M. Gavenus in Superior Court, Mecklenburg County, and ordering that defendant receive a new trial. On 22 September 2016, the Supreme Court allowed defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 22 March 2017.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellant/appellee.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant/appellee.

JACKSON, Justice.

In this appeal we consider whether North Carolina Rule of Evidence 702(a1) requires a law enforcement officer to be recognized explicitly as an expert witness pursuant to Rule 702(a) before he may testify to the results of a Horizontal Gaze Nystagmus (HGN) test. Because we conclude that such explicit recognition is not required and that the trial court implicitly recognized the law enforcement officer in this case as an expert prior to allowing him to testify as to the issue of defendant's impairment, we reverse that portion of the decision of the Court of Appeals that is inconsistent with this determination. Because we also conclude that the trial court did not err in denying defendant's request for a special jury instruction to explain that results of a chemical breath test are not conclusive evidence of impairment, we affirm that part of the decision of the Court of Appeals holding there was no error in the trial court's decision to deny defendant's request for special jury instructions.

The State's evidence at trial tended to show the following: On the evening of 18 January 2011, Officer Daniel R. Kennerly of the Charlotte-Mecklenburg Police Department initiated a traffic stop of a vehicle once he confirmed by radar that the vehicle was travelling fourteen miles per hour faster than the posted speed limit. The driver of the vehicle, defendant William Edwin Godwin III, subsequently pulled over and stopped

his vehicle on the side of the road. After approaching defendant, who was still seated in his vehicle, Officer Kennerly detected an odor of alcohol and observed that defendant's eyes were red and glassy. Officer Kennerly asked defendant from where he had driven and whether he had been drinking. Defendant responded that he was coming from a restaurant and had consumed three beers that evening.

Based on his observations, training, and experience, Officer Kennerly then requested that defendant exit the vehicle in order to perform three standardized field sobriety tests: the HGN, the walk-and-turn, and the one-leg stand. Officer Kennerly administered the HGN test to defendant twice in order to ascertain whether his eyes "jerked" during the test, which is an indication of impairment. After observing four out of six possible indicators of impairment during the HGN test, Officer Kennerly determined that defendant might be impaired and proceeded with the remaining two field sobriety tests.

Officer Kennerly observed two out of four possible indicators of impairment during the one-leg stand test and six out of eight possible indicators during the walk-and-turn test. At the conclusion of the three field sobriety tests, Officer Kennerly placed defendant under arrest for driving while impaired, transported him to the police station, and administered a breathalyzer test to defendant. Defendant's blood alcohol concentration (BAC) measured at 0.08 grams of alcohol per 210 liters of air. Defendant was charged with driving while subject to an impairing substance. After being convicted in district court, defendant appealed his conviction. Defendant was then tried during the 12 November 2013 criminal session of the Superior Court, Mecklenburg County.

When Officer Kennerly testified at trial regarding his administration of the HGN test, defendant objected, arguing that pursuant to the 2011 amendment to North Carolina Rule of Evidence 702(a), the State should not be permitted to present testimony regarding the HGN test without qualifying the testifying officer as an expert. In response, the State argued that Officer Kennerly did not need to be found explicitly to be an expert because he was merely testifying to the administration of the field sobriety tests and his resulting observations. The State also argued that Officer Kennerly had completed the requisite training to administer field sobriety tests; therefore, he was qualified to testify regarding the subject. At the conclusion of its own voir dire of the officer and a voir dire by both attorneys, the trial court concluded that Officer Kennerly could testify based upon his training and experience, regarding his administration of the three field sobriety tests as well as his observations of defendant during the tests. Officer Kennerly then testified that

he had received training as to how to administer the HGN test and how to identify indicators of impairment based upon the test. He also testified that, after administering the three field sobriety tests to defendant, he concluded from his training, experience, and observations that defendant's "mental and physical faculties were appreciably impaired."

At the close of the evidence, defendant proposed two relatively similar jury instructions concerning the results of the breathalyzer test and how the jury should analyze those results. The proposed instructions suggested to the jury that it was not compelled to find defendant's BAC to be 0.08 or more based upon the result of the chemical analysis. In response, the State argued that such an instruction would merely draw attention to the 0.08 BAC and confuse the jury. The State also asserted that it would be sufficient for the trial court to instruct the jury that it was the sole judge of the weight of the evidence and the credibility of the witnesses. After consideration of the applicable case law and the arguments of counsel, the trial court refused to give defendant's requested jury instructions and gave the pattern jury instructions on credibility and impaired driving.

On 15 November 2013, the jury convicted defendant of driving while impaired. Defendant appealed his conviction to the Court of Appeals, arguing, *inter alia*, that the trial court failed to comply with the standards of Rule 702 in allowing Officer Kennerly's testimony without requiring the State to tender the officer as an expert witness. Defendant also argued that Rule 702(a1) obligated the trial court to find explicitly that Officer Kennerly was qualified to present expert testimony as an expert pursuant to Rule 702(a) before allowing him to testify about the HGN test results. Defendant further maintained that the trial court erred in rejecting his proposed jury instructions. Defendant contended that the proposed instructions were necessary to inform the jury that, although the breathalyzer results were sufficient to support a finding of driving while impaired, they did not compel a finding that defendant was guilty of impaired driving beyond a reasonable doubt.

In response, the State argued before the Court of Appeals that the trial court properly limited Officer Kennerly's testimony to the administration of the field sobriety tests and his observations of defendant during those tests. The State further contended that if defendant believed that Officer Kennerly was not qualified to testify, it was defendant's responsibility to refute the officer's training and experience. Noting that defendant tendered two experts to counter Officer Kennerly's evidence at trial, the State highlighted that the jury still determined that defendant was guilty. Regarding the trial court's refusal to deliver defendant's

proposed jury instructions, the State argued that the requested instructions were given in substance, and that the jury was not misled or misinformed in receiving the pattern instructions.

Concluding that Rule 702(a1) requires that a witness explicitly be found to be an expert before testifying to the results of an HGN test, the Court of Appeals determined that the trial court erred in failing to recognize Officer Kennerly as an expert pursuant to Rule 702(a). *See State v. Godwin*, ___ N.C. App. ___, ___, 786 S.E.2d 34, 37-38 (2016). In reaching its decision, the Court of Appeals relied on *State v. Helms*, in which this Court held that the HGN test "represents specialized knowledge that must be presented to the jury by a qualified expert." *Id.* at ___, 786 S.E.2d at 36 (emphasis omitted) (quoting *State v. Helms*, 348 N.C. 578, 581, 504 S.E.2d 293, 295 (1998)). The Court of Appeals also highlighted potentially conflicting evidence regarding defendant's performance on the other field sobriety tests and concluded that such evidence created "a reasonable possibility" that, "had the HGN test results not been admitted, a different result would have been reached at trial." *Id.* at ___, 786 S.E.2d at 39. Based upon its holding on this issue, the Court of Appeals awarded defendant a new trial. *Id.* at ___, 786 S.E.2d at 40. As to the jury instructions, the Court of Appeals rejected defendant's argument, noting that the pattern jury instructions given by the trial court "informed the jury, in substance, that it was not compelled to return a guilty verdict based simply on the chemical analysis results." *Id.* at ___, 786 S.E.2d at 39 (quoting *State v. Beck*, 233 N.C. App. 168, 171-72, 756 S.E.2d 80, 83, *disc. rev. denied*, 367 N.C. 508, 759 S.E.2d 94 (2014)).

On appeal to this Court, the State argues that the trial court implicitly found that the witness was qualified as an expert. Therefore, the State contends that the Court of Appeals erred by holding that the expert testimony was erroneously admitted. We agree. On conditional appeal, defendant argues that the Court of Appeals erred in affirming the trial court's refusal to give his requested jury instructions. Defendant contends that without his proposed instructions, the jury would feel compelled to find he was impaired. We disagree. We now address these two issues in turn.

[1] According to Rule 702(a):

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education,

> may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a) (2015). The three numbered requirements for admission of expert testimony were added to Rule 702(a) by amendment in 2011 to incorporate the standard from the line of United States Supreme Court cases beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc. See State v. McGrady*, 368 N.C. 880, 884, 888, 787 S.E.2d 1, 5, 7-8 (2016). Also relevant to the subject matter of this case, Rule 702(a1) provides, in relevant part:

> A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administrated by a person who has successfully completed training in HGN.

N.C.G.S. § 8C-1, Rule 702(a1) (2015). Reading these subsections together, it is evident that the General Assembly envisioned the precise scenario we address today and made clear provision to allow testimony from an individual "who has successfully completed training in HGN" and meets the criteria set forth in Rule 702(a), as Officer Kennerly has done. *Id.* § 8C-1, Rule 702(a1)(1).

In assessing how a witness may be qualified as an expert, we have held that when the record contains sufficient evidence upon which the trial court could have based an explicit finding that the witness was an expert, an appellate court may conclude that the trial court found the witness to be an expert. *Apex Tire & Rubber Co. v. Merritt Tire Co.*, 270 N.C. 50, 53, 153 S.E.2d 737, 739 (1967). In *Apex Tire* the trial court explicitly denied counsel's motion to declare a witness was an expert. *Id.* at 54, 153 S.E.2d at 740. The trial court then permitted the witness to testify in detail, as well as offer an opinion in the case. *Id.* at 54, 153 S.E.2d at 740. We concluded that, notwithstanding the trial court's denial

of the motion to recognize explicitly the witness as an expert, the record contained evidence on which the trial court could have based a finding that the witness was an expert. *Id.* at 54, 153 S.E.2d at 740. Accordingly, we inferred from its actions that the trial court made an implicit finding that the witness was an expert. *Id.* at 53-54, 153 S.E.2d at 739-40.

Since our decision in *Apex Tire*, we have reiterated the concept of implicit recognition of expert witnesses in several opinions. We have held:

> In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness.

State v. Perry, 275 N.C. 565, 572, 169 S.E.2d 839, 844 (1969) (citations omitted). Similarly, we have held that a trial judge implicitly recognized a witness as an expert by overruling defense counsel's objection to the witness's qualifications. *State v. Bullard*, 312 N.C. 129, 143-44, 322 S.E.2d 370, 378 (1984) (citing *Perry*, 275 N.C. 565, 169 S.E.2d 839). In addition, we have determined that when a defendant interposed only general objections to trial testimony and never requested a finding by the trial court as to the witnesses' qualifications as experts, the recognition that the witnesses were qualified to testify as experts was "implicit in the trial court's ruling admitting the opinion testimony." *State v. Aguallo*, 322 N.C. 818, 821, 370 S.E.2d 676, 677 (1988) (citing *State v. Phifer*, 290 N.C. 203, 213-14, 225 S.E.2d 786, 793 (1976), *cert. denied*, 429 U.S. 1123 (1977)). More recently, we ruled that a "trial court's overruling of defense counsel's objection to the opinion testimony constituted an implicit finding that the witness was an expert." *State v. Wise*, 326 N.C. 421, 430, 390 S.E.2d 142, 148 (citing *Bullard*, 312 N.C. 129, 322 S.E.2d 370), *cert. denied*, 498 U.S. 853 (1990).

Although we decided the aforementioned cases prior to the amendment to Rule 702, the 2011 amendment did not categorically overrule all North Carolina judicial precedents interpreting that rule. *See McGrady*, 368 N.C. at 888, 787 S.E.2d at 8 ("Our previous cases are still good law if they do not conflict with the *Daubert* standard."). Relevant to the issue in this case, the 2011 amendment did not change the basic structure for a trial court's exercise of its gatekeeping function over expert testimony. *See id.* at 892, 787 S.E.2d at 10. Moreover, our precedents continue to dictate that a trial court's ruling on the admissibility of expert testimony

"will not be reversed on appeal absent a showing of abuse of discretion." *See id.* at 893, 787 S.E.2d at 11 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), *superseded by statute*, Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws 1048, 1049 (codified at N.C.G.S. § 8C-1, Rule 702(a)(1)-(3)), *as stated in McGrady*, 368 N.C. at 888, 787 S.E.2d at 8). Here we can detect no such abuse of discretion by the trial court.

During both the pretrial hearing and the trial in this case, Officer Kennerly was "qualified as an expert by knowledge, skill, experience, training, or education." N.C.G.S. § 8C-1, Rule 702(a). Officer Kennerly testified that he had completed training on how to administer the HGN test and other standardized field sobriety tests that he administered to defendant. During direct examination, Officer Kennerly explained that he attended a thirty-four hour course in standardized field sobriety testing and DWI detection in 2006. Officer Kennerly's certificate of completion for this course was admitted into evidence. He also testified that he attended an eight hour refresher course in 2009. Both courses were approved by the National Highway Traffic Safety Administration (NHTSA). Prior to the date he administered the HGN test to defendant, Officer Kennerly had conducted approximately three hundred impaired driving offense investigations.

The trial court also established that Officer Kennerly's testimony met the three-pronged test of reliability pursuant to the amended rule. The trial court conducted its own voir dire of Officer Kennerly, which elicited testimony that the HGN test he administered to defendant on the day in question was given in accordance with the standards set by the NHTSA, and that those standards were derived from the results of a specific scientific study. Additionally, the trial court's voir dire confirmed that the principles and methods utilized in the HGN test were found to be reliable indicators of impairment, and that Officer Kennerly applied those principles and methods to defendant in this case.

Defendant objected to Officer Kennerly's testimony on the grounds that he was neither formally tendered as an expert witness by the State nor recognized as such by the trial court. Yet we note that defendant did not object to any of Officer Kennerly's actual qualifications, even clarifying his general objection by stating, "I'm not saying Officer Kennerly could not be qualified, but I think the State's going to have to go through that." Defendant eventually narrowed his objection by acknowledging that if the State were to limit the officer's testimony to his observations and the indications of impairment, then defendant

had "less problem with it." The trial court then overruled defendant's objection; however, as the colloquy between the trial court and the defense attorney indicates, Officer Kennerly *only* was permitted to offer testimony regarding his *observations* of defendant's impairment as he administered the HGN test and was not permitted to comment on the HGN test's *reliability*. These distinctions are critical.

> TRIAL COURT: . . . I will allow this officer to testify that he administered the HGN test, the walk-and-turn test, and the one-legged test. He will be allowed to testify as to the indicators of impairment he observed of this defendant in giving these tests.
>
> Anything else?
>
> DEFENSE COUNSEL: I'd ask the Court to note my exception. Is the Court disqualifying him as an expert on the HGN?
>
> TRIAL COURT: I'm not – he doesn't have to be qualified as an expert. I'm not going to make that requirement. I'm just going to let him testify based on his training and experience, what – how the HGN should be administered and what the indicators are and what indicators he observed.

In overruling defendant's objection, the trial court implicitly found that Officer Kennerly was qualified to testify as an expert, and as such, in accordance with the guidance in Rule 702(a1), Officer Kennerly could "give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level." N.C.G.S. § 8C-1, Rule 702(a1).

Although the Court of Appeals relied on our prior decision in *Helms* to reach its conclusion that the expert testimony was erroneously admitted, several important facts render *Helms* distinguishable from the present case. At issue in *Helms* was the *reliability* of the HGN test, not the *observed impairment* of the individual being subjected to the HGN test. *Helms*, 348 N.C. at 582, 504 S.E.2d at 295. Furthermore, although the officer in *Helms* testified that he had taken a forty hour training course in the use of the HGN test, the State presented no evidence regarding—and the court conducted no inquiry into—the reliability of the HGN test. *Id.* at 582, 504 S.E.2d at 295. We also noted in *Helms* that nothing in the record of the case indicated that the trial court took judicial notice of

the reliability of the HGN test. *Id.* at 582, 504 S.E.2d at 295. Accordingly, we concluded that because no sufficient scientifically reliable evidence existed as precedent to show the correlation between intoxication and nystagmus, "it [was] improper to permit a lay person to testify as to the meaning of HGN test results." *Id.* at 582, 504 S.E.2d at 295. Additionally, the trial court permitted the law enforcement officer to testify as a lay person regarding the meaning of HGN test results, and there was no evidence in the record to support a finding that the trial court had implicitly found the officer to be an expert. *Id.* at 582, 504 S.E.2d at 295. This scenario plainly contrasts with the present case in which the trial court made a finding of reliability of the HGN test and an implicit finding that Officer Kennerly was qualified as an expert. Furthermore, with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State. *See* The Motor Vehicle Driver Protection Act of 2006, ch. 253, sec. 6, 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1178, 1183 (codified at N.C.G.S. § 8C-1, Rule 702(a1) (Supp. 2006)). Based on these distinguishing factors, our decision in *Helms* is not dispositive of the present case.

Notwithstanding our decision in this case, the better practice would have been for the trial court to refrain from stating, "[Officer Kennerly] doesn't have to be qualified as an expert. I'm not going to make that requirement." Furthermore, in light of the aforementioned findings regarding Officer Kennerly's knowledge, skill, experience, and training, the appellate division's ability to review the trial court's oral order would have benefited from the inclusion of additional facts supporting its determination that Officer Kennerly was qualified to testify as an expert regarding his observations of defendant's performance during the HGN test.

[2] Next, we turn to the issue of defendant's proposed jury instructions. When a defendant requests a special jury instruction that is correct in law and supported by the evidence, the court must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976) (citation omitted). Yet, "[e]ven if a defendant is entitled to requested instructions, the court is not required to give them verbatim. It is sufficient if they are given in substance." *State v. Howard*, 274 N.C. 186, 199, 162 S.E.2d 495, 504 (1968) (citation omitted). If "[t]he instructions given by the trial court adequately convey[ ] the substance of defendant's proper request[,] no further instructions [are] necessary." *State v. Green*, 305 N.C. 463, 477, 290 S.E.2d 625, 633 (1982) (citation omitted).

Here one of defendant's two proposed instructions stated:

> A chemical analysis of defendant's breath obtained from an EC/IR-II which shows an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath is deemed sufficient to prove defendant's alcohol concentration. However, such chemical analysis does not compel you to so find beyond a reasonable doubt. You are still at liberty to consider the credibility and/or weight to give such chemical analysis when considering whether defendant's guilt has been proven beyond a reasonable doubt.

Though worded slightly differently, the second proposed instruction also suggested to the jury that it was not compelled to find defendant's alcohol concentration to be 0.08 or more based on the result of the chemical analysis.[1]

Defendant asserted at trial that without either of the requested instructions, the jury would be required to presume that the reading of 0.08 was conclusive proof of impairment. Defendant argued that the purpose of his proposed instructions was to ensure that the jury realized it could consider the evidence presented by defendant of his lack of impairment, notwithstanding the evidence provided by the chemical analysis. Following the pattern jury instruction on impaired driving, the trial court explained to the jury that impairment could be proved by an alcohol concentration of 0.08 or more, and that this chemical analysis was "deemed sufficient evidence to prove a person's alcohol concentration." The trial court also explained to the jurors that they were "the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness," and that if they decided that certain evidence was believable, they "must then determine the importance of that evidence in light of all other believable evidence in the case." These statements signaled to the jury that it was free to analyze and weigh the effect of the breathalyzer evidence along with all the evidence presented during the trial. Therefore, we hold that the standard jury instruction on

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1. In its entirety the second proposed instruction stated:

> The results of the chemical analysis of the Defendant's breath do not create a presumption that the Defendant had, at a relevant time after driving, an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. You may find the Defendant's alcohol concentration to be 0.08 or more. You may find the Defendant's alcohol concentration to be 0.08 or more based upon the result, but you are not compelled to do so.

credibility was sufficient in this case and that the trial court adequately conveyed the substance of defendant's requested instructions to the jury. Accordingly, we affirm the holding of the Court of Appeals that the jury instructions were proper.

For the reasons stated above, we also hold that the trial court implicitly found that Officer Kennerly was qualified to give expert testimony, and therefore did not abuse its discretion by allowing Officer Kennerly to testify as an expert regarding defendant's impairment. The trial court overruled defendant's objection to Officer Kennerly's testimony, determined that his testimony was relevant and reliable, and ascertained that he was qualified to testify as an expert. Consequently, we conclude that the Court of Appeals erroneously determined that the trial court did not find Officer Kennerly to be an expert pursuant to Rule 702(a).

Accordingly, as explained above, we hold that the trial court made no error in the trial of defendant's case. Therefore, we reverse the decision of the Court of Appeals awarding defendant a new trial and instruct that court to reinstate the trial court's judgment.

AFFIRMED IN PART; REVERSED IN PART.

STATE OF NORTH CAROLINA
v.
JOSHUA EARL HOLLOMAN

No. 208PA16

Filed 9 June 2017

Criminal Law—self-defense—aggressor regaining the right

The trial court did not err, on the evidence, in its self-defense instruction in a prosecution for assault with a deadly weapon inflicting serious injury in a case where both the defendant and the victim pulled guns in an argument over a woman. Historically, North Carolina law did not allow an aggressor using deadly force to regain the right to self-defense when the other responded by using deadly force. However, the General Assembly, by passing N.C.G.S. § 14-51.4, appears to have allowed an aggressor to regain the right to utilize defensive force under certain circumstances (use of nondeadly force). A careful review of the record evidence in this case

demonstrates, however, the complete absence of any evidence tending to show that defendant was the aggressor using non-deadly, as compared to deadly, force.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 328 (2016), finding prejudicial error in a judgment entered on 27 April 2015 by Judge Donald W. Stephens in Superior Court, Wake County, and awarding defendant a new trial. Heard in the Supreme Court on 11 April 2017.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Amanda S. Zimmer, Assistant Appellate Defender, for defendant-appellee.

ERVIN, Justice.

The issue before this Court is whether the Court of Appeals erred by determining that the trial court committed prejudicial error in the course of instructing the jury concerning the right of self-defense. After carefully considering the record in light of the applicable law, we hold that the trial court's self-defense instructions were not erroneous, reverse the decision of the Court of Appeals to the contrary, and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

During the early morning hours of 1 January 2014, defendant Joshua Earl Holloman shot Darryl Anthony Bobbitt a number of times using a .45 caliber handgun at the corner of Rock Quarry Road and Martin Luther King Boulevard in Raleigh. According to Mr. Bobbitt, he and Mariah Mann, whom he believed to be his girlfriend, went to a bar to celebrate the imminent arrival of the New Year on the evening of 31 December 2013. Shortly after midnight, Mr. Bobbitt decided to wait in his vehicle until the time that the bar closed and Ms. Mann was ready to leave given that relations between the two of them had become strained during the course of the evening. After Ms. Mann left the bar, the two of them returned to Mr. Bobbitt's home, where they began to argue. Eventually, Ms. Mann left Mr. Bobbitt's home on foot. After his mother

and stepfather failed to induce Ms. Mann to return to the family home, Mr. Bobbitt began searching for Ms. Mann and eventually located her near some woods along Martin Luther King Boulevard in Raleigh.

Upon locating Ms. Mann, Mr. Bobbitt exited his car and crossed the road for the purpose of attempting to persuade Ms. Mann to enter his vehicle. In view of the fact that Ms. Mann appeared to be adhering to his request, Mr. Bobbitt reversed course and began walking back to his vehicle. As he did so, Mr. Bobbitt heard someone say, "Oh, you put your hands on her." According to Mr. Bobbitt:

> Once I heard that, I turned around. I looked back, saw the gun, so of course I had my gun. I turned back around, reached for my gun, and once I turned back around, I was already shot.
>
> . . . .
>
> I got shot, stumbled. Next thing I know, I'm looking at the pavement, and I just see somebody standing over me.

Mr. Bobbitt denied having fired any shots from his own weapon. Mr. Bobbitt sustained four gunshot wounds, two of which entered his stomach, one of which entered his left leg, and one of which pierced his right arm.

After confirming Mr. Bobbitt's account of the events leading up to the confrontation, Ms. Mann testified that, while Mr. Bobbitt was trying to get her to enter his car, she was attempting to call defendant, with whom she had also been romantically involved and with whom she had been in contact earlier in the evening for the purpose of requesting that he come get her. As she attempted to contact defendant, Mr. Bobbitt took her phone out of her hand. Upon arriving at the location at which Ms. Mann and Mr. Bobbitt were standing, defendant parked his car, got out of his vehicle, and told Ms. Mann to get inside. After complying with defendant's request, Ms. Mann lowered her head and began crying. As she wept, Ms. Mann heard defendant ask Mr. Bobbitt if "he [had] put his hands on [Ms. Mann]" before hearing the firing of several gunshots. After the firing of these gunshots, defendant returned to the car, told Ms. Mann that he thought that he had shot Mr. Bobbitt, and drove away.

Anna Dajui was driving her daughter, Roxana, home from a New Year's Eve party when a vehicle sped in front of them and stopped in the middle of the street. At that point, the Dajuis saw the driver of the vehicle get out of the car, reach for a firearm, and begin shooting at a second individual who was standing at the intersection of Rock Quarry Road

and Martin Luther King Boulevard. After the man fired several shots, the Dajuis saw the second man lying in the roadway.

Fortuitously, Sergeant Jennings Bunch of the Raleigh Police Department was patrolling in the area and happened to be at the intersection of Rock Quarry Road and Martin Luther King Boulevard at the time that the shooting occurred. Like the Dajuis, Sergeant Bunch saw the driver emerging from a vehicle that had stopped at the intersection. After hearing angry voices and a series of gunshots, Sergeant Bunch saw the driver of the stopped vehicle standing over and pointing a handgun at a second man, who was lying on the ground. Upon making these observations, Sergeant Bunch fired several shots into the air, an action that caused the driver of the vehicle to leave the scene.

On the other hand, defendant testified that in the early morning hours of 1 January 2014, he received a voice mail and a phone call from Ms. Mann, who appeared to be in a distressed condition, asking defendant to pick her up on Martin Luther King Boulevard. After arriving at the indicated location, defendant observed Ms. Mann walking on the sidewalk while being followed by another individual. Upon reaching Ms. Mann's location, defendant stopped his vehicle beside her, exited his vehicle while holding his gun by his side, and told Ms. Mann to get into his vehicle. When he noticed that Ms. Mann was crying and that there was blood on her face, defendant asked the man walking behind her whether "he [had] put his hands on her," stepped closer to the man after failing to hear any response, and repeated his question. By the time that he stepped toward the man, that individual turned around towards him and "open[ed] fire" upon defendant. In light of the fact that he feared for his life, defendant fired his weapon "[m]aybe three to five times" in an attempt to defend himself. After the man fell to the ground, defendant stood over him for a brief period of time. Upon hearing gunfire, defendant left the scene and went to the residence of his mother, where he was apprehended later that morning.

On 1 January 2014, an arrest warrant charging defendant with assault with a deadly weapon with the intent to kill and inflicting serious injury was issued. On 24 February 2014, the Wake County grand jury returned a bill of indictment charging defendant with assault with a deadly weapon with the intent to kill and inflicting serious injury. The charge against defendant came on for trial before the trial court and a jury at the 20 April 2015 criminal session of the Superior Court, Wake County.

At the jury instruction conference, defendant's trial counsel requested the trial court to instruct the jury concerning the law of

self-defense and defense of another, among other subjects.[1] More specifically, defendant requested the trial court to instruct the jury that:

> The defendant would be excused of assault with a deadly weapon with intent to kill inflicting serious injury on the ground of self-defense if:
>
> First, it appeared to the defendant and the defendant believed it to be necessary to assault the victim in order to save the defendant from death or great bodily harm.
>
> And Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time.
>
> And Third, [i]f the defendant was not the aggressor and the defendant was at a place the defendant had a lawful right to be, the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant except deadly force unless he reasonably believed that such force was necessary to prevent imminent death or great bodily harm to himself or another.
>
> However, the defendant would not be excused if the defendant used excessive force.
>
> . . . .
>
> The defendant would not be guilty of any assault if the defendant acted in self-defense, and if the defendant was not the aggressor in provoking the fight and did not use excessive force under the circumstances.
>
> One enters a fight voluntarily if one uses toward one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a

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1. The trial court declined to instruct the jury concerning the right of one person to defend another on the grounds that "[t]here's no evidence to suggest that this defendant acted to defend anyone other than himself." Defendant has not challenged the trial court's refusal to deliver a defense of another instruction before either the Court of Appeals or this Court.

> fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. . . . A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger. The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased.

Instead of delivering the exact instruction that defendant requested, however, the trial court instructed the jury with respect to the issue of self-defense using a modified version of the pattern jury instruction relating to felonious assaults in which the defendant claimed to have acted in self-defense, stating that:

> If the State has satisfied you beyond a reasonable doubt that the defendant assaulted Darryl Bobbitt with a deadly weapon with intent to cause death or serious bodily injury, then you would consider whether the defendant's actions are excused and the defendant is not guilty because the defendant acted in lawful self-defense. . . .
>
> If the circumstances which the defendant encountered at the time would have created a reasonable belief in the mind of a person of ordinary firmness that an assault upon Darryl Bobbitt with a firearm was necessary or appeared to be necessary to protect the defendant from imminent death or great bodily harm, and the circumstances did create such a belief in the defendant's mind at the time the defendant acted, such assault with a firearm upon Darryl Bobbitt would be justified by self-defense. . . .
>
> A person is justified in using defensive force to defend himself when the force used against him is so serious that the person using defensive force reasonably believes that he is in imminent danger of death or serious bodily harm, the person using defensive force has no reasonable means

> to avoid the use of that force, and his use of force likely to cause death or serious bodily harm is the only way to escape the danger. . . .
>
> Furthermore, self-defense is justified only if the defendant was not himself the aggressor. Justification for lawful self-defense is not present if the person who uses defensive force voluntarily enters into a fight with the intent to use deadly force. In other words, if one initially displays a firearm to his opponent, intending to engage in a fight and intending to use deadly force in that fight and provokes the use of deadly force against himself by an alleged victim, he is himself an aggressor and cannot claim he acted lawfully to defend himself.

On 24 April 2015, the jury returned a verdict finding defendant guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to a term of twenty-five to forty-two months imprisonment. However, the trial court suspended defendant's active sentence and placed him on supervised probation for a period of thirty-six months on the condition that he comply with the usual terms and conditions of probation, serve a term of ten months imprisonment in the custody of the Division of Adult Corrections, make restitution in the amount of $2,989.00, pay the costs, including the cost of his court-appointed attorney, and refrain from having any contact with Mr. Bobbitt or any member of his family. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the trial court's self-defense instruction misstated the applicable law and deprived him of the ability to fully present his defense.[2] More specifically, defendant asserted that, in light of the enactment of N.C.G.S. § 14-51.4(2)(a), the trial court erred by instructing the jury that "[j]ustification for lawful self-defense is not present if the person who uses defensive force voluntarily enter[ed] into a fight with the intent to use deadly force" and that, "if one initially displays a firearm to his opponent, intending to engage in a fight and intending to use

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2. In addition, defendant argued that the trial judge had unlawfully considered his personal feelings concerning firearm possession and other subjects in passing judgment upon defendant. However, we need not discuss this issue in any detail in this opinion given that the Court of Appeals declined to reach it given its decision to award defendant a new trial based upon the instructional error that it found the trial court to have committed.

deadly force in that fight and provokes the use of deadly force against himself by an alleged victim, he is himself an aggressor and cannot claim he acted lawfully to defend himself" and failing to instruct the jury that it could find that defendant regained the right to use defensive force pursuant to N.C.G.S. § 14-51.4(2)(a). In defendant's view, the enactment of N.C.G.S. § 14-51.4(2)(a), which allows a "person who initially provokes the use of force against himself or herself" to utilize defensive force in the event that "[t]he force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked [is] the only way to escape the danger," "arguably changes the common law as it relates [to] aggressors and the right to self-defense." According to defendant, his own "actions in possessing a gun and questioning [Mr.] Bobbitt over an incident that may have just occurred could have been seen by the jury as [defendant] initiating or seeking to provoke a fight with [Mr.] Bobbitt," causing Mr. Bobbitt to respond by "pulling a concealed gun from his pocket and firing at [defendant]." The amount of "force used by [Mr.] Bobbitt against [defendant] was so serious as to lead [defendant] to reasonably believe that he was in imminent danger of death or serious bodily harm, that he had no reasonable means to retreat, and that the use of force likely to cause death or serious bodily harm to [Mr.] Bobbitt was the only way to escape the danger." However, the self-defense instruction that the trial court actually delivered to the jury "failed to allow for the jury to consider whether [defendant] regained his right to self-defense under [N.C.G.S.] § 14-51.4 even if he had initiated or provoked the fight with [Mr.] Bobbitt," an error that prejudiced defendant and entitled him to a new trial given that "there is a reasonable probability that the jury would [have] acquitted [defendant] had they been properly instructed on the right to use self-defense even if [defendant] was the aggressor."

The State, on the other hand, argued that defendant had "requested an instruction substantially identical to the one" that the trial court had delivered, so that defendant had invited the commission of the error upon which his challenge to the trial court's judgment was predicated, citing *State v. Wilkinson*, 344 N.C. 198, 236, 474 S.E.2d 375, 396 (1996). In addition, the State argued that defendant had failed to demonstrate that the enactment of N.C.G.S. § 14-51.4 had "changed the law with regard to an aggressor *who had the intent to kill.*" On the contrary, the statutory reference to a person who " 'initially provokes the use of force' must mean an aggressor *without murderous intent*" in order to avoid

"allow[ing] a pretextual quarrel to countenance premeditated murder." In the State's view, the trial court's instructions "adequately informed the jury that a person may use defensive force when he reasonably believes [that] he is in imminent danger, he has no reasonable means to avoid the use of force, and his use of force is the only way to escape the danger."

The Court of Appeals awarded defendant a new trial on the grounds that "[t]he trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor cannot under any circumstances regain justification for using defensive force." *State v. Holloman*, ___ N.C. App. ___, ___, 786 S.E.2d 328, 334 (2016). According to the Court of Appeals, N.C.G.S. § 14-51.4(2)(a) allows "the person who initially provokes the use of force . . . to "us[e] defensive force" in the event that "[t]he force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger." *Id.* at ___, 786 S.E.2d at 332 (quoting N.C.G.S. § 14-51.4(2)(a) (2015)). The trial court erred, in the Court of Appeals' view, by "eliminat[ing] references to circumstances in which an aggressor can lawfully defend himself" and suggesting "that[,] if jurors determined [d]efendant had initiated the gun fight, they could not find that [he] acted in lawful self-defense, even if Mr. Bobbitt fired his gun first." *Id.* at ___, 786 S.E.2d at 334. As a result, after finding the trial court's error to be prejudicial, the Court of Appeals awarded defendant a new trial. This Court granted the State's request for discretionary review of the Court of Appeals' decision.

In seeking to persuade us to reverse the Court of Appeals' decision, the State notes that "[t]he 'law of self-defense in cases of homicide applies also in cases of assault,' " quoting *State v. Anderson*, 230 N.C. 54, 55, 51 S.E.2d 895, 897 (1949). As a result, "one who brings about an affray with the intent to take life or inflict serious bodily harm may not claim self-defense," citing *State v. Mize*, 316 N.C. 48, 52, 340 S.E.2d 439, 442 (1986). For that reason, the State argues that, "[i]f the defendant was the aggressor and killed with murderous intent, that is, the intent to kill or inflict serious bodily harm, then she is not entitled to an instruction on self-defense," quoting the dissenting opinion in *State v. Norman*, 324 N.C. 253, 274, 378 S.E.2d 8, 20 (1989). Although the State acknowledges that N.C.G.S. § 14-51.4(2)(a) appears to "abrogate[ ] the principle . . . that one who wrongfully commenced a fight may not regain the right of

self-defense upon being sorely pressed by his adversary," this apparent statutory expansion of the right of self-defense should not, as a matter of "common law, statutory context, and common sense," apply to "aggressors with murderous intent." According to the State, "[t]he legislature simply could not have intended for one who attacks with murderous intent to claim self-defense" given that "allow[ing] one to use defensive force when his intended victim lawfully responds with deadly force would legitimize both parties' conduct." For that reason, the challenged trial court instruction to the effect that an aggressor using deadly force could not regain the right to use defensive force did not misstate the applicable law and was not, for that reason, erroneous.

Defendant, on the other hand, asserts that the Court of Appeals correctly granted him a new trial based upon the trial court's failure to allow the jury to consider whether he had regained the right to use defensive force even if he was the aggressor. Assuming that "the statute only applies to aggressors without murderous intent," the challenged instruction "was still erroneous" because "[t]he intent to use deadly force is not the same as murderous intent" and "because the jury was not instructed to consider if [defendant] was an aggressor with murderous intent." According to defendant, the trial court's instructions allowed the jury to "conclude[ ] that [defendant] was an aggressor with intent to use 'deadly force' merely because he possessed a firearm and intended to use it to defend Ms. Mann and himself, if necessary." However, the jury failed to find that defendant intended to kill Mr. Bobbitt when it convicted him of assault with a deadly weapon inflicting serious injury rather than assault with a deadly weapon with the intent to kill and inflicting serious injury. In light of the conflicts in the evidence, "the jury had to determine if [Mr.] Bobbitt had the right to use lethal force against [defendant] and whether [defendant] had the right to use defensive force in response." Since the trial court's instructions "did not tell the jury that [defendant] could use defensive force even if the jury felt [that defendant] had provoked [Mr.] Bobbitt," those instructions "misstated the law, confused the jury, and deprived [defendant] of his constitutional right to fully present his defense." As a result, given that "[t]here is a reasonable possibility that the trial court's error impacted the jury's decision," the Court of Appeals correctly awarded defendant a new trial.

The ultimate issue before us in this case is the extent, if any, to which the trial court erred by instructing the jury that an individual having the status of an aggressor using deadly force could not regain the right to act in self-defense and by failing to instruct the jury that the aggressor may be entitled to utilize defensive force in the event that

the person provoked responded by using such significant force that the aggressor was placed in imminent danger of death or serious bodily harm, the aggressor did not have a reasonable opportunity to retreat, and the aggressor can only protect himself or herself from death or serious bodily harm by using defensive force. According to well-established North Carolina law, a trial judge's jury charge shall "give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (quoting *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971)). For that reason, "the judge has the duty to instruct the jury on the law arising from all the evidence presented." *Id.* at 346, 626 S.E.2d at 261 (quoting *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 862 (1985)). In instructing the jury with respect to a defense to a criminal charge, "the facts must be interpreted in the light most favorable to the defendant." *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979).

> A defendant may request a jury instruction in writing, and the trial court must so instruct provided the instruction is supported by the evidence. However, a trial court is not obligated to give a defendant's exact instruction so long as the instruction actually given delivers the substance of the request to the jury.

State v. Roache, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004) (citing *State v. McNeill*, 346 N.C. 233, 239, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 118 S. Ct. 704, 139 L. Ed. 2d 647 (1998); *State v. Atkins*, 349 N.C. 62, 90, 505 S.E.2d 97, 115 (1998), *cert. denied*, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999)). Although "[u]se of the pattern instructions is encouraged," *State v. Garcell*, 363 N.C. 10, 49, 678 S.E.2d 618, 642-43 (citation omitted), *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009), "[f]ailure to follow the pattern instructions does not automatically result in error," *State v. Bunch*, 363 N.C. 841, 846, 689 S.E.2d 866, 870 (2010); *see also State v. Mundy*, 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1967) (stating that, "[i]n giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon"). On the other hand, even though "no exact formula is required" when the trial court instructs the jury, "[o]nce it undertakes to do so, however, the [instructions] should be

given in substantial accord with those approved by this [C]ourt." *State v. Watson*, 294 N.C. 159, 167, 240 S.E.2d 440, 446 (1978) (citing *State v. Hammonds*, 241 N.C. 226, 85 S.E.2d 133 (1954)); *see also State v. Davis*, 238 N.C. 252, 253-54, 77 S.E.2d 630, 631 (1953) (stating that "[c]orrect instruction as to the law . . . limit[s] [the trial judge's] responsibilit[ies]"). Thus, we must determine whether the trial court's self-defense instructions accurately stated the applicable law arising upon the evidentiary record developed at trial.

The initial issue that must be addressed in order to determine whether the trial court correctly instructed the jury with respect to the self-defense issue is the extent, if any, to which North Carolina law allows an aggressor to regain the right to utilize defensive force based upon the nature and extent of the reaction that he or she provokes in the other party. Historically, as the State notes, North Carolina law did not allow an aggressor using deadly force to regain the right to exercise the right of self-defense in the event that the person to whom his or her aggression was directed responded by using deadly force to defend himself or herself. *State v. Wetmore*, 298 N.C. 743, 750, 259 S.E.2d 870, 875 (1979) (stating that, "[i]f one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder" (quoting *State v. Potter*, 295 N.C. 126, 144 n.2, 244 S.E.2d 397, 409 n.2 (1978))).[3] According to N.C.G.S. § 14-51.3, however:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:

3. Although defendant appears to understand the references to "murderous intent" and "deadly force" as contained in certain of our prior decisions to refer to a specific intent to kill and argues that only such a specific intent to kill obviates an aggressor's right to use defensive force, that understanding is simply incorrect. Instead, "[m]urderous intent means the intent to kill or inflict serious bodily harm," *Mize*, 316 N.C. at 52, 340 S.E.2d at 442, and "[d]eadly force has been defined as 'force likely to cause death or great bodily harm,' " *State v. Hunter*, 315 N.C. 371, 373, 338 S.E.2d 99, 102 (1986) (quoting *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979), *overruled on other grounds*, *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982)).

> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to [N.C.] G.S. [§] 14-51.2.[4]

N.C.G.S. § 14-51.3 (2015). However, as has already been noted, N.C.G.S. § 14-51.4 provides, in pertinent part, that:

> The justification described in [N.C.]G.S. [§] 14-51.2 and [N.C.]G.S. [§] 14-51.3 is not available to a person who used defensive force and who:
>
> . . . .
>
> (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
>
> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.

Id. As this language reflects and as the State acknowledges, the General Assembly, by enacting this legislation, appears to have allowed an aggressor to regain the right to utilize defensive force under certain circumstances. Moreover, as the State also concedes, N.C.G.S. § 14-51.4(2)(a) does not, when read literally, appear to distinguish between situations in which the aggressor did or did not utilize deadly force. The absence of such a limitation does not, as defendant appears to suggest, necessarily resolve this issue. Instead, we can only determine whether the right to utilize defensive force can be regained by an aggressor using deadly force by properly construing the relevant statutory provision.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d

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4. N.C.G.S. § 14-51.2 addresses a person's right to use defensive force for the purpose of protecting one's home, workplace, or motor vehicle.

513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 119 S. Ct. 1576, 143 L.Ed. 2d 671 (1991), *abrogated in part on other grounds by Lenox*, 353 N.C. at 663-64, 548 S.E.2d at 517). For that reason, "[l]egislative intent controls the meaning of a statute." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of the Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

> If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls. Conversely, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Barksdale*, 181 N.C. 621, [625,] 107 S.E. 505[, 507] (1921).

Mazda Motors of Am., Inc. v. Sw. Motors, Inc., 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (internal citations omitted).

The effect of adopting the construction of N.C.G.S. § 14-51.4(2)(a) espoused by defendant, which would allow an aggressor to utilize defensive force in the event that his conduct caused the person provoked to lawfully utilize deadly force in his own defense, cannot be squared with the likely legislative intent motivating the enactment of the relevant statutory provision. Simply put, the adoption of defendant's construction of N.C.G.S. § 14-51.4(2)(a) would create a situation in which the aggressor utilized deadly force in attacking the other party, the other party exercised his or her right to utilize deadly force in his or her own defense, and the initial aggressor then utilized deadly force in defense of himself or herself, thereby starting the self-defense merry-go-round all over again. We are unable to believe that the General Assembly intended to foster such a result, under which gun battles would effectively become legal, and hold that the provisions of N.C.G.S § 14-51.4(2)(a) allowing an aggressor to regain the right to use defensive force under certain circumstances do not apply in situations in which the aggressor initially uses deadly force against the person provoked. *See Mize*, 316 N.C. at 52, 340 S.E.2d at 442 (stating that, "[i]f . . . one brings about an affray

with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense" (quoting *Wetmore*, 298 N.C. at 750, 259 S.E.2d at 875)). As a result, the trial court's instruction to the effect that a defendant who was the aggressor using deadly force had forfeited the right to use deadly force in self-defense and that a person who displays a firearm to his opponent with the intent to use deadly force against him or her and provokes the use of deadly force in response is an aggressor for purposes of the law of self-defense does not constitute an inaccurate statement of the applicable North Carolina law.

Our determination that the instructions that the trial court actually gave with respect to the self-defense issue do not misstate the applicable law does not, however, end the inquiry that we must make in order to adequately address defendant's challenge to the trial court's instructions. Instead, we must also determine whether the trial court erred by failing to instruct the jury, in accordance with defendant's request, that he might have regained the right to use defensive force based upon Mr. Bobbitt's reaction to any provocative conduct in which defendant might have engaged. In light of the manner in which we have construed N.C.G.S. § 14-51.4(2)(a), defendant could have only been entitled to the delivery of such an instruction to the extent that his provocative conduct involved non-deadly, rather than deadly, force. A careful review of the record evidence demonstrates, however, the complete absence of any evidence tending to show that defendant was the aggressor using non-deadly, as compared to deadly, force.

The evidence developed at trial presented two contrasting accounts of the events that occurred at the time that defendant shot Mr. Bobbitt. On the one hand, Mr. Bobbitt and the other witnesses who testified on behalf of the State asserted that defendant approached Mr. Bobbitt with a gun in his hand and fired at Mr. Bobbitt before Mr. Bobbitt could retrieve his own firearm. In the event that the jury believed the testimony offered by the State, defendant was, under the authorities discussed above, an aggressor using deadly force. Defendant, on the other hand, asserted, that, as he stepped toward Mr. Bobbitt with his gun at his side for the purpose of ascertaining if Mr. Bobbitt had assaulted Ms. Mann, Mr. Bobbitt fired at him. In the event that the jury believed defendant's account, defendant was not an aggressor at all. *State v. Spaulding*, 298 N.C. 149, 155-56, 257 S.E.2d 391, 395 (1979) (stating that the fact that the "[d]efendant went out to the [prison] yard, a place where he had a right to be"; that the defendant "did not seek [the victim] out for the purpose of a violent encounter" and did not say "anything to provoke [the victim]"; and that the defendant "repeatedly told [the victim that] he

wanted no trouble" tend to show that the defendant "was free from fault in the difficulty"); *State v. Vaughn*, 227 N.C. App. 198, 203, 742 S.E.2d 276, 279-80 (stating that the "[d]efendant's decision to arm herself and leave the vehicle, while perhaps unwise, was not, in and of itself, evidence that she brought on the difficulty"), *disc. rev. denied*, 367 N.C. 221, 747 S.E.2d 526 (2013); *State v. Tann*, 57 N.C. App. 527, 531, 291 S.E.2d 824, 827 (1982) (stating that the fact that the "defendant, who anticipated the confrontation, armed himself with a .38 caliber pistol, and failed to avoid the fight" did "not in any way suggest that [he] was the provocator"). Although defendant asserts that the jury could have understood his conduct in approaching Mr. Bobbitt with his gun by his side while seeking an answer to his inquiry concerning whether Mr. Bobbitt had harmed Ms. Mann to make him an aggressor without the intent to use deadly force, any such decision on the part of the jury would have been in conflict with established North Carolina law. Thus, the trial court did not err by failing to allow the jury to consider whether defendant could have regained the right to use defensive force even though he had been the aggressor with the intent to use non-deadly force for the simple reason that such an instruction would not have constituted an accurate statement of the law arising upon the evidence. As a result, since the trial court's instructions concerning the law of self-defense were not, in light of the record evidence, erroneous, we reverse the Court of Appeals' decision to vacate defendant's conviction for assault with a deadly weapon inflicting serious injury and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA
v.
KEYSHAWN JONES

No. 27PA16

Filed 9 June 2017

Larceny—mistaken deposit—constructive possession

The State presented sufficient evidence to support defendant's larceny convictions where defendant, a truck driver and independent contractor, passively but knowingly received an overpayment by direct deposit and then proceeded to withdraw the excess funds against the wishes of the rightful possessor. The company for which defendant was driving (West) had the intent and capability to maintain control and dominion over the funds by effecting a reversal of the deposit; the fact that the reversal order was not successful did not indicate that West lacked constructive possession. Defendant had no possessory interest in the funds for the same reasons.

Justice NEWBY concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 781 S.E.2d 333 (2016), vacating defendant's convictions after appeal from a judgment entered on 29 October 2014 by Judge Kenneth F. Crow in Superior Court, Wayne County. Heard in the Supreme Court on 14 February 2017.

Joshua H. Stein, Attorney General, by Robert C. Montgomery, Senior Deputy Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by John F. Carella, Assistant Appellate Defender, for defendant-appellee.

MARTIN, Chief Justice.

In this case, defendant was overpaid because a payroll processor accidentally typed "$120,000" instead of "$1,200" into a payment processing system, resulting in a total payment (after deductions) of $118,729.49. Although defendant was informed of the error and was asked not to remove the excess funds from his bank account, he made a series of withdrawals and transfers totaling $116,861.80. We must decide

whether the State produced sufficient evidence to support defendant's convictions for three counts of felonious larceny.

When the overpayment occurred, defendant Keyshawn Jones[1] was a truck driver who worked as an independent contractor. At that time, he was driving trucks for EF Corporation, which was doing business as WEST Motor Freight (West). West gave its drivers the option to have money withheld every payroll period and placed in a "maintenance account" for the driver. Defendant participated in the maintenance account program and, in July 2012, requested $1,200 from his maintenance account.

But Sherry Hojecki, West's payroll processor, made an error while trying to type in the $1,200 payment, accidentally typing in "$120,000" instead. The final statement indicated that, after payroll deductions, defendant was to be given $118,729.49. Hojecki sent a report to M&T Bank, the bank that held West's funds, directing that this $118,729.49 figure be paid by direct deposit to defendant's account.

The next morning, Hojecki realized her error and tried to stop the transaction. She also told defendant, through his agent, about the error and requested that defendant not withdraw or transfer the excess funds from his account. The stop transaction did not succeed, however, and the deposit went through. As a result, $118,729.49 was deposited in defendant's State Employees' Credit Union (SECU) account. West promptly tried to initiate a reversal of the deposit.

Despite West's instructions, defendant made several withdrawals and transfers that removed almost all of the excess funds from his account. Three days after being asked not to withdraw the funds, defendant made seven ATM cash withdrawals of $1,000 each, totaling $7,000. He also electronically transferred $20,000 from his checking account to his savings account. The next day, defendant went to one of SECU's branch locations to withdraw more of the money. The teller who assisted him noticed the deposit of $118,729.49 and asked defendant why such a large amount of money had been deposited into his account. Defendant replied that he was in business with someone else and had sold his part of the business. Defendant requested two cashier's checks in the amounts of $21,117.80 and $2,000. He also withdrew $66,744 from his checking account and used a portion of that amount to purchase a third

1. Defendant states in his brief that the correct spelling of his first name is "Keyshaun," not "Keyshawn." Because the trial court's judgment used the spelling "Keyshawn," however, that is what we use here.

cashier's check. These three withdrawals totaled $89,861.80. Because defendant had withdrawn or transferred virtually all of the money in question, the reversal that West had tried to initiate was not successful.

Defendant was later indicted for three counts of larceny and three counts of possession of stolen goods. The three larceny counts each charged defendant with "tak[ing] and carry[ing] away" a discrete amount of money from West—specifically, with taking and carrying away $7,000, $20,000, and $89,861.80, respectively. At the close of the State's evidence, the State made a motion to dismiss the three possession-of-stolen-goods counts, which the trial court granted. After the trial court ruled on the State's motion, defendant moved to dismiss the remaining charges based on insufficiency of the evidence. The trial court denied defendant's motion. Defendant renewed his motion at the close of all evidence, and the trial court again denied defendant's motion. The jury found defendant guilty of all three counts of larceny. Defendant appealed to the Court of Appeals, and the Court of Appeals vacated defendant's convictions, finding that he had not committed a trespassory taking. *State v. Jones*, ___ N.C. App. ___, ___, 781 S.E.2d 333, 339 (2016). The State petitioned this Court for discretionary review, and we allowed the State's petition.

The question before us is whether the State presented sufficient evidence of felonious larceny. A defendant is guilty of larceny if the State proves that he "(a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently." *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988) (citing *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010)). "To survive a motion to dismiss for insufficient evidence, the State must present 'substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense.' " *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (quoting *State v. Myrick*, 306 N.C. 110, 113-14, 291 S.E.2d 577, 579 (1982)). Whether the evidence that the State presented at trial was substantial "is a question of law for the court." *State v. Barnes*, 345 N.C. 146, 148, 478 S.E.2d 188, 189 (1996) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). A reviewing court must evaluate the evidence "in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom." *State v. Davis*, 340 N.C. 1, 12, 455 S.E.2d 627, 632, *cert. denied*, 516 U.S. 846 (1995).

Here, it is beyond dispute that defendant carried property away, and that—assuming the property did not belong to him—he did so with the intent to permanently deprive the owner of the property, and without the owner's consent. Thus, the only issue in this case is whether defendant "took" the property of another when he withdrew and transferred money from his bank account.

To constitute a larceny, a taking must be wrongful. *See State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968). In other words, the taking must be by an act of trespass. *See id.*; *State v. Webb*, 87 N.C. 558, 559 (1882). A larcenous trespass may be either actual or constructive. *Bowers*, 273 N.C. at 655, 161 S.E.2d at 14. A constructive trespass occurs "when possession of the property is fraudulently obtained by some trick or artifice." *Id.* (quoting *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 232-33 (1953)). An actual trespass, on the other hand, occurs when the taking is without the consent of the owner. *See* 50 Am. Jur. 2d *Larceny* § 22 (2017); 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.2(a), at 63 (2d ed. 2003) [hereinafter *Substantive Criminal Law*]; Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 303-04 (3d ed. 1982).

However the trespass occurs, it must be against the *possession* of another. *See Webb*, 87 N.C. at 559 (noting that a person with an interest in property may still be guilty of larceny if he "commit[s] a trespass upon the possession of" another); *Substantive Criminal Law* § 19.1(a), at 57 (noting that larceny is "a common law crime . . . committed when one person misappropriate[s] another's property by means of taking it *from his possession* without his consent" (emphasis added)). Possession of property can also be actual or constructive, though the meaning of these terms differs from their meaning in the trespass context.[2] *See, e.g.*, *State v. Weaver*, 359 N.C. 246, 259, 607 S.E.2d 599, 606-07 (2005). With respect to the crime of possession of a controlled substance, this Court has stated that "[a] person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). The Court of Appeals has adopted this test for constructive possession in the context of other offenses as well, including larceny. *See, e.g.*, *State v. McNair*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA16-707, 2017 WL 1381591, at *6 (Apr. 18, 2017) (possession of burglary tools); *State v. Bailey*, 233 N.C. App. 688, 691,

2. In other words, while we have just discussed actual and constructive *trespass*, this issue—whether a person or entity has actual or constructive *possession*—is a wholly separate one.

757 S.E.2d 491, 493, *disc. rev. denied*, 367 N.C. 789, 766 S.E.2d 678 (2014) (possession of a firearm by a felon); *State v. Phillips*, 172 N.C. App. 143, 146-47, 615 S.E.2d 880, 882-83 (2005) (possession of stolen property); *State v. Osborne*, 149 N.C. App. 235, 238-39, 562 S.E.2d 528, 531, *aff'd per curiam*, 356 N.C. 424, 571 S.E.2d 584 (2002) (larceny); *State v. Bonner*, 91 N.C. App. 424, 426, 371 S.E.2d 773, 775 (1988), *disc. rev. denied*, 323 N.C. 705, 377 S.E.2d 227 (1989) (embezzlement). We implicitly endorsed applying this test to the embezzlement context in *State v. Weaver*, *see* 359 N.C. at 259, 607 S.E.2d at 606-07, and we explicitly adopt it in the larceny context here.

To determine whether defendant took West's property by trespass, then, we must first determine whether West retained actual or constructive possession of the excess funds after they had been deposited in defendant's SECU account. Account holders generally do not have actual possession of funds in their bank accounts, and there is no indication in the record that West had actual possession of the funds here, even when they were still in its own account. *See Lipe v. Guilford Nat'l Bank*, 236 N.C. 328, 330-31, 72 S.E.2d 759, 761 (1952); Ann Graham, 1 Banking Law (Matthew Bender & Co., Inc.) § 9.05, at 9 14 (Feb. 2005) ("Absent some special arrangement between the parties, money deposited in a bank becomes the property of the bank and is available for use by the bank in its business."). Because there is no evidence that West had actual possession of the funds in its *own* bank account, West certainly did not retain actual possession of the funds that were transferred to *defendant's* bank account.

West did, however, retain constructive possession of the excess funds even after they had been transferred to defendant's account. From the time that defendant first knew about the excess funds transfer up until the time that defendant removed the funds from his account, West had the intent and capability to maintain control and dominion over the funds by effecting a reversal of the deposit. The fact that the reversal order was not successful—because defendant had removed the funds before the reversal could go through—does not indicate that West lacked constructive possession when the funds were in defendant's account. All it shows is that defendant's removal of the funds *deprived* West of constructive possession, which is consistent with *all* larcenies. After all, in every larceny, the possessor loses—for at least the briefest of moments, *see State v. Green*, 81 N.C. 560, 562 (1879)—the capability to control the property. As we have seen, that is what larceny is—a trespass against the rightful possessor's possession.

Having determined that the excess funds were in West's possession even after they were deposited into defendant's account, we must ascertain whether defendant simultaneously had possession of the funds once they were in his account. If he did, then he could not have committed larceny, because a defendant cannot commit larceny of goods that he already possesses. *See Substantive Criminal Law* § 19.2(a), at 62 ("If the wrongdoer fraudulently converts property already properly in his possession, he does not take it from anyone's possession and so cannot be guilty of larceny.").

We have not squarely addressed a situation like this one before, in which a defendant passively but knowingly received an overpayment by direct deposit and then proceeded to withdraw the excess funds against the wishes of the rightful possessor. But this case is akin to a case in which a person walks into a candy store and buys fifty cents' worth of candy. He hands the store owner a twenty dollar bill, only to be kicked out of the store, and the store owner pockets the bill. In that case, the store owner would be guilty of larceny because he did not have possession of the bill; the customer retained constructive possession of it, leaving the store owner with only custody of it. *See id.* §§ 19.1(a), at 59, 19.2(c), at 67. Similarly, here, because West retained constructive possession of the excess funds in defendant's account, and because defendant knew that West had the intent and capability to control the excess funds through a reversal of the deposit, defendant had no possessory interest in the funds. Like the store owner who accepts a bill that is worth more than he is owed without returning the change, defendant was simply the recipient of funds that he knew were supposed to be returned in large part. He therefore had mere custody of the funds, not possession of them.

When a person has mere custody of property, that person may be convicted of larceny when he appropriates the property to his own use with felonious intent. *See State v. Ruffin*, 164 N.C. 416, 417, 79 S.E. 417, 417 (1913). This is precisely because the property remains in the constructive possession of the rightful possessor, and the later appropriation interferes with that property right. *Id.*; *see also State v. Tilley*, 239 N.C. 245, 249, 79 S.E.2d 473, 476 (1954) (characterizing a warehouse custodian as having been "entrusted at most with the bare custody of the goods, whose possession in contemplation of law remained in the [owner] until [the defendant] feloniously took and carried them away"); *Substantive Criminal Law* § 19.1(a), at 58-59. The moment that the person in custody of the property wrongfully interferes with the rightful possessor's possessory interest is the moment that he takes that property.

So, because defendant lacked possession of the excess funds in his bank account, he "took" those funds when he removed them from his account through transfers and withdrawals. *Those* acts are what deprived West of constructive possession, by depriving West of its ability to effect a reversal of its excessive funds transfer. The State therefore presented sufficient evidence that defendant took West's property by an act of trespass when he removed the excess funds from his account.

Because we hold that the State presented sufficient evidence in support of defendant's larceny convictions, we reverse the decision of the Court of Appeals.

REVERSED.

Justice NEWBY concurring.

I concur fully with the majority opinion. I write separately to observe that this case presents an excellent example of the common law at work today, applying age-old tangible property principles to the modern, intangible electronic-banking context. As the Chief Justice well notes in his opinion, it is the knowing exercise of dominion and control over property to the exclusion of the true owner that "trespasses" on the owner's property rights and effectuates larceny. His candy store hypothetical is a good example. I write separately to amplify this point by taking this opportunity to answer the timeworn question arising from the iconic film *It's a Wonderful Life*: Was Old Man Potter simply morally corrupt or was he also guilty of a crime?

The role of the Court is not to devise the common law but to recognize and apply its lasting principles. *See Penny v. Little*, 4 Ill. (3 Scam.) 301, 304 (1841) (opinion of Stephen A. Douglas, father of Justice Robert M. Douglas of the North Carolina Supreme Court) ("The common law is a beautiful system; containing the wisdom and experience of ages . . . and a]dapting itself to the condition and circumstances of the people . . . ."); *see also Reg. v. Ramsey* [1883] 48 L.T. 733 at 735 (Eng.) (Lord Coleridge CJ) ("[L]aw grows; and . . . though the principles of the law remain unchanged, . . . their application is to be changed with the changing circumstances of the times."); 1 William Blackstone, *Commentaries* *73 (The "chief corner stone of the laws . . . is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice: which decisions are preserved among our public records, explained in our reports, and digested for general use.")

North Carolina law has long recognized that when an individual finds property, and is unaware of its true owner, that individual has no legal duty to locate and return the property to the true owner. *See State v. Roper*, 14 N.C. (3 Dev.) 473, 474-75 (1832) (opinion of Daniel, J.) (A bona fide finder of lost or abandoned property, who later "appropriate[s the property] to his own use," is not guilty of larceny.); *see also State v. West*, 293 N.C. 18, 30, 235 S.E.2d 150, 157 (1977) ("[T]he owner of articles of personal property may terminate his ownership by abandoning it and, in that event, title passes to the first person who thereafter takes possession." (citation omitted)). Nonetheless, we applaud the high morals of one who does.

On the other hand, when an individual possesses property with the knowledge of its true owner, and exercises dominion and control over the property for his or her own purposes, thus trespassing on the true owner's property rights, that individual has committed larceny. See *State v. Farrow*, 61 N.C. (Phil.) 161, 163 (1867). It is not the unintentional receipt of the property that makes the act larceny, but the knowing exercise of control over it. *See id.*; *Roper*, 14 N.C. (3 Dev.) at 474-75; *see also State v. Arkle*, 116 N.C. 1017, 1031, 21 S.E. 408, 408 (1895) ("[T]here must be an original, felonious intent . . . at the time of the taking or finding of lost property . . . to constitute larceny.").

Here defendant knowingly exercised dominion and control over the mistakenly deposited funds to the exclusion of West. Evidence showed that West immediately put defendant on notice of the company's error and that defendant knew the money was West's as early as 12 July 2012, well before his ATM withdrawals and electronic transfers on 15 July 2012. *See Roper*, 14 N.C. (3 Dev.) at 474-75. Logically, if West had lost or abandoned its ownership interest, West would not have immediately contacted defendant and his bank. Moreover, defendant could not have been mistaken about the money's ownership, given both West's notice to him and that his initial request was for only $1200. *See id.* at 475 ("If money, by mistake, is sent with a bureau to be repaired, and it is taken with felonious intent, it will be a larceny . . . ."); *see also* 50 Am. Jur. 2d *Larceny* § 32, at 42 (2006) ("Where money . . . is delivered by mistake, and the receiver takes it with knowledge of the mistake and with the intent to keep it, the offense is larceny, since there is no consent on the part of the owner to part with the excessive amount . . . ."). Thus, defendant committed larceny.

While the Chief Justice's opinion applies such long-standing common law principles to the modern banking context, the principles are

equally applicable to situations arising in the past. Thus are we able to use them to answer the question, lingering in the minds of many, as to the criminal culpability of Old Man Potter. *See It's a Wonderful Life* (Liberty Films 1946).

In this beloved film, on Christmas Eve morning in 1945, Uncle Billy goes to Old Man Potter's bank to deposit $8000 in cash[1] for his family's benevolent business, the Bailey Brothers Building & Loan Company. While Uncle Billy is preparing his deposit slip in the bank lobby, Potter arrives with newspaper in hand. Uncle Billy turns to greet him and cannot help but good-naturedly needle crotchety Potter, who had greedily sought to quash the struggling Building & Loan Company for some time. Uncle Billy grabs the newspaper from Potter and proudly points to the picture of his nephew Harry on the front page—the war hero returning home. Potter angrily snatches the newspaper back, in which Uncle Billy had mistakenly folded the $8000 cash. At this point no crime has occurred; Uncle Billy has misplaced his money and Potter is unaware of his possession of it. *See Roper*, 14 N.C. (3 Dev.) at 475 (Though the defendant had possession of a lost shawl, he lacked felonious intent and was not guilty of larceny while simply returning it to the true owner.).

Back in his bank office, Potter unfolds the newspaper and discovers the money. Meanwhile, Uncle Billy attempts to make the deposit and, in horror, finds that he has misplaced the funds. Potter begins to return with the money to the lobby, but upon opening his office door he observes Uncle Billy searching frantically. Potter "puts two and two together," realizing the loss of funds will ruin George Bailey and his Building & Loan Company. Potter closes the door, keeping the $8000 cash. Armed with the knowledge that the money belongs to the Building & Loan Company, Potter exercises dominion and control by keeping the funds, and has thus committed larceny. *See id.* at 474-75.

That same day, the state bank examiner began auditing the Building & Loan Company, which now faced unavoidable collapse given the $8000 shortage. At his wits' end, George pleads with Potter for a loan to save the business. In response, Potter not only does not confess that he has the Building & Loan Company's money, but instead brazenly inquires of George whether he had lost the money, possibly by "playing the markets" or through an extramarital affair. *See id.* at 474 (The finder's "subsequent appropriation in a secret manner, or *his denial*

1. $8000 adjusted for inflation would be approximately $107,483 today. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, [*Consumer Price Index*] *Inflation Calculator* (2017).

of any knowledge of the goods, or any other acts showing a felonious intent, would be evidence [supporting larceny]." (emphasis added) (citations omitted)). Ultimately, Potter phones the police to arrest George for "misappropriation" of company funds.

Facing certain tragedy, George attempts to take his own life. The attempt is cleverly thwarted by Clarence, an angel looking to earn his wings. Clarence helps George appreciate that, despite the current seemingly overwhelming challenges, life is worth living. George favors life over death. When he finally returns home to face whatever consequences may occur, George finds that the community has rallied around him, accumulating the necessary funds to save the Building & Loan Company and his reputation, just in time for Christmas.

So the story ends. George has a wonderful life. Clarence gets his wings. Old Man Potter is a morally bankrupt individual, but an unindicted felon. And we continue our quest to apply ageless common law principles to our ever-changing modern world.

STATE OF NORTH CAROLINA
v.
THOMAS DERUSSELL KNIGHT

No. 97A16

Filed 9 June 2017

Confessions and Incriminating Statements—Miranda rights—knowing and voluntary waiver—by course of conduct

Under the totality of the circumstances, the State established by a preponderance of the evidence that defendant understood his *Miranda* rights but knowingly and voluntarily waived them during a police interrogation. Through his course of conduct, defendant effected a knowing and voluntary waiver of his rights: He listened as the detective read his *Miranda* rights; he spoke coherently and was mature and experienced enough to understand his rights; he did not state that he wanted to remain silent or wanted an attorney; he emphatically denied any wrongdoing and tried to convince the police of his innocence; and he was not threatened or coerced in any way. An affirmative response acknowledging that defendant understood his rights was not required for his waiver to be valid. Further, even assuming defendant denied that he understood his rights, a

bare statement that he did not understand, without more, would not outweigh all of the evidence that he understood.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 324 (2016), finding no prejudicial error after appeal from a judgment entered on 7 February 2014 by Judge Kendra D. Hill in Superior Court, Wake County. On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review of an additional issue. The case was calendared for argument in the Supreme Court on 14 February 2017, but was determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(d).

Joshua H. Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General, for the State-appellee/appellant.

Craig M. Cooley for defendant-appellant/appellee.

MARTIN, Chief Justice.

Defendant Thomas Knight allegedly raped and assaulted T.H., the victim, at her home in October 2012. Wearing only a shirt, T.H. eventually escaped and ran to a neighbor's house to get help. Her neighbor gave her a pair of pants to wear and called the police. Evidence that the police recovered from T.H.'s home was consistent with her account of the events. The police soon apprehended defendant at a nearby gas station. When the police found defendant, he was carrying two cell phones, one of which belonged to T.H.

The police took defendant to a police station for questioning. Detective Jeff Wenhart began questioning defendant at around 10:30 or 10:45 p.m. that evening. In the video-recorded interrogation, which lasted under forty minutes, defendant acknowledged spending time with T.H. at her home earlier in the evening but vehemently denied having sexual relations with her and denied any wrongdoing.

I

Defendant was charged with common law robbery, assault on a female, interfering with emergency communication, second-degree rape, second-degree sexual offense, and first-degree kidnapping. He was tried before a jury, with the Honorable Reuben F. Young presiding. Defendant moved to suppress the custodial statements that he made to Detective Wenhart at the police station, claiming that the State had

not proved that he had understood his *Miranda* rights or that he had explicitly waived them. Judge Young granted defendant's motion and suppressed the statements. At the close of evidence, the trial court dismissed the common law robbery charge and the interfering-with-emergency-communication charge. The jury found defendant guilty of assault on a female but could not reach a unanimous verdict on the other three charges that remained. As a result, the trial court sentenced defendant for his assault-on-a-female conviction and declared a mistrial on the other three charges.

About six months later, defendant was retried before a new jury, with the Honorable Kendra D. Hill presiding, on those three charges—namely, second-degree rape, second-degree sexual offense, and first-degree kidnapping. At defendant's second trial, defendant again moved to suppress the custodial statements that he made to Detective Wenhart. Judge Hill held a voir dire hearing, heard the arguments of the parties, viewed the video recording of defendant's custodial interrogation, and ruled that defendant's custodial statements were admissible.

In the findings of fact that supported her ruling, Judge Hill noted that, when Detective Wenhart began to read defendant his *Miranda* rights and told defendant that he had a right to remain silent, "[d]efendant immediately said[,] are you arresting me?" Judge Hill also explained that, at the time, defendant "was clearly detained, and yet the reading of the rights triggered in the defendant's mind that this was an arrest, which to the [trial] [c]ourt provides some indication of knowledge" and "understanding about *Miranda* to some extent." Plus, "[c]lear language was used [by Detective Wenhart] here." "The defendant," moreover, was "an adult . . . in his 30s at the time of this" interrogation and gave "no indication to the [trial] [c]ourt" that he had "any cognitive problems." In addition, Judge Hill observed that "[d]efendant ha[d] a prior criminal history" and thus had "some knowledge and familiarity with the criminal justice system." Finally, "the discussion prior to the full reading of the rights made it clear that the defendant was seeking information . . . and wanted to provide information with regard to his indication of what had been done here." Judge Hill concluded that the discussion "indicat[ed] a willingness for the defendant to speak to" Detective Wenhart and noted that defendant "actually sa[id] to the officer[,] I want to be frank with you, I want to explain this to you."

Based on these findings of fact, Judge Hill found, under the totality of the circumstances, that there was "enough to determine that the defendant understood his *Miranda* rights" and that, "through his continued discussion[,] . . . he voluntarily waived those rights in providing

a statement to Detective Wenhart." At the close of defendant's second trial, the jury found him guilty of second degree rape and first-degree kidnapping and not guilty of second-degree sexual offense. Defendant gave oral notice of appeal.

Before the Court of Appeals, defendant argued, among other things, that Judge Hill erred when she denied defendant's motion to suppress his custodial statements. The Court of Appeals unanimously agreed that Judge Hill had erred because the State had not shown that defendant actually understood his *Miranda* rights. *State v. Knight*, ___ N.C. App. ___, ___, ___, 785 S.E.2d 324, 333-36, 338-40 (2016); *id.* at ___, 785 S.E.2d at 340 (Stroud, J., concurring in part and dissenting in part). The Court of Appeals therefore concluded that defendant had not knowingly and intelligently waived his rights. *Id.* at ___, 785 S.E.2d at 336 (majority opinion); *id.* at ___, 785 S.E.2d at 340 (Stroud, J., concurring in part and dissenting in part). A majority of the panel nevertheless held that Judge Hill's purported error was harmless beyond a reasonable doubt and thus found no prejudicial error in defendant's second trial. *Id.* at ___, ___, 785 S.E.2d at 336-38, 340 (majority opinion). A dissenting judge disagreed and would have granted defendant a new trial. *Id.* at ___, 785 S.E.2d at 340-41 (Stroud, J., concurring in part and dissenting in part).

Defendant appealed to this Court based on the dissenting opinion. The State filed a petition for discretionary review of an additional issue, namely, whether the Court of Appeals' ruling that defendant did not understand his *Miranda* rights and therefore did not knowingly and intelligently waive them was correct. We allowed the petition. By consent of the parties, the case was submitted for decision on the briefs under Rule 30(d) of the North Carolina Rules of Appellate Procedure.

II

The Fifth Amendment, which applies to the states through the Fourteenth Amendment, *see Griffin v. California*, 380 U.S. 609, 611, 615 (1965), provides that no person "shall be compelled in any criminal case to be a witness against himself," U.S. Const. amend. V. To protect this right, the Supreme Court of the United States has formulated a set of prophylactic warnings that criminal suspects must receive for any custodial statements that they make to be admissible in court. *See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). The substance of those warnings has not changed over the last fifty years. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010).

A defendant may, however, waive his *Miranda* rights as long as he waives them voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S.

at 444; *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985). A court's waiver inquiry has two distinct dimensions. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). First, a court must determine whether the waiver was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* Second, a court must determine that the waiver was knowing and intelligent—that is, that it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

A waiver can be either express or implied. *See State v. Connley*, 297 N.C. 584, 586, 256 S.E.2d 234, 235-36 (order on remand) (citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)), *cert. denied*, 444 U.S. 954 (1979). "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." *Id.* at 586, 256 S.E.2d at 235 (quoting *Butler*, 441 U.S. at 373). A court may properly conclude that a defendant has waived his *Miranda* rights only if the totality of the circumstances surrounding the defendant's interrogation show both that he adequately understands them and that he was not coerced into waiving them. *Moran*, 475 U.S. at 421; *see also State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983). Whether a defendant has knowingly and intelligently waived his *Miranda* rights therefore "depends on the specific facts and circumstances of each case, including the [defendant's] background, experience, and conduct." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (citing, inter alia, *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). And although the Supreme Court has stated that the State bears a "heavy burden" in proving waiver, *Miranda*, 384 U.S. at 475, the Court later clarified that "the State need prove waiver only by a preponderance of the evidence," *Colorado v. Connelly*, 479 U.S. 157, 168 (1986), *cited in Berghuis*, 560 U.S. at 384.

More recently, in *Berghuis v. Thompkins*, the Supreme Court addressed whether a defendant who was "[l]argely silent" during a nearly three hour custodial interrogation had invoked his *Miranda* rights, and also addressed whether he had waived them. *See* 560 U.S. at 375 (brackets in original; internal quotation marks omitted); *id.* at 380-87. After receiving his *Miranda* warnings, Van Chester Thompkins, the defendant in *Berghuis*, gave only "a few limited verbal responses" to the police officers' questions, "such as 'yeah,' 'no,' or 'I don't know.' " *Id.* at 375. "About 2 hours and 45 minutes into the interrogation," one of the interrogating police officers asked Thompkins if he believed in

God. *Id.* at 376. He replied, "Yes," and "his eyes welled up with tears." *Id.* (internal quotation marks and brackets omitted). The officer asked Thompkins if he prayed to God, and he replied, "Yes." *Id.* The officer then asked him if he prayed to God "to forgive [him] for shooting that boy down," and he "answered 'Yes' and looked away." *Id.*

The Court held that Thompkins had not invoked his right to remain silent under *Miranda*. *Id.* at 382. It ruled that a suspect must invoke his right to remain silent unambiguously, and that Thompkins had not done so. *See id.* at 381-82 (citing, inter alia, *Davis v. United States*, 512 U.S. 452, 458-62 (1994)). The Court also held that Thompkins waived his right to remain silent. *Id.* at 385, 387. It found that he had understood his *Miranda* rights, that he had engaged in a course of conduct to waive those rights, and that he had waived those rights voluntarily. *See id.* at 385-87.

With respect to the waiver issue, the Court first stated that "[t]here was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights." *Id.* at 385. It noted that "Thompkins received a written copy of the Miranda warnings"; that one of the officers who interrogated Thompkins "determined that Thompkins could read and understand English"; and that "Thompkins was given time to read the warnings." *Id.* at 385-86. The Court further noted that Thompkins read one of the *Miranda* warnings aloud and that one of the officers read all of the warnings aloud. *See id.* at 386. Based on these facts, the Court said that "[t]here is no basis in this case to conclude that [Thompkins] did not understand his rights; and . . . it follows that he chose not to invoke or rely on those rights when he did speak." *Id.* at 385.

Next, the Court ruled that, by responding to the officer's questions about praying to God for forgiveness for shooting the victim, Thompkins engaged in a " 'course of conduct indicating waiver' of the right to remain silent." *Id.* at 386 (quoting *Butler*, 441 U.S. at 373). "If Thompkins wanted to remain silent," the Court explained, "he could have said nothing in response to [the officer's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." *Id.*

Finally, the Court stated that there was "no evidence that Thompkins' statement was coerced." *Id.* It noted that "Thompkins d[id] not claim that police threatened or injured him during the interrogation or that he was in any way fearful." *Id.* It also observed that, although Thompkins seemed to have been "in a straight backed chair for three hours, . . . there is no authority for the proposition that an interrogation of this length is

inherently coercive," and that even when longer interrogations had been held to be improper, the interrogations were accompanied by other coercive factors. *Id.* at 386-87. The Court held that, in these circumstances, Thompkins had "knowingly and voluntarily made a statement to police, so he waived his right to remain silent." *Id.* at 387.

III

When a trial court makes findings of fact after a voir dire hearing concerning the admissibility of a custodial statement, those findings are conclusive and binding on the appellate courts if they are supported by competent evidence. *See Simpson*, 314 N.C. at 368, 334 S.E.2d at 59. The trial court's conclusions of law, however, are reviewed de novo. *See id.*

The case at hand gives us our first opportunity to apply *Berghuis*, and the analysis in *Berghuis* is particularly instructive here. Defendant does not allege that he invoked his right to remain silent during the custodial interrogation with Detective Wenhart. He instead argues that the State did not show, by a preponderance of the evidence, that he understood his rights. He also argues that the trial court's purported error in admitting his custodial statements was prejudicial. We do not need to reach the prejudice issue, though, because we hold that, as in *Berghuis*, defendant understood his *Miranda* rights and that, through a "course of conduct indicating waiver," *Berghuis*, 560 U.S. at 386 (quoting *Butler*, 441 U.S. at 373), he effected a knowing and voluntary waiver of them.

Here, as in *Berghuis*, defendant never said "during the interrogation . . . that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." *Id.* at 375. Quite the contrary. As Judge Hill noted in her ruling on the admissibility of defendant's custodial statements, the video of defendant's interrogation—which, again, lasted under forty minutes—shows that defendant was willing to speak with Detective Wenhart. After being read his rights, defendant indicated that he wanted to tell his side of the story when he said "I'm not gonna lie to you, man" and "I'm gonna be frank with you." The video also shows that defendant talked at length during the interrogation, often interrupting Detective Wenhart, and that defendant responded without hesitation to Detective Wenhart's questions about where he had been and what he had been doing that evening. What's more, the video shows that defendant emphatically denied any wrongdoing; provided his account of the evening's events in detail, including the fact that he had spent some time at the victim's home; and seemed to be trying to talk his way out of custody. This last point is worth emphasizing because it appears that, when

faced with a choice between invoking his rights or trying to convince the police that he was innocent, defendant chose to do the latter.

Thus, defendant's course of conduct indicating waiver was much more pronounced than that of the defendant in *Berghuis*, who remained largely silent over the course of an almost three hour interrogation and who gave very limited responses when he did speak. *See id.* at 375. And yet, in *Berghuis*, the Supreme Court found that the defendant had implicitly waived his rights through his course of conduct when he answered the officer's question about whether he prayed to God for forgiveness for shooting the victim. *See id.* at 386-87. It follows that defendant in this case also made an implied waiver of his *Miranda* rights through a course of conduct that indicated waiver when he spoke, at great length, with Detective Wenhart.

In addition, as in *Berghuis*, there is no evidence here that defendant's statements were involuntary. The video of the interrogation shows that defendant was not threatened in any way and that Detective Wenhart did not make any promises, false or otherwise, to get defendant to talk. Before reading defendant his rights, Detective Wenhart simply told him that "[t]his is your opportunity, should you so desire, . . . to tell your side of the story so that we can get to the bottom of what happened." The interrogation was conducted in what appears to be a standard interview room, and Detective Wenhart's tone throughout the interrogation was calm and conversational. And the length of Defendant's interrogation—which, as we have already noted, was less than forty minutes—was much shorter than the interrogation in *Berghuis*, which lasted almost three hours. As we have already seen, the Supreme Court noted in *Berghuis* that even interrogations *longer* than three hours have been held to be improper only when they were accompanied by other coercive factors. *Id.* at 387. Here, the only factor that one could even arguably claim was coercive was the fact that defendant's arm was handcuffed to a bar on the wall in the interrogation room. But his chair had an armrest; his arm still had an ample range of motion; and he did not appear to be in any discomfort during the interrogation. Thus, defendant voluntarily waived his *Miranda* rights.

Although he waived his *Miranda* rights through a course of conduct that indicated waiver, and although he did so voluntarily, defendant argues that the police still violated his *Miranda* rights because, he says, he did not *understand* his rights when he waived them. But under the totality of the circumstances, defendant here, like the defendant in *Berghuis*, did understand his rights.

In discussing why the defendant in *Berghuis* understood his rights, the Supreme Court noted that the defendant read and spoke English, was given a written copy of his *Miranda* rights, was informed that these rights would not dissipate after a certain amount of time, and was told that the police would have to honor his rights, which could be asserted at any time. *Id.* at 385-86. One of the officers in *Berghuis* also read the defendant's *Miranda* rights aloud to him. Id. at 386.

Similarly, in this case, Detective Wenhart read all of defendant's *Miranda* rights aloud, including his right to stop answering questions at any time during the interrogation. The video of the interrogation shows that Detective Wenhart spoke clearly when he read defendant his rights, and that defendant appeared to be listening and paying attention. It is clear from the video as a whole, moreover, that defendant speaks English fluently. And defendant was certainly mature and experienced enough to understand his rights. He repeatedly told Detective Wenhart that he was "38 years old," and, as the trial court found, he had prior experience with the criminal justice system and recognized that his rights were being read to him, as evidenced by his statement that, "[i]f you're reading me my rights, I'm under arrest." In addition, as the trial court also found, defendant gave no indication that he had any cognitive problems. Nor was there anything else that would have impaired his understanding of his rights. Although defendant admitted during the interrogation that he had "been drinking" and "smoking a little pot," and claimed at one point that he was intoxicated, the video of his interrogation shows that his answers to Detective Wenhart's questions were coherent and responsive throughout.

Defendant asserts, nevertheless, that he did not understand his rights because he did not say that he understood them. But it is clear from *Berghuis* that the State does not need to prove that a defendant explicitly *said* that he understood his rights; it must simply prove under the totality of the circumstances that he *in fact* understood them. In *Berghuis*, the Supreme Court stated that there was conflicting evidence as to whether Thompkins affirmatively said that he understood his *Miranda* rights, and he refused to sign an acknowledgement that he understood them. *Id.* at 375; *id.* at 399 (Sotomayor, J., dissenting). But, even though it was not clear whether Thompkins had said that he understood his rights, the Supreme Court still found that he had in fact understood them. *See id.* at 385-86 (majority opinion). In this case, then, as in *Berghuis*, "[t]here is no basis . . . to conclude that [defendant] did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak." *Id.* at 385.

Of course, defendant arguably indicated that he did *not* understand his rights. When asked if he understood them, he said, "I -- not really." Here is the exchange in context:

> MR. KNIGHT: See, that's the thing right there I just don't understand. What the hell am I doing in these damn cuffs, man?
>
> DETECTIVE: Well, if you want me to explain that, you got to allow me to get through here. Okay?
>
> MR. KNIGHT: I -- I'm -- listening --
>
> DETECTIVE: Before I ask you any questions --
>
> MR. KNIGHT: I'm listening (Inaudible) --
>
> DETECTIVE: -- You must understand your rights.
>
> MR. KNIGHT: You're not talking (Inaudible) --
>
> DETECTIVE: You have the right to remain silent and not make any statement.
>
> MR. KNIGHT: Like I said, I'm going to jail for no
>
> f---ing reason.
>
> DETECTIVE: Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice and before I ask you any questions, and to have him or anyone else with you during questioning. If you cannot afford a lawyer, one will be appointed for you by the court before questioning, if you wish.
>
> If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.
>
> Do you understand each of the rights I've explained to you, Mr. Knight?
>
> MR. KNIGHT: I -- not really. I'm --
>
> DETECTIVE: Well --
>
> MR. KNIGHT: I'm -- I'm not gonna lie to you, man. I'm -- I'm -- I'm -- I'm serious. See, this is where I'm at now.
>
> DETECTIVE: Uh-huh?

> MR. KNIGHT: (Inaudible) I'm gonna be frank with you. This is exactly where I'm at. I haven't did anything wrong, man.
>
> DETECTIVE: Uh-huh.
>
> MR. KNIGHT: Not a damn thing. You see what you see. I don't care. But I haven't did any damn thing wrong. I haven't harmed anybody, I haven't did anything to anybody. All I'm trying to do is go home and lay in my damn bed so I can go to my boy's football game tomorrow morning at 9:30. That's all I'm trying to do, man.
>
> DETECTIVE: Okay.
>
> MR. KNIGHT: Other than that right there, I don't know what the hell you talking about.
>
> DETECTIVE: So why would this young lady say that -- that you attacked her --
>
> MR. KNIGHT: She's f---ing drunk. That's why.
>
> DETECTIVE: Were you drinking with her?
>
> MR. KNIGHT: Yeah, of -- yeah, we -- yeah, of course.

When viewed in its proper context, therefore, defendant's response to Detective Wenhart's question about understanding—"I -- not really. I'm--"—was a continuation of defendant's statement that he did not understand why he was in handcuffs and, more generally, why he was being held in custody, because—in his words—he had not done "anything wrong." So the argument that defendant denied understanding his rights is not persuasive.

Even if defendant *had* been denying that he understood his rights, this bare statement, without more, would not be enough to outweigh all of the evidence of understanding that we have already discussed. The totality of the circumstances analysis might have produced a different result had defendant also asked clarifying questions or sought additional details about his right to remain silent or his right to counsel. But he did not.

In other words, the fact that a defendant affirmatively denies that he understands his rights cannot, on its own, lead to suppression. Again, while an express written or oral statement of waiver of *Miranda* rights is usually strong proof of the validity of that waiver, it is neither necessary

nor sufficient to establish waiver. *Butler*, 441 U.S. at 373. Likewise, a defendant's affirmative acknowledgement that he *understands* his *Miranda* rights is neither necessary nor sufficient to establish that a defendant in fact understood them, because the test for a defendant's understanding looks to the totality of the circumstances. Just because a defendant says that he understands his rights, after all, does not mean that he actually understands them. By the same token, just because a defendant claims not to understand his rights does not necessarily mean that he does not actually understand them. In either situation, merely stating something cannot, in and of itself, establish that the thing stated is true. That is exactly why a trial court must analyze the totality of the circumstances to determine whether a defendant in fact understood his rights. As a result, even if defendant here had denied that he understood his rights—and again, in context it appears that he did not—that would not change our conclusion in this case.

Thus, under the totality of the circumstances, the State established by a preponderance of the evidence that defendant understood his rights but knowingly and voluntarily waived them, and Judge Hill's determination was correct.

The Court of Appeals' opinion could be read to suggest that a defendant must make some sort of affirmative verbal response or affirmative gesture to acknowledge that he has understood his *Miranda* rights for his waiver to be valid. *See Knight*, ___ N.C. App. at ___, 785 S.E.2d at 335-36. That suggestion, to the extent that it exists, is explicitly disavowed. As we have shown, requiring that a defendant affirmatively acknowledge that he understands his rights in order to validly waive them conflicts with the holding in *Berghuis*.

In sum, defendant waived his *Miranda* rights during his custodial interrogation, so the statements that he made during that interrogation are admissible. Because we find no error in the trial court's decision to admit those statements, we do not need to consider whether erroneously admitting them would have been prejudicial. The remaining issues addressed by the Court of Appeals are not before us, and we do not disturb its decision on those issues.

Although the Court of Appeals erred in finding that the admission of defendant's video-recorded interrogation violated his *Miranda* rights, it correctly upheld defendant's convictions and the judgment entered on those convictions. We therefore modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ALLEN McKIVER

No. 213PA16

Filed 9 June 2017

Constitutional Law—Confrontation Clause—911 calls

The Confrontation Clause did not prohibit the use of information received from an anonymous 911 caller and a reverse call by the 911 operator where the circumstances objectively indicated that the primary purpose for the calls was to enable law enforcement to meet an ongoing emergency and the statements were nontestimonial in nature.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 85 (2016), finding prejudicial error in a judgment entered on 29 April 2015 by Judge Benjamin G. Alford in Superior Court, New Hanover County, and awarding defendant a new trial. Heard in the Supreme Court on 11 April 2017.

Joshua H. Stein, Attorney General, by Daniel P. O'Brien, Special Deputy Attorney General, for the State-appellant.

Kimberly P. Hoppin for defendant-appellee.

NEWBY, Justice.

This case is about whether the Confrontation Clause prohibits the use at trial of information received from an anonymous 911 caller who informed law enforcement of a possible incident involving a firearm and described the suspect. Because the circumstances surrounding the 911 caller's statements objectively indicate that their primary purpose was to enable law enforcement to meet an ongoing emergency, the statements were nontestimonial in nature, thus not implicating the Confrontation Clause. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's evidentiary ruling and the resulting judgment upon defendant's conviction.

At 9:37 p.m. on 12 April 2014, an anonymous 911 caller reported a possible dispute involving a black man with a gun in his hand who was

standing outside on Penn Street in the Long Leaf Park subdivision of Wilmington, North Carolina. In response to the dispatch, Officer Scott Bramley of the Wilmington Police Department activated his patrol car's blue lights and siren on the way to the scene. Officer Bramley characterized the dispatch as "a pretty serious call" that is "always dispatched with backup." After stopping a few blocks away to retrieve his patrol rifle from his vehicle's trunk, he proceeded to Penn Street, where he parked on the side of the roadway. Penn Street was "very dark" with "very sporadic" street lighting, and Officer Bramley turned on his high-beam headlights "to try and light-up the area."

Upon exiting his vehicle, Officer Bramley noticed two people standing near a black, unoccupied Mercedes, which was still running and parked beside a vacant lot. Officer Bramley heard music "blaring" from the car radio. Lacking a detailed description of the suspect, Officer Bramley approached the two individuals. One of the individuals, a black male wearing a red and white plaid shirt and jeans, walked towards Officer Bramley. Officer Bramley "confronted him about possibly having [a firearm], at which point he lifted his shirt to show [Officer Bramley] he did not have a gun." Officer Bramley conducted a pat-down to confirm the man was unarmed and then, having no description or location for the suspect, continued to investigate down the block.

By this time other officers had arrived on the scene, and Officer Bramley observed a number of onlookers watching from nearby residences and the vacant lot. Officer Bramley asked for a more detailed description of the suspect, but the dispatcher informed him that the anonymous 911 caller had already disconnected. Officer Bramley requested that the dispatcher initiate a reverse call. After reconnecting with the caller, the dispatcher informed Officer Bramley that the caller "said it was in the field in a black car and someone said he might have thrown the gun."

In response to Officer Bramley's request for a more detailed description from the caller, the dispatcher replied: "Black Male light plaid shirt. He was last seen by the car with a gun in his hand and then they all went in the house because they were afraid." Officer Bramley testified that, upon receiving this information, he "immediately knew [the suspect] was the first gentleman that [he] had come into contact with because no one else in that area was wearing anything remotely similar to that clothing description." Officer Bramley relayed the suspect's description "to other officers still en route to help search the area in an attempt to locate him." Officers searched the nearby vacant lot and discovered a Sig Sauer P320 .45 caliber handgun located about ten feet away from the

Mercedes. The officers identified defendant as the suspect based on the caller's description, and defendant was arrested.

Defendant was indicted, *inter alia*, on one count of possession of a firearm by a felon. Before trial defendant moved to exclude evidence of the initial 911 call and the dispatcher's reverse call, contending that admitting statements made during either call without requiring the anonymous caller to testify would allow the jury to hear inadmissible testimonial statements in violation of his Sixth Amendment right to confront the witnesses against him. The State successfully argued, however, that the statements primarily served to enable law enforcement to meet an ongoing emergency and were therefore nontestimonial in nature. *See Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Along with the calls, the State introduced other evidence from the scene, including the firearm, and documentation verifying defendant's prior felony conviction. The jury convicted defendant of possessing a firearm as a convicted felon, and the trial court sentenced defendant to fourteen to twenty-six months of imprisonment, suspended for thirty-six months of supervised probation after completion of a six-month term. Defendant appealed.

On appeal the Court of Appeals concluded, *inter alia*, that the anonymous 911 call and the dispatcher's reverse call were inadmissible testimonial statements. *State v. McKiver*, ___ N.C. App. ___, ___, 786 S.E.2d 85, 94 (2016). According to the Court of Appeals, the 911 call was not placed in response to an "ongoing emergency" and admitting the statements without requiring the anonymous caller to testify violated defendant's constitutional right to confront the witnesses against him.[1] *Id.* at ___, 786 S.E.2d at 93-94 (citing *Davis*, 547 U.S. at 828, 126 S. Ct. at 2277, 165 L. Ed. 2d at 240-41). Noting the anonymous 911 caller's "position of relative safety" in her home and away from her window, the Court of Appeals determined that the record did not objectively indicate that an ongoing emergency existed. *Id.* at ___, 786 S.E.2d at 93. Even though "the identity and location of the man with the gun were not yet known to the officers," according to the Court of Appeals, " 'this fact [alone] does not in and of itself create an ongoing emergency.' " *Id.* at ___, 786 S.E.2d at 93 (quoting *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 829 (2007)). Moreover, the court concluded that receiving evidence of the calls could not be harmless because defendant's identification as the suspect rested almost entirely on these statements. *Id.* at ___, 786

1. The Court of Appeals first held that the incriminating circumstantial evidence sufficiently supported a jury verdict that defendant constructively possessed the firearm. *McKiver*, ___ N.C. App. at ___, 786 S.E.2d at 88-90. This issue is not before the Court.

S.E.2d at 94. While it emphasized that its conclusion should not be read to condemn the officers "who reacted professionally and selflessly to a potentially dangerous situation," the Court of Appeals ultimately held that the trial court erred by failing to exclude evidence concerning both the initial 911 call and the dispatcher's reverse call from evidence, and awarded defendant a new trial. *Id.* at ___, 786 S.E.2d at 94. This Court allowed discretionary review.

We review a trial court's decisions regarding a defendant's allegations of constitutional violations de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). The Confrontation Clause of the Sixth Amendment to the Federal Constitution declares: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend VI. The Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177, 194 (2004). The Confrontation Clause does not, however, apply to non-testimonial statements. *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S. Ct. 1173, 1183, 167 L. Ed. 2d 1, 13 (2007).

In *Davis v. Washington* the United States Supreme Court defined "non-testimonial statements" and compared them to "testimonial statements":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237. The Court described an ongoing emergency as "a call for help against a bona fide physical threat" or "speaking about events *as they were actually happening*, rather than 'describ[ing] past events.' " *Id.* at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240 (brackets in original) (quoting *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 1900, 144 L. Ed. 2d 117, 135 (1999) (plurality opinion)). Statements made during a 911 call often describe "current circumstances requiring police assistance" rather than

provide a narrative of past events. *Id.* at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240.

Moreover, the existence of an ongoing emergency and its duration "depend on the type and scope of danger posed to the victim, the police, and the public." *Michigan v. Bryant*, 562 U.S. 344, 371, 131 S. Ct. 1143, 1162, 179 L. Ed. 2d 93, 115 (2011). For example, assessing whether an emergency is ongoing, and is therefore a continuing threat to the public and law enforcement, "may depend in part on the type of weapon employed." *Id.* at 364, 131 S. Ct. at 1158, 179 L. Ed. 2d at 111 (reviewing statements made by a victim, mortally wounded during a nondomestic dispute in an exposed public location, that described and identified the fleeing gunman who posed a prospective threat to the general public).

"In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation," taking into account that law enforcement officers serve as both first responders and interrogators. *Id.* at 367, 131 S. Ct. at 1160, 179 L. Ed. 2d at 112. Formal statements made in the course of police interrogation suggest the lack of such an emergency. *Id.* at 366, 131 S. Ct. at 1160, 179 L. Ed. 2d at 112; *accord Lewis*, 361 N.C. at 548, 648 S.E.2d at 829 (concluding that a victim's formal statements to police in her home after the commission of a crime and her photo identification of the defendant while she was at the hospital were testimonial). "[C]ourts should look to all of the relevant circumstances" and objectively evaluate "the statements and actions of all participants," including "the parties' perception that an emergency is ongoing." *Bryant*, 562 U.S. at 369-70, 131 S. Ct. at 1162, 179 L. Ed. 2d at 114-15.

Here the trial court properly determined that, based on the objective circumstances surrounding the 911 calls, an ongoing emergency existed. The primary purpose of the initial 911 call was to inform law enforcement of current circumstances: a possible dispute involving an unidentified man brandishing a firearm outside the caller's home on a public street in a residential subdivision. *See Davis*, 547 U.S. at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240 (A "call for help" is nontestimonial.). The caller reacted by going into her home and staying away from the window. Likewise, the officer retrieved his patrol rifle before entering the scene. As is evident from the precautions taken by both the 911 caller and the officers on the scene, they believed the unidentified suspect was still roving the subdivision with a firearm, posing a continuing threat to the public and law enforcement. *See Bryant*, 562 U.S. at 370-71, 131 S. Ct. at 1162, 179 L. Ed. 2d at 115 ("[T]he existence and duration of an

emergency depend on the type and scope of danger posed to the victim, the police, and the public.").

To properly address the continuing threat, Officer Bramley requested that the dispatcher place a reverse call to ask for a more complete description of the individual and, once received, he quickly relayed that information to the other officers in an effort to locate and apprehend the suspect. Only after receiving this additional information from the reverse call were the officers able to find the weapon and identify the suspect. The 911 caller's description of the suspect's clothing and approximate location gave law enforcement the information that they needed to address an ongoing emergency. *See State v. Hewson*, 182 N.C. App. 196, 206-07, 642 S.E.2d 459, 466-67 (concluding that the victim's 911 call was nontestimonial because it "was not designed to establish a past fact, but 'to describe current circumstances requiring police assistance' " (quoting *Davis*, 547 U.S. at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240)), *disc. rev. denied*, 361 N.C. 572, 651 S.E.2d 229 (2007); *see also United States v. Johnson*, 509 F. App'x 487, 488-89, 494 (6th Cir. 2012) (concluding that an anonymous 911 caller's statement that "a black male wearing a blue t-shirt and dark-colored shorts" was carrying a gun and walking southbound down the street described "an ongoing situation requiring police assistance" and was therefore nontestimonial), *cert. denied*, ___ U.S. ___, 133 S. Ct. 2361, 185 L. Ed. 2d 1083 (2013). As a result, the anonymous 911 caller's statements here fit squarely within the definition of nontestimonial statements as defined in *Davis v. Washington*. Therefore, the statements are admissible without implicating the Confrontation Clause.

In sum, the circumstances surrounding the initial 911 call and the dispatcher's reverse call objectively indicate that the primary purpose of the dispatcher's questions and the caller's responses was to enable law enforcement to meet an ongoing emergency. As such, the statements were nontestimonial and did not trigger Sixth Amendment Confrontation Clause protection. Accordingly, we reverse the decision of the Court of Appeals on this issue and reinstate the trial court's evidentiary ruling and resulting judgment.

REVERSED.

STATE OF NORTH CAROLINA
v.
AUSTIN LYNN MILLER

No. 113PA16

Filed 9 June 2017

Drugs—newly enacted statute—unlawful to possess pseudoephedrine if prior conviction for methamphetamine possession or manufacture—as-applied challenge—active conduct

Where defendant was convicted of violating a newly enacted statute, N.C.G.S. § 90-95(d1)(1)(c), which made it unlawful for any person with a prior conviction for the possession or manufacture of methamphetamine to possess a pseudoephedrine product, based on his purchase of "Allergy Congestion Relief D-ER tabs," the Supreme Court held that his conviction did not violate his federal constitutional right to due process of law. His as-applied challenge failed because his conviction rested upon his own active conduct rather than a "wholly passive" failure to act.

Justice MORGAN dissenting.

Justice BEASLEY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 783 S.E.2d 512 (2016), vacating a judgment entered on 5 February 2015 by Judge Eric C. Morgan in Superior Court, Watauga County. Heard in the Supreme Court on 14 February 2017.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Jeffrey William Gillette for defendant-appellee.

ERVIN, Justice.

On 12 June 2013, the General Assembly enacted legislation that, effective 1 December 2013, made it "unlawful for any person" to "[p]ossess a pseudoephedrine product if the person has a prior conviction for the possession or manufacture of methamphetamine," with any person convicted of this offense to "be punished as a Class H felon." Act

of June 12, 2013, ch. 124, secs. 1, 3, 2013 N.C. Sess. Laws 291, 291-93 (codified at N.C.G.S. § 90-95(d1)(1)(c)).[1] Prior to the enactment of N.C.G.S. § 90-95(d1)(1)(c), any person aged eighteen or older was entitled to purchase "at retail" up to "3.6 grams of any pseudoephedrine products[[2]] per calendar day" and up to "9 grams of pseudoephedrine products within any 30-day period," N.C.G.S. § 90-113.53 (2015),[3] as long as the purchaser furnished appropriate photo identification and a current valid residential address and signed a form attesting to the validity of his or her personal information and other information that could be accessed by law enforcement officers, *see id.* §§ 90 113.52 (2015), 113.53. The ultimate issue presented for our consideration in this case is whether N.C.G.S. § 90-95(d1)(1)(c), as applied to defendant, worked a deprivation of defendant's right to due process of law under the federal constitution. After careful consideration of the record evidence in light of the applicable legal principles, we conclude that defendant's as-applied challenge to the constitutionality of N.C.G.S. § 90-95(d1)(1)(c) lacks merit and reverse the decision of the Court of Appeals, *State v. Miller*, ___ N.C. App. ___, ___, 783 S.E.2d 512, 523-24 (2016), to the contrary.

On 3 October 2012, Judge R. Stuart Albright entered a judgment in Ashe County File Nos. 12 CrS 248, 11 CrS 50918, 11 CrS 50919, and 11 CrS 50920 sentencing defendant to a term of sixteen to twenty months of imprisonment, with this sentence being suspended and with defendant being placed on supervised probation for a period of thirty-six months, based upon defendant's convictions for possession of a methamphetamine precursor with the intent to distribute (File No. 12 CrS 248), maintaining a vehicle or dwelling for the purpose of selling or delivering a controlled substance (File No. 11 CrS 50918), possession of methamphetamine (File No. 11 CrS 50919), and possession of drug paraphernalia (File No. 11 CrS 50920). On 5 January 2014, defendant purchased "Allergy Congestion Relief D–ER tabs," which contained 3.6 grams of pseudoephedrine, from a Walmart pharmacy in Boone. On 7 January 2014, Detective John Hollar of the Watauga County Sheriff's Office examined the National Precursor Log Exchange, which is an electronic database administered by the National Association of Drug

1. The Governor approved the new statutory provision on 19 June 2013.

2. A "pseudoephedrine product" is "a product containing any detectable quantity of pseudoephedrine or ephedrine base, their salts or isomers, or salts of their isomers." N.C.G.S. § 90-113.51(a) (2015).

3. The statutory purchase limits do not apply "if the product is dispensed under a valid prescription." *Id.* § 90-113.53(a), (b).

Diversion Investigators that tracks pseudoephedrine purchases, N.C.G.S. § 90-113.52A (2015), and determined that defendant had made this pseudoephedrine purchase. In view of the fact that Detective Hollar knew that defendant had previously been convicted of possessing methamphetamine, he obtained the issuance of a warrant for defendant's arrest. On 4 August 2014, the Watauga County grand jury returned a bill of indictment charging defendant with "possess[ing] an immediate precursor chemical, pseudoephedrine, having a prior conviction for the possession of methamphetamine, to wit: The defendant was convicted of Possession of Methamphetamine in Ashe County, File Number 11 CRS 50919, on 1 October 2012."[4]

On 4 February 2015, defendant filed a motion in which he requested the trial court to declare N.C.G.S. § 90-95(d1)(1)(c) unconstitutional on the grounds that punishing him for violating this newly enacted statutory provision contravened his federal due process rights as enunciated in *Lambert v. California*, 355 U.S. 225, 2 L. Ed. 2d 228 (1957). In support of this contention, defendant argued that N.C.G.S. § 90-95(d1)(1)(c) had criminalized the otherwise innocent act of possessing a pseudoephedrine product for a subset of felons to which defendant belonged despite the fact that the purchase of such substances by individuals like defendant had been entirely lawful little more than a month earlier and that the State's failure to provide adequate notice of this change in law constituted a federal due process violation like that identified in *Lambert*. In addition, defendant asserted that federal due process principles required that a mens rea or scienter element be imported into N.C.G.S. § 90-95(d1)(1)(c) in light of *Lambert*; *Morissette v. United States*, 342 U.S. 246, 96 L. Ed. 288 (1952); and *Liparota v. United States*, 471 U.S. 419, 85 L. Ed. 2d 434 (1985). For that reason, in the event that this case proceeded to trial, defendant argued that the trial court would be required to instruct the jury that, in order to return a verdict of guilty, the jury would have to find beyond a reasonable doubt that defendant had the specific intent to violate the law consisting of proof that defendant "had knowledge that it was illegal to purchase [a pseudoephedrine product] because he had a meth[amphetamine] conviction."

In response, the State argued that N.C.G.S. § 90-95(d1)(1)(c) resembles N.C.G.S. § 14-415.1, which provides, in pertinent part, that "[i]t

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4. Although the dates associated with defendant's conviction for methamphetamine possession set out in the indictment and delineated in the evidence differ, defendant did not argue in the Court of Appeals that this divergence between allegation and proof constituted a fatal variance entitling him to dismissal of the charge that had been lodged against him.

shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction" and which has repeatedly been upheld by North Carolina courts. N.C.G.S. § 14-415.1(a) (2015). More specifically, the State asserted that N.C.G.S. § 90-95(d1)(1)(c), like N.C.G.S. § 14-415.1, merely requires an "intent to act"; that the dangers posed by methamphetamine are similar to those posed by firearms in the possession of felons; and that the similarities between these two statutes demonstrate the constitutionality of N.C.G.S. § 90-95(d1)(1)(c). Additionally, the State asserted that defendant's specific intent argument amounted to a claim that "ignorance of the law should be an excuse." At the conclusion of the pretrial hearing, the trial court denied defendant's motion to declare N.C.G.S. § 90-95(d1)(1)(c) unconstitutional "without prejudice to later arguments at the charging conference as to jury instructions."

At the jury instruction conference held near the conclusion of defendant's trial, defendant reiterated his request that the trial court instruct the jury concerning the necessity for a showing that he had acted with specific intent to violate the law using the "instruction from the *Liparota* case which tracked an earlier federal pattern jury instruction." Ultimately, the State and defendant agreed that the trial court would instruct the jury utilizing N.C.P.I. Crim. 120.10, which defines intent, 1 N.C.P.I.–Crim. 120.10 (June 2012), and N.C.P.I. Crim. 261.55, which defines the showing that the State was required to make in order to convict defendant of the substantive offense with which he had been charged, 3 N.C.P.I.–Crim. 261.55 (June 2014). In light of that agreement, the trial court instructed the jury that:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.
>
> The defendant has been charged with the possession of a pseudoephedrine product with a prior conviction of the possession of methamphetamine. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that the defendant possessed a pseudoephedrine product. And, second, that the defendant has a prior conviction for the possession of methamphetamine.

> If you find from the evidence beyond a reasonable doubt that the defendant possessed a pseudoephedrine product and has a prior conviction for the possession of methamphetamine, then it would be your duty to return a verdict of guilty. If you do not so find, or have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty.

At the conclusion of its deliberations, the jury returned a verdict convicting defendant as charged. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to a term of six to seventeen months of imprisonment, with this sentence having been suspended and with defendant having been placed on supervised probation for a period of twenty-four months. Defendant successfully sought review of the trial court's judgment by filing a petition seeking the issuance of a writ of certiorari with the Court of Appeals. *Miller*, ___ N.C. App. at ___, 783 S.E.2d at 516.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that N.C.G.S. § 90-95(d1)(1)(c), as applied to him, violated his due process rights. In support of this contention, defendant argued that, in instances, like this one, in which a state has rendered otherwise innocent and lawful behavior subject to significant criminal penalties, due process considerations require either that scienter or mens rea be shown in order to prove guilt or, in the alternative, that the State establish that defendant had fair warning that a previously lawful act was now subject to the criminal sanction. Defendant claimed that he reasonably believed that he had the right to lawfully purchase pseudoephedrine products on 5 January 2014, that he reasonably lacked any knowledge that the law had changed effective 1 December 2013, that he did not intend to violate the law by purchasing an allergy medication, and that punishing him as a felon for purchasing a product containing pseudoephedrine under such circumstances was fundamentally unfair. For that reason, defendant asserted that guilt of the offense made punishable by N.C.G.S. § 90-95(d1)(1)(c) should require proof that defendant knew that his actions were unlawful or, in the absence of such a scienter or mens rea requirement, that the State's failure to notify him and other similarly situated individuals that they were prohibited from purchasing products containing pseudoephedrine as a precondition for subjecting them to the criminal sanction for acting in that manner rendered the relevant statutory provision unconstitutional.

In response, the State argued that, since N.C.G.S. § 90-95(d1)(1)(c) does not fall within the narrow category of crimes for which knowledge

that the prohibited conduct is unlawful is required, defendant's ignorance of the prohibited nature of his conduct does not preclude a finding of criminal liability. In the State's view, N.C.G.S. § 90-95(d1)(1)(c) is a straightforward and easily understood statutory provision rather than a "highly technical" tax or currency statute of the sort that requires proof that the defendant knew that his or her conduct was unlawful, citing *Bryan v. United States*, 524 U.S. 184, 194-95, 141 L. Ed. 2d 197, 207 (1998). Moreover, the State argued that the exception to the general rule that proof that the defendant knew of the unlawfulness of his or her conduct is not required in order to establish the defendant's guilt set out in *Lambert* only applies in the event that the challenged statutory provision criminalizes "wholly passive" conduct and that defendant's decision to purchase pseudoephedrine cannot be characterized in that manner. Although proof of defendant's guilt in this case does require a showing that defendant knew that he had a prior methamphetamine possession conviction and that the substance that he possessed contained pseudoephedrine, the relevant statutory provision cannot be reasonably construed to require proof that defendant knew that it was unlawful for him to possess pseudoephedrine as a precondition for a finding of guilt.

The Court of Appeals began its discussion of defendant's challenges to the trial court's judgment by noting that the extent, if any, to which the General Assembly intended to include a specific intent or scienter element in N.C.G.S. § 90-95(d1)(1)(c) depends upon the manner in which the relevant statutory language should be construed.[5] *Miller*, ___ N.C. App. at ___, 783 S.E.2d at 516. Given that N.C.G.S. § 90-95(d1)(1)(c) fails to explicitly provide for a specific intent or mens rea element and that the General Assembly has included such language in defining the other offenses listed under N.C.G.S. § 90-95(d1), *id.* at ___, 783 S.E.2d at 516-17 (discussing N.C.G.S. §§ 90-95(d1)(1)(a)-(b) and 90-95(d1)(2)(a)-(b)), the Court of Appeals concluded that the General Assembly had " ' intentionally and purposely' " excluded "an intent element" from N.C.G.S. § 90-95(d1)(1)(c), *id.* at ___, 783 S.E.2d at 517 (quoting *State v. Watterson*, 198 N.C. App. 500, 506, 679 S.E.2d 897, 900 (2009) (quoting *N.C. Dep't of*

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5. The exact nature of defendant's statutory construction challenge to the trial court's judgment is not entirely clear. Although defendant could have advanced this contention in support of an argument that the trial court had erred by failing to dismiss the charge that had been lodged against him for insufficiency of the evidence, an argument that the trial court had erroneously instructed the jury concerning the applicable law, or an argument that N.C.G.S. § 90-95(d1)(1)(c) could only be upheld against a constitutional challenge in the event that the relevant statutory provision was construed so as to include such a scienter or mens rea requirement, defendant did not clearly make any one of these three arguments.

Revenue v. Hudson, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009))). Although "any possession of a controlled substance offense contains an implied *knowledge* element, to wit, that the defendant must know he possesses the controlled substance and must also know the identity of the substance," *id.* at ___ n.3, 783 S.E.2d at 517 n.3 (citing *State v. Galaviz–Torres*, 368 N.C. 44, 52, 772 S.E.2d 434, 439 (2015) (discussing *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346, *disc. rev. denied*, 367 N.C. 271, 752 S.E.2d 466 (2013))), the Court of Appeals concluded that the General Assembly intended for N.C.G.S. § 90-95(d1)(1)(c) "to be exactly what its plain language indicates: a strict liability offense without any element of intent," *id.* at ___, 783 S.E.2d at 517.

After rejecting defendant's contention that N.C.G.S. § 90-95(d1)(1)(c) should be construed to require proof that defendant knew that he was not entitled to purchase products containing pseudoephedrine, the Court of Appeals addressed defendant's as-applied challenge to the constitutionality of that statutory provision. *Id.* at ___, 783 S.E.2d at 517-23. Despite its recognition "that methamphetamine manufacture and use is a significant law enforcement and public health problem which demands serious criminal penalties," *id.* at ___, 783 S.E.2d at 519-20, the Court of Appeals concluded that, "in light of . . . *Lambert* and *Liparota*," N.C.G.S. § 90-95(d1)(1)(c) "is unconstitutional as applied to [defendant]," *id.* at ___, 783 S.E.2d at 520, given that "[p]ossession of pseudoephedrine products is an innocuous and entirely legal act for the majority of people in our State, including most convicted felons," *id.* at ___, 783 S.E.2d at 520, and that "possessing allergy medications containing pseudoephedrine," unlike the possession of "illegal drugs," "hand grenades," or "dangerous acids," "is an act that citizens, including convicted felons, would reasonably assume to be legal," *id.* at ___, 783 S.E.2d at 520 (citing *Liparota*, 471 U.S. at 426, 85 L. Ed. 2d at 440). Prior to the enactment of N.C.G.S. § 90-95(d1)(1)(c), the statutory provisions regulating the purchase of products containing pseudoephedrine required the provision of notice of the lawfulness of particular purchases at the point of sale, *id.* at ___, 783 S.E.2d at 520; however, violations of N.C.G.S. § 90-95(d1)(1)(c) can occur without the provision of any such point of sale notice even though such purchases would be lawful "for most people, *including the vast majority of convicted felons*," *id.* at ___, 783 S.E.2d at 520. "Simply put," the Court of Appeals reasoned, "there were no 'circumstances which might move one to inquire as to' a significant change in the [Controlled Substances Act's] requirements nor any notice to [defendant] that the new [provision] had transformed an innocent act previously legal for him into a felony." *Id.* at ___, 783 S.E.2d at 520 (quoting *Lambert*, 355 U.S. at 229, 2 L. Ed. 2d at 232). In reaching this conclusion, the Court of

Appeals found the decision in *Wolf v. State of Oklahoma*, 2012 OK CR 16, 292 P.3d 512 (Okla. Crim. App. 2012), *cert. denied*, ___ U.S. ___, 186 L. Ed. 2d 877 (2013), to be highly persuasive, *Miller*, ___ N.C. App. at ___, 783 S.E.2d at 520-21, concluding, in reliance upon *Wolf*, that

> [t]aken together, *Lambert* and *Liparota* suggest that, while a legislature may criminalize conduct in itself, with no intent requirement, the legislature must make some provision to inform a person that the conduct, as applied to her, is criminal. This is particularly important where the conduct in question is otherwise legal. This is precisely the circumstance here: some convicted felons are prohibited from purchasing pseudoephedrine, while others, along with the general population, are not.

Id. at ___, 783 S.E.2d at 521 (alteration in original) (quoting *Wolf*, 2012 OK CR at ¶ 10, 292 P.3d at 516). As a result, the Court of Appeals held that N.C.G.S. § 90-95(d1)(1)(c) is unconstitutional "as applied to a defendant in the absence of notice to the subset of convicted felons whose otherwise lawful conduct is criminalized thereby or proof beyond a reasonable doubt by the State that a particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law," *id.* at ___, 783 S.E.2d at 521, and that defendant's conviction for violating N.C.G.S. § 95-90(d1)(1)(c) should, for that reason, be vacated, *id.* at ___, 783 S.E.2d at 523-24. On 9 June 2016, we allowed the State's petition for discretionary review of the Court of Appeals' decision that N.C.G.S. § 90-95(d1)(1)(c) is unconstitutional as applied to defendant on notice-related grounds.

In seeking relief from the decision of the court below before this Court, the State argues that the Court of Appeals disregarded the well-established legal principle that ignorance of the law is no excuse by misapplying the *Lambert* exception and misconstruing decisions such as *Liparota* in order to limit the otherwise applicable maxim that members of the public have notice of the applicable law to situations in which a reasonable person would know the content of the law. In the State's view, this case is controlled by *Lambert* and this Court's decision in *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2005), in which we described *Lambert* as creating "a narrow exception to the general rule" to the effect that citizens are presumed to know the law applicable in situations when the allegedly unlawful conduct is " 'wholly passive.' " *Id.* at 566, 614 S.E.2d at 487 (quoting *Lambert*, 355 U.S. at 228, 2 L. Ed. 2d at 231). In order to take advantage of this exception, the defendant must establish that the statutory provision in question criminalizes

a failure to act, such as the failure to register as a felon at issue in *Lambert* and the failure to register as a sex offender at issue in *Bryant*. In the State's view, defendant was not prosecuted for a failure to act. On the contrary, N.C.G.S. § 90-95(d1)(1)(c) proscribes an affirmative act, which is the intentional possession of a prohibited substance. As defendant conceded before the trial court, his conduct was "not an absence to act like there is in *Lambert*." In the event that a defendant fails to establish that his behavior is "wholly passive," whether because the relevant conduct does not involve a failure to act, as is the situation in this case, or because the defendant's failure to act occurred under circumstances that would lead a reasonable person to inquire as to his or her legal duties, as was the case with the defendant's duty to register as a sex offender in North Carolina at issue in *Bryant*, the maxim that ignorance of the law provides no excuse and that all citizens are presumed to know the law remains applicable. Instead of correctly applying the narrow *Lambert* exception in accordance with this Court's decision in *Bryant*, the Court of Appeals created an inappropriate notice requirement resting upon a failure to distinguish between an affirmative action and purely passive conduct and conflating the analysis set out in *Lambert* with the analysis utilized in statutory construction cases such as *Liparota*.

In response, defendant contends that the proper resolution of the critical question concerning whether an act is "wholly passive" for purposes of *Lambert* and *Bryant* hinges upon whether the surrounding circumstances would put a reasonable person on notice that he or she should have inquired as to whether there had been a change in law rather than upon whether the underlying conduct should be deemed active or passive. Defendant argues that *Lambert* and *Bryant* rest upon a distinction between "active and passive *notice*, that is, the presence or absence of 'circumstances that should alert the doer to the consequences of his deed,' " rather than upon a distinction between acts of commission and acts of omission. According to defendant, his conduct should be deemed "wholly passive" given the absence of "circumstances that would [have] move[d] him to inquire if the General Assembly had recently criminalized his otherwise innocuous conduct." Moreover, even if a defendant's underlying conduct is a component of the relevant constitutional analysis, possession, as compared to the purchase, of a substance is a passive act.

In the alternative, defendant contends that, even if we "decline[ ] to adopt the analysis of the Court of Appeals," we should still affirm the result that it reached on the grounds "that an element of scienter must be read into [N.C.G.S.] § 90-95(d1)(1)(c) to comport with traditional notions of fair play and substantial justice, and the State failed

to present evidence from which a jury could infer such an element." According to defendant, the Court of Appeals should have held that proof of defendant's "awareness that a reasonable person in his shoes would have[known] that the purchase of pseudoephedrine was an illegal act" constituted an essential element of the offense created by N.C.G.S. § 90-95(d1)(1)(c). In reaching a contrary conclusion, the Court of Appeals overlooked the fact that the United States Supreme Court has read a similar requirement into various criminal statutes for the purpose of ensuring the constitutionality of the challenged statute regardless of any evidence concerning actual Congressional intent.

As this Court indicated in *Bryant*, the *Lambert* exception to the general rule that ignorance of the law is no excuse is "decidedly narrow." 359 N.C. at 568, 614 S.E.2d at 488.[6] After carefully reviewing the record, we conclude that the *Lambert* exception does not operate to protect defendant from criminal liability given the facts contained in the present record. Moreover, defendant's alternative argument to the effect that guilt of the offense defined in N.C.G.S. § 90-95(d1)(1)(c) requires proof that the defendant knew of the illegality of his conduct is not properly before us. Thus, we reverse the decision of the Court of Appeals.

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes.

Bryant, 359 N.C. at 566, 614 S.E.2d at 487 (citations omitted) (quoting *Cheek v. United States*, 498 U.S. 192, 199, 112 L. Ed. 2d 617, 628 (1991)). In *Lambert*, the United States Supreme Court sustained an as-applied challenge to a municipal ordinance making it unlawful for any individual who had been convicted of an offense that was a California felony or would have been a felony if committed in California to remain in Los Angeles for more than five days without registering with the Chief of Police. *Lambert*, 355 U.S. at 226-27, 2 L. Ed. 2d at 230-31. After noting

6. Moreover, as the United States Supreme Court has stated, "application [of *Lambert*] has been limited, lending some credence to Justice Frankfurter's colorful prediction in dissent that the case would stand as 'an isolated deviation from the strong current of precedents—a derelict on the waters of the law.' " *Texaco, Inc. v. Short*, 454 U.S. 516, 537 n.33, 70 L. Ed. 2d 738, 756 n.33 (1982) (quoting *Lambert*, 355 U.S. at 232, 2 L. Ed. 2d at 233 (Frankfurter, J., dissenting)).

that the defendant, unlike defendant in this case, had presented proof that she "had no actual knowledge of the [registration] requirement" and that the relevant ordinance did not require proof of "willfulness," *id.* at 227, 2 L. Ed. 2d at 231, the United States Supreme Court stated that the relevant issue before it was "whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge," *id.* at 227, 2 L. Ed. 2d at 231. Recognizing that, as a general proposition, lawmakers have wide latitude in defining the scope and extent of prohibited conduct, the Court pointed out that the defendant's "conduct [was] wholly passive—mere failure to register" and did not constitute "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Id.* at 228, 2 L. Ed. 2d at 231 (citations omitted). Although the Court acknowledged the rule that "ignorance of the law will not excuse," *id.* at 228, 2 L. Ed. 2d at 231 (quoting *Shevlin–Carpenter Co. v. Minnesota*, 218 U.S. 57, 68, 54 L. Ed. 930, 935 (1910)), and that the police power is "one of the least limitable" powers of government, *id.* at 228, 2 L. Ed. 2d at 231 (quoting *District of Columbia v. Brooke*, 214 U.S. 138, 149, 53 L. Ed. 941, 945 (1909)), the Court pointed out that due process conditions the exercise of governmental authority upon the existence of proper notice "where a person, wholly passive and unaware of any criminal wrongdoing, is brought to the bar of justice for condemnation in a criminal case," *id.* at 228, 2 L. Ed. 2d at 231. In view of the fact that the ordinance at issue in *Lambert* did not condition a finding of guilt upon "any activity" whatsoever, *id.* at 229, 2 L. Ed. 2d at 232, and the fact that there were no surrounding "circumstances which might move one to inquire as to the necessity of registration," *id.* at 229, 2 L. Ed. 2d at 232, "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply [were] necessary before a conviction under the ordinance [could] stand" consistently with due process guarantees, *id.* at 229, 2 L. Ed. 2d at 232.

The statutory provision at issue in Bryant required individuals convicted of certain sexual offenses in other states to register as a sex offender with the relevant North Carolina sheriff's office within ten days after establishing residence in North Carolina or within fifteen days after the individual in question had entered North Carolina, whichever came first, with any person failing to comply with these requirements to be subject to criminal penalties. 359 N.C. at 561-63, 614 S.E.2d at 483-85. In that case, a person who had been convicted of committing an offense requiring registration in South Carolina and had been charged with violating the statutory provision in question challenged the provision's

constitutionality as applied to him given the absence of any requirement that the State "prove actual or probable notice of his duty to register to satisfy the due process notice requirement of *Lambert*." *Id.* at 565, 614 S.E.2d at 486. In rejecting the defendant's argument, this Court stated that

> to be entitled to relief under the decidedly narrow *Lambert* exception, a defendant must establish that his conduct was "wholly passive" such that "*circumstances which might move one to inquire as to the necessity of registration are completely lacking*" and that [the] defendant was ignorant of his duty to register and there was no reasonable probability that [the] defendant knew his conduct was illegal.

Id. at 568, 614 S.E.2d at 488 (quoting *Lambert*, 355 U.S. at 228-29, 2 L. Ed. 2d at 231-32 (emphasis added)). Defendant's assertion to the contrary notwithstanding, this Court never indicated in *Bryant* that the distinction between active and passive conduct set out in *Lambert* revolves around the nature and extent of the notice with which the defendant had been provided rather than upon the nature and extent of the underlying conduct that led to the imposition of the criminal sanction. Instead, this Court simply assumed that the defendant's conduct amounted to a failure to act and proceeded to examine the extent to which his failure to comply with North Carolina's sex offender registration requirements had occurred under circumstances suggesting that he should have registered upon moving from South Carolina to North Carolina. *Id.* at 566-68, 614 S.E.2d at 486-88. After making no suggestion that the defendant had actual notice of the necessity that he register as a sex offender in North Carolina after moving to this state and after concluding that the defendant's case was "rich with circumstances that would move the reasonable individual to inquire of his duty to register in North Carolina such that [the] defendant's conduct was not wholly passive and *Lambert* [was] not controlling," *id.* at 568, 614 S.E.2d at 488, this Court held that the defendant's case did "not fall within the narrow *Lambert* exception to the general rule that ignorance of the law is no excuse," *id.* at 569, 614 S.E.2d at 488.

> Thus, because "[g]enerally[,] a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply," *Texaco*, [*Inc. v. Short*,] 454 U.S. [516,] 532, 70 L. Ed. 2d [738,] 752[(1982), this Court

> remained] bound by the rule that "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130, 86 L. Ed. 2d 81, 93 (1985); *see also N. Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 69 L. Ed. 953, 957 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them.").

Id. at 569, 614 S.E.2d at 488-89 (first and seventh alterations in original). As a result, *Bryant* establishes that, in the event that a defendant's conduct is not "wholly passive," because it arises from either the commission of an act or a failure to act under circumstances that reasonably should alert the defendant to the likelihood that inaction would subject him or her to criminal liability, *Lambert* simply does not apply.

A defendant commits the offense delineated in N.C.G.S. § 90-95(d1)(1)(c) in the event that he or she has "the power and intent to control [the] disposition or use" of the substance that the defendant is charged with possessing, *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972), with knowledge of the identity of the substance that the defendant is alleged to have possessed, *Galaviz–Torres*, 368 N.C. at 49, 772 S.E.2d at 437 (citation omitted). The undisputed evidence contained in the present record tends to show that defendant actively procured the pseudoephedrine product that he was convicted of possessing over a month after it had become unlawful for him to do so and almost six months after the enactment of N.C.G.S. § 90-95(d1)(1)(c). Moreover, defendant has not argued in either this Court or the lower courts that he was ignorant of the fact that he possessed a pseudoephedrine product or that he had previously been convicted of methamphetamine possession. As defendant himself acknowledged, his conduct differs from the failure to register at issue in *Lambert* and *Bryant*. Since defendant's conviction rests upon his own active conduct rather than a "wholly passive" failure to act, there is no need for us to determine whether the surrounding circumstances should have put defendant on notice that he needed to make inquiry into his ability to lawfully purchase products containing pseudoephedrine. As a result, defendant's as-applied challenge to the constitutionality of N.C.G.S. § 90-95(d1)(1)(c) necessarily fails.

Liparota and other similar decisions, whether considered in conjunction with or in addition to *Lambert*, do not call for a different result. In *Liparota*, the United States Supreme Court considered what "mental state, if any, that the Government" needed to show, 471 U.S. at 423, 85 L. Ed. 2d at 438, in order to establish that the defendant had violated a federal statute making it a crime to "knowingly" use, transfer, acquire,

alter, or possess food stamps " 'in any manner not authorized by [the statute] or the regulations,' " *id.* at 423, 85 L. Ed. 2d at 438 (alteration in original) (quoting 7 U.S.C. § 2024(b)(1) (1977)), with the specific issue before the Court in that case being whether the term "knowingly" should be construed so as to require the Government to prove that the defendant was aware that he was acting in a manner not authorized by the applicable law, *id.* at 420-21, 85 L. Ed. 2d at 437. As a result, *Liparota*, like a number of the other decisions upon which defendant relies,[7] is a statutory construction case rather than one, like *Lambert*, in which the constitutionality of a statute was at issue. While these cases are arguably pertinent to defendant's statutory construction argument, they have no bearing on the constitutionality of N.C.G.S. § 90-95(d1)(1)(c) in the face of defendant's *Lambert*-based challenge. However, since neither defendant nor the State sought review of the Court of Appeals' determination that the offense defined in N.C.G.S. § 90-95(d1)(1)(c) does not include any sort of scienter or specific intent requirement over and above the knowledge requirement necessary for guilt of any possession-based offense by either noting an appeal or filing a discretionary review petition, defendant's statutory construction argument is not properly before us. *See* N.C. R. App. P. 16(a) (stating that "[r]eview by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals" and that, "[e]xcept when the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the issues stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed

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7. For example, *see Elonis v. United States*, ___ U.S. ___, ___, ___, 192 L. Ed. 2d 1, 8, 17 (2015) (interpreting a federal statute making "it a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another' " as requiring proof that the defendant intended to issue threats or knew that his communications would be viewed as threats (ellipsis in original) (quoting 18 U.S.C. § 875(c) 1994))); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68, 78, 130 L. Ed. 2d 372, 378, 385 (1994) (interpreting a federal statute prohibiting persons from "knowingly" transporting, shipping, receiving, distributing, or reproducing a visual depiction, if such depiction " 'involves the use of a minor engaging in sexually explicit conduct,' " to require proof that the defendant knew of the sexually explicit nature of the material and the age of the individuals depicted in the video (quoting 18 U.S.C. § 2252(a)(1)(A), -(a)(2)(A) (1988 ed. and Supp. V))); *Morissette*, 342 U.S. at 248, 271, 96 L. Ed. at 292, 304 (interpreting a federal statute providing that " 'whoever embezzles, steals, purloins, or knowingly converts' " property of the federal government shall be fined and imprisoned to require that the defendant have "knowledge of the facts, though not necessarily the law, that made the taking a conversion" (quoting 18 U.S.C. § 641 (1948))).

pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court"); *see also Estate of Fennell v. Stephenson*, 354 N.C. 327, 331-32, 554 S.E.2d 629, 632 (2001) (stating that "this Court's review of the Court of Appeals decision is limited to the issues raised by [the] defendants' petition for discretionary review" because the plaintiffs had failed to file their own discretionary review petition or a conditional discretionary review petition). As a result, given that defendant has failed to establish that his conduct in possessing pseudoephedrine was "wholly passive," *Bryant*, 359 N.C. at 568, 614 S.E.2d at 488, we hold that defendant's conviction for violating N.C.G.S. § 95-90(d1)(1)(c) did not result in a violation of his federal constitutional right to due process of law and, accordingly, reverse the decision of the Court of Appeals.

REVERSED.

Justice MORGAN dissenting.

While I agree with my learned colleagues in the majority that the Court of Appeals' interpretation of the applicability of *Liparota v. United States*, 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985) is misplaced, nonetheless I embrace the lower court's view that the narrow exception to the time-honored adage "ignorance of the law will not excuse" as articulated in *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) is applicable in the instant case regarding the properness of notice and due process. In addition, I consider the majority's interpretation of the phrase "wholly passive" as originally coined in *Lambert* and applied by this Court in *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2004), *superseded by statute*, 2006 N.C. Sess. Laws, Ch. 247, *on other grounds as recognized in State v. Moore*, 240 N.C. App. 465, 478, 770 S.E.2d 131, 141, *disc. review denied*, 368 N.C. 353, 776 S.E.2d 854 (2015) to be rigidly restrictive, particularly in light of this Court's own construction of this phrase in *Bryant*, and therefore I dissent.

In *Lambert*, a criminal defendant was found guilty of violating a registration provision of Los Angeles, California's Municipal Code because, as a person who had been "convicted of an offense punishable as a felony in the State of California," she "remain[ed] in Los Angeles for a period of more than five days without registering" with the city's Chief of Police. *Lambert*, 355 U.S. at 226, 78 S. Ct. at 241-42, 2 L. Ed. 2d at 230. As a resident of Los Angeles for over seven years at the time of her arrest on suspicion of another offense, the defendant argued that

her due process rights under the United States Constitution were violated with regard to the application of the city's registration law to her, because she had no actual knowledge of the requirement to register pursuant to the Los Angeles Municipal Code. *Id.* at 226, 78 S. Ct. at 241-42, 2 L. Ed. 2d at 230-31. In framing the legal issue in this case as a question of "whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge," the nation's highest court held that the Code's registration provision as applied to the defendant violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 227, 229-30, 78 S. Ct. at 242-44, 2 L. Ed. 2d at 231-32.

Defendant in the case *sub judice* cited the *Lambert* case as persuasive authority to support his position addressed by this dissent that his federal due process rights were violated by the application of the statute at issue to him because of his lack of proper notice of then newly-enacted N.C.G.S. § 90-95(d1)(1)(c), which had taken effect barely a month before defendant's proscribed pseudoephedrine purchase. Pursuant to the statute, his possession of such a substance was illegal in light of his prior methamphetamine convictions. Regarding the application of constitutional due process principles to the operation of statutes that create an imposition upon individuals convicted of a certain class of offenses that does not exist for the general population, I find the defendant in *Lambert* and the current defendant to be similarly situated. In *Lambert*, the defendant was required by law to register as a convicted felon if her stay in the city exceeded five days, which was not a registration requirement imposed on others; here, defendant was required by law to refrain from possessing pseudoephedrine as a person convicted of methamphetamine offenses, which was not a possession restriction imposed on others.

I also find that the defendant in the case at bar is similarly situated to the *Lambert* defendant in the resolution of the legal issue in *Lambert* which was ideally identified by the United States Supreme Court. The high court found, in applying its due process analysis to the dual components of the framed issue in *Lambert*, that the Los Angeles Municipal Code registration provision violated that defendant's due process rights because she had no knowledge of the duty to register and there was no showing made by the prosecution as to the probability of such knowledge by the defendant. *Id.* at 227-28, 78 S. Ct. at 242-43, 2 L. Ed. 2d at 231. While citing the phrase "ignorance of the law will not excuse," the United States Supreme Court conversely recognized that the exercise of

this legal axiom is limited by due process considerations. *Id.* at 228, 78 S. Ct. at 243, 2 L. Ed. 2d at 231. The Court went on to explain:

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a forfeiture might be suffered for mere failure to act. Recent cases illustrat[e] th[is] point . . . . These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

Id. (citations omitted).

I find these observations to be pertinent and applicable to the present case, just as the United States Supreme Court articulated them as insightful direction in *Lambert*. While ignorance of the law typically will not excuse one from criminal culpability, the operation of this routine legal paradigm must take a proverbial backseat when one's constitutional due process rights, undergirded by the concept of notice, are otherwise sacrificed. In the instant case, as in *Lambert*, the defendant has claimed that he had no knowledge of the law at issue when he purchased pseudoephedrine on 5 January 2014 and was therefore in *unlawful* possession of the medication which otherwise would have been in his *lawful* possession if the purchase had been made prior to the 1 December 2013 change in the law which did not apply to the general population, nor even all convicted felons, but rather only to a particular subset of convicted felons. Also in the present case, like *Lambert*, there has been no showing made of the probability that defendant knew of this change in the law which rendered *illegal* for him such activity that was *legal* for him a mere 36 days prior to his arrest. The majority's fervent embrace of the maxim that ignorance of the law provides no excuse supplies an untenable compromise of defendant's due process rights. Indeed, the well-established existence of a law and one's ignorance of it is markedly different from the newly-created existence of a law and one's unawareness of it, especially when it is a change in the law to make what was recently lawful suddenly unlawful *and* when it does not apply to everyone.

In my opinion, just as the majority fails to employ an appropriate application of the *Lambert* principle regarding due process wherein ignorance of the law by a criminal defendant is indisputable, the majority's unfortunate position is exacerbated by its strained literal interpretation of the phrase "wholly passive" in *Lambert*. The United States Supreme Court christened the term in *Lambert* to describe the lack of affirmative conduct by the defendant in that case—the failure to register one's presence—and to fit it into the framework of an individual's right to due process through the requirement of notice. The majority has focused so intently upon the "wholly passive" description of the *Lambert* defendant's proscribed conduct of failure to register that it is unable to clearly view the fullness of the relationship between due process and the required notice concerning the violation of criminal law.

The majority's position is faulty regarding its literal application of the phrase "wholly passive" on two fronts. Firstly, the United States Supreme Court in *Lambert* used the defendant's "wholly passive" failure to register as an example of the broad need to correctly balance constitutional due process with the "ignorance of the law will not excuse" axiom. The Court, in its discussion of the concept of due process through the requirement of notice in *Lambert*, spoke in sweeping terms about the importance of these legal tenets, without mentioning whether or not the illegal conduct involved was an offense of commission of an act or an offense of an omission to act. The high court thereupon applied its global look at these principles to the defendant's circumstances in *Lambert*, described her Municipal Code violation of failure to register as behavior which was "wholly passive," continued its analysis that this failure to register abrogated the breadth and depth of the integration of due process and notice, and ultimately determined that the application of the challenged registration law to the defendant's "wholly passive" failure to register was unconstitutional. In the case *sub judice*, the majority's occupation by the "wholly passive" categorization of the *Lambert* defendant's criminal act of omission has prevented it from fully grasping the wider requirement to apply constitutional due process and notice requirements so as to protect defendant's identical rights in the current case.

Secondly, this Court utilized the "wholly passive" language in *Lambert* to both discuss and decide our decision in *Bryant*. The majority in the instant case heavily relies upon *Bryant*, a criminal action in which a defendant, who was a convicted sex offender in the state of South Carolina, was notified by the South Carolina Department of Corrections prison officials of his lifelong requirement to register with

that state due to his sex offender status. *Id.* at 556, 614 S.E.2d at 480. Although the defendant was notified of this duty in verbal and written form, he failed to "provide written notice to the county sheriff where s/he was last registered in South Carolina within 10 days of the change of address to a new state," when the defendant moved out of the state of South Carolina and relocated in North Carolina. *Id.* at 556-57, 614 S.E.2d at 481 (emphasis omitted). The defendant likewise was deficient in his compliance with his South Carolina sex offender requirement that he "must send written notice of change of address to the county Sheriff's Office in the new county and the county where s/he previously resided within 10 days of moving to a new residence." *Id.* (emphasis omitted). Although the defendant moved to Winston-Salem, North Carolina and thereby established a residence in Forsyth County, nonetheless he failed to register upon establishing residency in North Carolina and did not notify the appropriate authorities in South Carolina of his out-of-state move. *Id.* at 557-58, 614 S.E.2d at 481-82. The defendant was convicted in this state of failing to register as a sex offender and attaining the status of habitual felon. *Id.* at 558, 614 S.E.2d at 482. On appeal, the defendant argued that North Carolina's sex offender registration statute was unconstitutional as applied to an out-of-state offender who lacked notice of his duty to register upon moving to North Carolina. *Id.* at 558, 614 S.E.2d at 482. The defendant relied almost exclusively upon *Lambert* in arguing his position on appeal to this Court. *Id.* at 564, 614 S.E.2d at 485. We found in *Bryant* that the defendant was not entitled to the application of *Lambert*. *Id.* at 568-69, 614 S.E.2d at 487-88. In this Court's decision, we explained:

> We find this case rich with circumstances that would move the reasonable individual to inquire of his duty to register in North Carolina such that defendant's conduct was not wholly passive and *Lambert* is not controlling. First, defendant had actual notice of his *lifelong duty* to register with the State of South Carolina as a convicted sex offender. Second, defendant had actual notice that he must register as a convicted sex offender in South Carolina for "similar offenses from other jurisdictions" and had a duty to inform South Carolina officials of a move out of state "within 10 days of the change of address to a new state," which defendant failed to do. Third, defendant himself informed law enforcement authorities that he had been convicted of a sex offense in Florida. These circumstances coupled with the pervasiveness of sex offender registration programs certainly constitute circumstances

> which would lead the reasonable individual to inquire of a duty to register in any state upon relocation.

Id. at 568, 614 S.E.2d at 488 (citations omitted) (emphasis in original). This explanation extracts pivotal terminology from the instructional language employed by the nation's Supreme Court in *Lambert* when it established the mandatory standard, which we expressly cited in *Bryant*, which I find to be the guiding rationale for adaptation in the present case and which I determine that the defendant has satisfied:

> Therefore, to be entitled to relief under the decidedly narrow *Lambert* exception, a defendant must establish that his conduct was "wholly passive" such that "*circumstances which might move one to inquire as to the necessity of registration are completely lacking*" and that defendant was ignorant of his duty to register and there was no reasonable probability that defendant knew his conduct was illegal. *Lambert*, 355 U.S. at 228-29, 78 S. Ct. 243-44, 2 L. Ed. 2d at 231-32) (emphasis added).

Id. at 568, 614 S.E.2d at 488. This Court's additional emphasis indicates that it defined the crucial phrase "wholly passive" as turning on whether the attendant circumstances could reasonably be seen as providing notice.

With the majority's determination that *Bryant* is controlling authority in the case at bar, it compounds the problematic analysis that it originally employs in the majority's erroneous premise that the requirement of a "wholly passive" act automatically disqualifies the current defendant from constitutional due process and intrinsic notice requirements where ignorance of the law is an existing circumstance. This compounded misdirection is further accentuated by the recitation of the aspects that are present in *Bryant* which clearly distinguish it from the case *sub judice*. While there are a litany of facts and circumstances occurring in *Bryant* that render the narrow *Lambert* exception as inapposite to the *Bryant* defendant, as this Court correctly decided, no such characteristics arise here. Indeed, the defendant in the instant case is deemed not to have had actual notice about the change in the law or the change in his status under the new law governing his ability to legally possess pseudoephedrine. Nor did the defendant here inform law enforcement authorities about any matters that would demonstrate his awareness about the change in the law or the change in his status under the new law. In summarizing the above delineation of factors quoted in *Bryant* and applying them to the present case, there are no circumstances here which would lead the reasonable individual to know, or even inquire

about, a duty to refrain from the possession of pseudoephedrine due to a recent change in the law which turned defendant's heretofore legal possession of the substance into a criminal offense.

Since I would find N.C.G.S. § 90-95(d1)(1)(c) unconstitutional as applied to defendant under these facts and circumstances, consistent with my interpretation of *Lambert*, and the critical distinguishing features of *Bryant*, I respectfully dissent.

Justice BEASLEY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JOSEPH MARIO ROMANO

No. 199PA16

Filed 9 June 2017

1. Search and Seizure—driving while impaired—blood draw—unconscious

In a prosecution for impaired driving, the trial court correctly suppressed blood test results taken from a highly inebriated defendant at a hospital without a warrant. The officer did not attempt to obtain a warrant for defendant's blood, did not believe any exigency existed, and instead expressly relied upon the statutory authorization set forth in N.C.G.S. § 20-16.2(b), allowing the taking and testing of blood from a person who has committed a driving while impaired offense if the person is unconscious or otherwise incapable of refusal. However, unlike breath tests, blood tests require an intrusive piercing of the skin and give law enforcement a sample that can be preserved and from which more than a blood alcohol reading can be determined. The United States Supreme Court has concluded that the Fourth Amendment does not permit warrantless blood tests incident to arrest for drunk driving. The analysis here is limited to N.C.G.S. § 20-16.2(b) and does not address any other provision of the implied-consent statute.

2. Motor Vehicles—driving while impaired—reasonable grounds

There was sufficient evidence in the record to show that a police sergeant had reasonable grounds to believe defendant had

committed a driving while impaired offense. The record showed that defendant stopped his vehicle at a congested intersection in the middle of the day, left the vehicle while wearing his sweater backwards, stumbled across four lanes of traffic, had a bottle of rum in his possession, and had vomited on himself and in his vehicle before exiting the vehicle. When police arrived, defendant was incoherent with slurred speech; his eyes were bloodshot; he smelled strongly of alcohol; and he could not stand or sit without assistance. Reasonable grounds in this context is equivalent to probable cause.

3. Appeal and Error—impaired driving—blood draw from unconscious defendant—per se exception—other issues not considered

In an impaired driving prosecution involving a blood draw at a hospital from an unconscious defendant, whether a third party was acting as an agent of the State or whether the independent source exception to the exclusionary rule applied were separate determinations from the statutory per se exception.

Chief Justice MARTIN dissenting.

Justices NEWBY and JACKSON join in this dissenting opinion.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 168 (2016), affirming an order entered on 23 March 2015 by Judge R. Gregory Horne in Superior Court, Buncombe County. On 18 August 2016, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 20 March 2017.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant/appellee.

Glenn Gerding, Appellate Defender, by Constance E. Widenhouse and Andrew DeSimone, Assistant Appellate Defenders, for defendant-appellant/appellee.

BEASLEY, Justice.

The issue before us in this case is whether N.C.G.S. § 20-16.2(b), which authorizes law enforcement to obtain a blood sample from an unconscious defendant who is suspected of driving while impaired without first obtaining a search warrant, was unconstitutionally applied to defendant. The trial court suppressed the results of defendant's blood test on Fourth Amendment grounds, and the Court of Appeals affirmed that decision. We now affirm the opinion of the Court of Appeals as modified herein.

On 6 October 2014, defendant was indicted for felony habitual driving while impaired and driving while his license was revoked. These charges were based on events that occurred on 17 February 2014. On 26 January 2015, defendant filed a pretrial motion to suppress all evidence gathered after his arrest. The motion was heard on 2 and 3 February 2015.

Based on the evidence presented at the suppression hearing, the trial court found the following facts. On 17 February 2014, Officer Tammy Bryson responded to a dispatch indicating that a white male wearing his sweater backwards and carrying a liquor bottle had stopped his SUV in the travel portion of a public road, gotten out of the vehicle, and stumbled across the multilane highway. Officer Bryson found Joseph Romano (defendant), who matched the description of the driver, sitting behind a restaurant "approximately 400 feet from the abandoned SUV." Officer Bryson observed that defendant was making incoherent statements, that his speech was slurred, that he was unable to stand due to his obvious intoxication, and that he smelled strongly of alcohol and vomit. Officer Bryson determined that defendant's faculties were appreciably impaired. Defendant was arrested for driving while impaired (DWI), and, due to his extreme level of intoxication, defendant was transported to a hospital for medical treatment. Officer Bryson requested the assistance of Sergeant Ann Fowler, a Drug Recognition Expert.

Defendant was belligerent and combative throughout his encounters with law enforcement and medical personnel. At the hospital, medical staff and law enforcement attempted to restrain defendant. Medical personnel determined it was necessary to medicate defendant to calm him down. Sergeant Fowler told the treating nurse "that she would likely need a blood draw for law enforcement purposes." Before defendant was medicated, Sergeant Fowler did not "advise[ ] [him] of his chemical analysis rights," "request[ ] that he submit[ ] to a blood draw," or obtain a warrant for a blood search. After defendant was medically subdued, the treating nurse drew blood for medical treatment purposes; however, the nurse drew more blood than was needed for treatment

purposes and offered the additional blood for law enforcement use. Before accepting the blood sample, Sergeant Fowler attempted to get defendant's consent to the blood draw or receipt of the evidence, but she was unable to wake him. The trial court found as fact that "[d]ue to his medically induced state, the Defendant was rendered unable to meaningfully receive and consider his blood test rights, unable to give or withhold his informed consent, and/or unable to exercise his right to refuse the warrantless test."

During this entire series of events, multiple officers were present to assist with the investigation, "such that an officer could have left to drive the relatively short distance (only a few miles) to the Buncombe County Magistrate's Office to obtain a search warrant." Sergeant Fowler was familiar with the blood search warrant procedure, and search warrants for a blood draw are fill-in-the-blank forms that are not time-consuming; moreover, magistrates were on duty and available during the relevant time period. Sergeant Fowler did not attempt to obtain a warrant for defendant's blood nor did she believe any exigency existed. Instead, she "expressly relied upon the statutory authorization set forth in [subsection] 20-16.2(b)," which allows the taking and testing of blood from a person who has committed a DWI if the person is "unconscious or otherwise in a condition that makes the person incapable of refusal." After taking possession of defendant's blood, Sergeant Fowler "drove to the Buncombe County Magistrate's Office and swore out warrants for the present charges," and then returned to the hospital and served the warrants on defendant. The trial court found that "nothing prevent[ed] her from obtaining a search warrant [for defendant's blood] at the same time she [obtained the other warrants] and then subsequently seizing the blood."

The trial court quoted *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013), which states that "a warrantless search of the person is reasonable only if it falls within a recognized exception," such as "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at ___, 133 S. Ct. at 1558 (citations omitted). A court "looks to the totality of circumstances" to determine whether exigent circumstances justified law enforcement in acting without a warrant. *Id.* at ___, 133 S. Ct. at 1559 (citations omitted).

The trial court concluded as a matter of law that the seizure of defendant's blood "was a search subject to Fourth Amendment protection," and, under "a totality of the circumstances test, no exigency existed justifying a warrantless search." The court concluded that N.C.G.S.

§ 20-16.2(b) "creates a per se exigency exception to the warrant requirement," and as applied here violates the holding in *McNeely*. Therefore, "any subsequent testing performed by law enforcement on the seized blood must be suppressed."

At the conclusion of the hearing on 3 February 2015, the court ruled orally on defendant's motions to suppress. The court then filed written orders on 23 March 2015.[1] The State timely appealed the trial court's order suppressing the blood test results.

The Court of Appeals affirmed the trial court's order suppressing the test results of the blood that Sergeant Fowler obtained from defendant at the hospital. *State v. Romano*, ___ N.C. App. ___, ___, 785 S.E.2d 168, 175 (2016). The court quoted *McNeely*'s holding that " 'the natural metabolization of alcohol in the bloodstream' does not present a '*per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases.' " *Id.* at ___, 785 S.E.2d at 173 (quoting *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1556). The Court of Appeals determined that N.C.G.S. § 20-16.2(b) could not justify a warrantless blood draw from an unconscious DWI defendant because *McNeely* "sharply prohibits *per se* warrant exceptions for blood draw searches." *Id.* at ___, 785 S.E.2d at 174.

Applying N.C.G.S. § 20-16.2(b) to the instant case, the Court of Appeals opined that "the record suggests, but does not affirmatively show, that [Sergeant] Fowler had 'reasonable grounds' to believe Defendant . . . was intoxicated while he drove his SUV," as opposed to his becoming intoxicated while drinking rum after leaving his vehicle. *Id.* at ___, 785 S.E.2d at 174. The court added: "More importantly, Fowler testified that she did not attempt to obtain a search warrant at any time, even though the magistrate's office was 'a couple of miles' away from the hospital." *Id.* at ___, 785 S.E.2d at 174. The court concluded that

> [t]he State's *post hoc* actions do not overcome the presumption that the warrantless search is unreasonable, and it offends the Fourth Amendment, the State Constitution, and *McNeely*. As the party seeking the warrant exception, the State did not carry its burden in proving "the exigencies of the situation made that [warrantless] course

1. At the suppression hearing, defendant made an oral motion to suppress the car keys and identification that were retrieved from him before he was transported to the hospital. The trial court denied suppression of the keys and identification; that order is not at issue in this appeal.

> imperative." *Coolidge* [*v. New Hampshire*], 403 U.S. [443,] 455, 91 S.[ ]Ct. 2022[, 2032 (1971)]. Under the totality of the circumstances, considering the alleged exigencies of the situation, the warrantless blood draw was not objectively reasonable. *See McNeely*, ___ U.S. at ___, 133 S.[ ]Ct. at 1558.

Romano, ___ N.C. App at ___, 785 S.E.2d at 174 (second alteration in original).

The Court of Appeals also concluded that neither the independent source doctrine nor the good faith exception to the warrant requirement applied in this case. *Id.* at ___, 785 S.E.2d at 174-75. The court first recognized that the State raised these arguments for the first time on appeal. Then, the court noted that under a previous Court of Appeals decision, "[t]he independent source doctrine permits the introduction of evidence initially discovered [during], or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality." *Id.* at ___, 785 S.E.2d at 174 (quoting *State v. Robinson*, 148 N.C. App. 422, 429, 560 S.E.2d 154, 159 (2002)). The court determined that "[t]he sequence of events in this case does not follow this framework," in that the attending nurse knew that defendant was going to be arrested for DWI and that officers wanted his blood drawn. *Id.* at ___, 785 S.E.2d at 174. As such, the court concluded that "the nurse cannot be an independent lawful source." *Id.* at ___, 785 S.E.2d at 174. Additionally, the Court of Appeals concluded that "[t]he good faith exception," which "allows police officers to objectively and reasonably rely on a magistrate's warrant that is later found to be invalid," *id.* at ___, 785 S.E.2d at 174 (citation omitted), was not applicable in this situation because "the officers never attempted to obtain a search warrant prior to the blood draw," *id.* at ___, 785 S.E.2d at 175. Thus, the officers could not "objectively and reasonably rely on the good faith exception." *Id.* at ___, 785 S.E.2d at 175.

[1] Both parties sought review of the Court of Appeals' decision. This Court allowed both petitions for discretionary review on 18 August 2016.

After the parties filed their petitions for discretionary review but before they filed their briefs with this Court, the Supreme Court of the United States decided *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016). After we granted review, in their briefs and oral arguments to this Court, both parties acknowledged that the *Birchfield* decision challenges the constitutionality of N.C.G.S. § 20-16.2(b). Both in its brief and oral argument before this Court, the State recognized that

Birchfield suggests that N.C.G.S. § 20-16.2(b) is unconstitutional. The State noted the differences between *Birchfield* and this case, but during oral argument stated that it could not read *Birchfield* to suggest anything other than that subsection 20-16.2(b) was unconstitutional. Defendant argued that subsection 20-16.2(b) was unconstitutional as applied to him because it created a per se exception to the warrant requirement in violation of *McNeely* and now also *Birchfield*. Defendant asserted that under *McNeely* and *Birchfield* both exigency and valid consent must be determined by a totality of the circumstances. Defendant argued that N.C.G.S. § 20-16.2(b) could only be constitutional if it could be read as allowing a blood draw from unconscious persons so long as the officer also complied with the Fourth Amendment.

The State also argued that the Court of Appeals' analyses of probable cause, state action, the independent source doctrine, and the good faith exception were incorrect and asked this Court to reverse or modify the Court of Appeals' opinion on those issues. Defendant argued that the State was procedurally barred from raising a state action, good faith, or independent source claim because these claims were not presented to the trial court.

We now address the application of the Supreme Court's decisions in *Birchfield v. North Dakota* and *Missouri v. McNeely* to the situation at bar, specifically, the warrantless blood draw from defendant for purposes of determining blood alcohol content. We hold that, in light of *Birchfield* and *McNeely*, N.C.G.S. § 20-16.2(b) is unconstitutional as applied to defendant because it permitted a warrantless search that violates the Fourth Amendment.[2] We also hold that the State's state action, good faith, and independent source claims are not properly before us.

Appellate courts review a trial court's denial of a motion to suppress to determine whether the trial court's findings of fact are supported by competent evidence, in which event they are conclusively binding on

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2. We recognize that other courts have grappled with the application of *McNeely* and *Birchfield* to implied-consent statutes as applied to unconscious DWI suspects and have reached differing conclusions. *Compare People v. Hyde*, 2017 CO 24, ¶ 32, ___ P.3d ___, ___ (holding that blood draw from an unconscious suspect was constitutional because statutory implied consent satisfies the consent exception to the Fourth Amendment warrant requirement), *with State v. Havatone*, 241 Ariz. 506, ___, 389 P.3d 1251, 1253, 1255 (2017) (holding that the "unconscious clause" of the implied-consent statute was unconstitutional as applied to the defendant and further determining that the "unconscious clause" can be constitutionally applied only when exigent circumstances prevent law enforcement from obtaining a warrant). *See generally Bailey v. State*, 338 Ga. App. 428, 434 & n.42, 790 S.E.2d 98, 103 & n.42 (2016) ("[I]mplied consent of an unconscious suspect is insufficient to satisfy the Fourth Amendment.") (collecting cases).

appeal, and whether the findings of fact support the trial court's conclusions of law. *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994) (citations omitted). Conclusions of law "are fully reviewable on appeal." *Id.* at 141, 446 S.E.2d at 585 (quoting *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 115 S. Ct. 749 (1995)). Whether a statute is constitutional is a question of law that this Court reviews de novo. We review the decision of the Court of Appeals for any errors of law. *Id.* at 149, 446 S.E.2d at 590 (citations omitted).

The Fourth Amendment to the United States Constitution and Article I of the North Carolina Constitution protect the rights of people to be secure from unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Our courts have held that drawing blood from a person constitutes a search under both the Federal and North Carolina Constitutions. *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966); *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988). A warrantless search of a person is per se unreasonable unless it falls within a recognized exception to the warrant requirement. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971).

In this case Sergeant Fowler took possession of defendant's blood from the treating nurse while defendant was unconscious without first obtaining a warrant in reliance on N.C.G.S. § 20-16.2(b). Subsection 20-16.2(b) states:

> (b) **Unconscious Person May Be Tested.** – If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.

N.C.G.S. § 20-16.2(b) (2016). Thus, we must determine whether this warrantless search violated the Fourth Amendment. This Court has never before addressed the constitutionality of N.C.G.S. § 20-16.2(b). This issue was raised, but not thoroughly discussed, in the Court of Appeals opinion in *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985). In that case the Court of Appeals considered the application of

the warrantless search exception permitted by N.C.G.S. § 20-16.2(b) but ultimately relied on *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000 (1973), and *Schmerber*, 384 U.S. 757, 86 S. Ct. 1826, to affirm the constitutionality of the officer's search and seizure in that case.[3]

In *Hollingsworth* a blood sample was taken from the defendant while he was unconscious at the hospital. The State argued that the defendant "gave implied consent to the blood test by operation of the 'implied consent' statute," N.C.G.S. § 20-16.2. 77 N.C. App. at 40, 334 S.E.2d at 466 (internal citation omitted). The Court of Appeals observed that "[N.C.]G.S. § 20-16.2 operates to imply consent by an unconscious driver to a blood alcohol test." *Id.* at 41, 334 S.E.2d at 467. The Court of Appeals, however, did not analyze whether the blood draw from the unconscious defendant was constitutional based upon an implied-consent rationale. *Id.* at 41-42, 334 S.E.2d at 467. Instead, the court held that the officer's actions did not violate the Fourth Amendment because a blood draw is only slightly intrusive, and probable cause and exigent circumstances existed, which permitted the officers to draw the defendant's blood without a warrant.[4] *Id.* at 44-45, 334 S.E.2d at 468-69. As to the exigency of destructibility of the evidence, the Court of Appeals relied on *Schmerber* in determining that "the body's breakdown of alcohol in the blood creates the reasonable risk that the evidence of intoxication will quickly be destroyed." *Id.* at 44, 334 S.E.2d at 468 (citing *Schmerber*, 384 U.S. 757, 86 S. Ct. 1826).[5]

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3. In *State v. Garcia–Lorenzo* the Court of Appeals again mentioned N.C.G.S. § 20-16.2(b) without specifically addressing or discussing the constitutionality of the statute. 110 N.C. App. 319, 430 S.E.2d 290 (1993). In that case the court relied on *Schmerber*, 384 U.S. 757, 86 S. Ct. 1826, and *State v. Howren*, 312 N.C. 454, 456, 323 S.E.2d 335, 337 (1984), in determining that the defendant's constitutional rights to due process and to be free from illegal search and seizure were not violated. *Garcia–Lorenzo*, 110 N.C. App. at 330, 430 S.E.2d at 296. The court also concluded that the defendant's *statutory* rights under N.C.G.S. 20-16.2 were not violated. *Id.* at 330-32, 430 S.E.2d at 296-97.

4. Though *Hollingsworth* has been credited with upholding N.C.G.S. § 20-16.2(b) as constitutional, in *Hollingsworth* the court did not rely on section 20-16.2(b) for its rationale, and the constitutional analysis of the blood draw in *Hollingsworth* would have been the same with or without the statute. 77 N.C. App. at 41-42, 334 S.E.2d at 467.

5. The Court of Appeals in *Hollingsworth* premised its decision, as did many courts across the country, on *Schmerber's* holding that indicated that all DWI cases involve exigent circumstances based solely on the fact that alcohol begins to naturally dissipate in the blood stream after a person stops drinking. *See, e.g.*, *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008) (holding that the natural dissipation of blood alcohol evidence is per se exigency), *cert. denied*, 555 U.S. 1137, 129 S. Ct. 1001 (2009); *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (same), *cert. denied*, 510 U.S. 836, 114 S. Ct. 112 (1993); *see also State v. Woolery*, 116 Idaho 368, 775 P.2d 1210 (1989) (same), *overruled by State v. Wulff*,

In *Schmerber v. California* the Supreme Court of the United States upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' " 384 U.S. at 770, 86 S. Ct. at 1835 (quoting *Preston v. United States*, 376 U.S. 364, 367, 84 S. Ct. 881, 883 (1964)). After the *Schmerber* decision, courts split over "whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency" that justifies a warrantless, nonconsensual blood test in drunk-driving investigations. *See McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558 & n.2. The Supreme Court settled this issue in *Missouri v. McNeely*, holding that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant," *id.* at ___, 133 S. Ct. at 1568, and that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances," *id.* at ___, 133 S. Ct. at 1563.[6] Subsection 20-16.2(b), therefore, cannot be constitutionally upheld based on a per se exigency rationale. Here the trial court aptly noted that this case does not involve a situation of exigency.

Though exigency did not relieve Sergeant Fowler of the requirement to obtain a warrant for a blood draw, the State argued that N.C.G.S. § 20-16.2 authorized Sergeant Fowler's actions because a DWI is an implied-consent offense. "[A] search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973). Thus, the State argued that by driving on the road, defendant consented to having his blood drawn for a blood test and never withdrew this statutorily implied consent before the blood draw. We must therefore determine whether the warrantless seizure of defendant's blood pursuant to N.C.G.S. § 20-16.2(b) was constitutional as applied to defendant based on the rationale that the seizure satisfied the consent exception to the warrant requirement.

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157 Idaho 416, 337 P.3d 575 (2014). The Supreme Court of the United States corrected this interpretation of *Schmerber* in its analysis of *McNeely* as discussed below. *See McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558-63.

6. *McNeely* distinguishes blood-testing cases from other destruction-of-evidence cases in which a suspect "has control over easily disposable evidence," such as *Cupp v. Murphy*, 412 U.S. at 296, 93 S. Ct. at 2004, in which the defendant was trying to get rid of evidence under his fingernails. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1561. Blood alcohol concentration, on the other hand, "naturally dissipates over time in a gradual and relatively predictable manner." *Id.* at ___, 133 S. Ct. at 1561.

North Carolina's Uniform Driver's License Act states that "[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense."[7] N.C.G.S. § 20-16.2(a) (2016). Impaired driving is an implied-consent offense. *Id.* § 20-16.2(a1) (2016). When a law enforcement officer "has reasonable grounds to believe that the person charged has committed the implied-consent offense," the officer "may obtain a chemical analysis of the person." *Id.* § 20-16.2(a).

Before the administration of any chemical analysis, the person charged must be informed orally and in writing of the following:

> (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
>
> (2) [Repealed.]
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> (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
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> (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving

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7. In *Seders v. Powell*, 298 N.C. 453, 259 S.E.2d 544 (1979), this Court discussed the purpose and rationale for this implied-consent statute.

> By accepting his license and operating a motor vehicle on our highways, plaintiff consented to submitting to a [chemical analysis] if arrested for driving under the influence. . . . We think the legislature wisely enacted the statute in question. Its purpose is to provide scientific evidence of intoxication not only for the purpose of convicting the guilty and removing them from the public highways for the safety of others, but also to protect the innocent by eliminating mistakes from objective observation such as a driver who has the odor of alcohol on his breath when in fact his consumption is little or those who appear to be intoxicated but actually suffer from some unrelated cause. Public policy behind such a statute is a sound one. It ensures civil cooperation in providing scientific evidence and avoids incidents of violence in testing by force. It gives an arrested person a reasonable time to make up his mind about the test and yet does not tie up officers involved for an unreasonable amount of time which would interfere with their regular duties.

Id. at 464-65, 259 S.E.2d at 551-52.

a commercial vehicle, or 0.01 or more if you are under the age of 21.

(5) After you are released, you may seek your own test in addition to this test.

(6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Id. "If the person charged willfully refuses to submit to [the] chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures." N.C.G.S. § 20-16.2(c) (2016). Under N.C.G.S. § 20-16.2(b), a DWI suspect who is unconscious, however, does not have to be given notification of his right to refuse any test or given the opportunity to willfully refuse the test. *Id.* § 20-16.2(b).

In 2016, after this case proceeded through the trial court and the Court of Appeals, and the parties had submitted their petitions for discretionary review to this Court, the Supreme Court of the United States decided *Birchfield v. North Dakota*. In *Birchfield* the Supreme Court for the first time addressed the constitutionality of a blood draw under the rationale of statutory implied consent, as well as whether a blood draw can be justified as a search incident to arrest.

The specific issue in *Birchfield* was "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." 579 U.S. at ___, 136 S. Ct. at 2172. The Supreme Court concluded that "the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving" but does not permit warrantless blood tests incident to arrest for drunk driving. *Id.* at ___, 136 S. Ct. at 2184. Additionally, the Supreme Court concluded "that motorists cannot be deemed to have consented to submit to a blood test [by virtue of an implied-consent statute] on pain of committing a criminal offense." *Id.* at ___, 136 S. Ct. at 2186.

In *Birchfield* the Supreme Court first considered whether the warrantless "search-incident-to-arrest" doctrine applied to breath and blood

tests. Using the analysis in *Riley v. California*, 573 U.S. ___, ___, 134 S. Ct. 2473, 2484 (2014)—which assessed the degree to which the search intrudes on an individual's privacy versus the degree to which the search is needed to promote a legitimate governmental interest—the Court determined that a breath test is a permissible search incident to arrest but a blood test is not. *Birchfield*, 579 U.S. at ___, ___, 136 S. Ct. at 2176, 2184-85. The Court noted that, unlike breath tests, blood tests require an intrusive piercing of the skin and give law enforcement a sample that can be preserved and from which more than a blood alcohol reading can be determined. *Id.* at ___, 136 S. Ct. at 2178.

After determining that a warrantless blood test could not be justified as a search incident to arrest, the Court turned to whether a blood test is permissible based on a driver's statutory implied consent to submit to it. The Court noted that its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at ___, 136 S. Ct. at 2185. Nonetheless, "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads," *id.* at ___, 136 S. Ct. at 2185, and the Court determined that imposing a criminal penalty for refusing to submit to a blood test exceeds such a limit, *id.* at ___, 136 S. Ct. at 2186.

Here N.C.G.S. § 20-16.2(b) does not impose a criminal penalty for refusal to submit to a warrantless blood test; rather, the statute allows police to take blood from an unconscious person suspected of driving while intoxicated on the basis that the person has given implied consent by choosing to drive on public roads. Thus, *Birchfield* does not answer the specific question before us, namely, whether treating N.C.G.S. § 20-16.2(b) as a per se consent exception to the warrant requirement is constitutional under the Fourth Amendment.[8] Though we do not have definitive guidance from the Supreme Court, based on the Supreme Court's Fourth Amendment precedent regarding consent as well as the rationale and language the Court employed in *McNeely* and *Birchfield*, we conclude that the blood draw from defendant cannot be justified

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8. As discussed above, there is no dispute that the constitutionality of N.C.G.S. § 20-16.2(b) cannot be upheld under a per se exigency rationale. In *McNeely* the Supreme Court concluded that the natural dissipation of alcohol in the blood stream does not always constitute an exigency justifying the warrantless taking of a blood sample. 569 U.S. at ___, 133 S. Ct. at 1556. Exigent circumstances must be determined by the totality of the circumstances on a case-by-case basis. *Id.* at ___, 133 S. Ct. at 1559.

under N.C.G.S. § 20-16.2(b) as a per se categorical exception to the warrant requirement.

Treating subsection 20-16.2(b) as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances. "[W]hether a consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2047-48. Further, the State has the burden to prove that "consent was, in fact, freely and voluntarily given." *Id.* at 222, 93 S. Ct. at 2045 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 1792 (1968)). Consent is not voluntary if it is "the product of duress or coercion, express or implied." *Id.* at 227, 93 S. Ct. at 2048. A court's decision regarding whether a suspect's consent was voluntary is based on "a careful scrutiny of all the surrounding circumstances" and does not "turn[ ] on the presence or absence of a single controlling criterion." *Id.* at 226, 93 S. Ct. at 2047. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness . . . ." *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-04 (1991); *State v. Stone*, 362 N.C. 50, 53, 653 S.E.2d 414, 417 (2007).

Additionally, in *McNeely*, though the Supreme Court only specifically addressed the exigency exception to the warrant requirement, *McNeely*, 569 U.S. at ___ n.3, 133 S. Ct. at 1559 n.3, the Court spoke disapprovingly of per se categorical exceptions to the warrant requirement, *id.* at ___, 133 S. Ct. at 1564 ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. . . . [A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence."). Moreover, language in *Birchfield*, though not specifically on point, indicates that taking blood without a warrant is an unreasonable search and seizure under the Fourth Amendment unless an exception to the warrant requirement applies, such as exigent circumstances or valid consent.

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication

> or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Id. at ___, 136 S. Ct. at 2184-85.[9]

Thus, while the specific issue analyzed in *Birchfield* does not directly address the constitutionality of N.C.G.S. § 20-16.2(b) as applied to defendant, the reasoning and analysis in *Birchfield* and *McNeely*, as well as other Fourth Amendment precedent, suggest that blood draws may only be performed after either obtaining a warrant, obtaining valid consent from the defendant, or under exigent circumstances with probable cause. Here, because Sergeant Fowler relied on N.C.G.S. § 20-16.2(b) to take a blood draw outside these circumstances, we conclude that N.C.G.S. § 20-16.2(b) was unconstitutionally applied to defendant.[10]

Here there is no dispute that the officer did not get a warrant and that there were no exigent circumstances. Regarding consent, the State's argument was based solely on N.C.G.S. § 20-16.2(b) as a per se exception to the warrant requirement. To be sure, the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw, but the statute alone does not create a per se exception to the warrant requirement. The State did not present any other evidence of consent or argue that under the totality of the circumstances defendant consented to a blood draw. Therefore, the State did not carry its burden of proving voluntary consent. As such, the trial court correctly suppressed the blood evidence and any subsequent testing of the blood that was obtained without a warrant.

[2] We now turn to the State's remaining concerns regarding the Court of Appeals' opinion below. To the extent that the Court of Appeals questioned whether Sergeant Fowler had "reasonable grounds" to believe that defendant had committed the implied-consent offense of DWI, we modify that portion of the opinion. The Court of Appeals stated that "[t]he record does not affirmatively show Defendant was intoxicated while he drove his SUV," *Romano*, ___ N.C. App. at ___, 785 S.E.2d at

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9. This statement was made during the Court's analysis of whether a warrantless blood draw could be justified as a search incident to arrest. We believe that that the sentiment is also applicable to our analysis of implied consent.

10. Our analysis here is limited to N.C.G.S. § 20-16.2(b) and does not address any other provision of the implied-consent statute.

174; however, a finding of "reasonable grounds" does not require "affirmative proof." "Reasonable grounds" in this context is equivalent to "probable cause." *See Moore v. Hodges*, 116 N.C. App. 727, 729-30, 449 S.E.2d 218, 220 (1994) (citations omitted); *Rock v. Hiatt*, 103 N.C. App. 578, 584, 406 S.E.2d 638, 642 (1991) (citations omitted). Probable cause for an arrest requires "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty"; it does not require that "the evidence . . . amount to proof of guilt, or even to prima facie evidence of guilt." *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971).

The record shows that defendant stopped his vehicle at a congested intersection in the middle of the day, left the vehicle while wearing his sweater backwards, and proceeded to stumble across four lanes of traffic. Defendant had a bottle of rum in his possession, and had vomited on himself and in his vehicle before exiting the SUV. When police arrived, defendant was incoherent with slurred speech; his eyes were bloodshot; he smelled strongly of alcohol; and he could not stand or sit without assistance. Thus, there was sufficient evidence in the record to show that Sergeant Fowler had reasonable grounds to believe defendant had committed a DWI offense. Furthermore, defendant has never contested this issue on appeal and has conceded that there were reasonable grounds to believe he committed a DWI offense.

The State also argues that there was no state action and that the good faith exception and the inevitable discovery and independent source exceptions to the exclusionary rule are applicable in this case. A review of the record reveals that the State did not advance these arguments at the suppression hearing; accordingly, the issues are waived and are not properly before this Court. N.C. R. App. P. 10; *see State v. Cooke*, 306 N.C. 132, 136-38, 291 S.E.2d 618, 621-22 (1982) (stating that a party is limited to specific grounds argued to the trial court and concluding in particular that the State cannot assert new bases to justify admissibility of evidence obtained from a warrantless search for the first time on appeal).

Here defendant argued at the suppression hearing that the statute's per se exception to the warrant requirement was unconstitutional under *McNeely*, and the trial court specifically asked the parties for additional research regarding "the constitutionality of the statute . . . in regard to the unconscious defendant." The State was aware that the statute's constitutionality was questionable and that Sergeant Fowler's actions may have been illegal. The State had the opportunity at the suppression

hearing to argue that the good faith exception to the exclusionary rule should apply if the court determined that the officer's actions were unconstitutional, but the State failed to raise the argument. N.C. R. App. P. 10; *see, e.g.*, *State v. Rodrigues*, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (per curiam) (holding that the State, when seeking reversal of a trial court's grant of a motion to suppress, waived the argument that a good faith exception to the exclusionary rule applied because "the State had never presented the issue . . . to the trial court" and observing that "[i]t is a generally accepted rule that issues not raised at the trial level will not be considered on appeal" (citations omitted)).

Additionally, the trial court explicitly invited the parties to make an argument regarding whether the nurse was a third-party actor; the State made no argument that the nurse was not a state actor, or that the seizure of the blood was not an act of the State and thus, was not subject to the Fourth Amendment's search and seizure analysis. *See Cooke*, 306 N.C. 132, 136, 291 S.E.2d 618, 621 (1982) (concluding that the State could not advance the argument on appeal that "the Fourth Amendment does not apply" when it "failed to [present this argument] at the suppression hearing in the trial court"); *see also United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013) (noting that the government bears the burden to prove, as an initial matter, that a challenged search or seizure is not unlawful (citing, *inter alia*, *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 2097 (1984)), *cert denied*, ___ U.S. ___, 134 S. Ct. 1572 (2014).

[3] Though we do not address the merits of the State's arguments regarding these exceptions to the exclusionary rule, we will address the State's concerns regarding the Court of Appeals' statements of law pertaining to these issues. The Court of Appeals' opinion seems to limit the federal good faith exception's[11] applicability to situations in which law enforcement reasonably relies on a magistrate's warrant that is later found to be invalid; however, this is not the only situation in which the good faith exception to the exclusionary rule may apply. For example, the good faith exception also applies to searches conducted in reasonable reliance on subsequently invalidated statutes, as well as searches conforming to appellate precedent. *See Davis v. United States*, 564 U.S. 229, 237-41, 131 S. Ct. 2419, 2428-29 (2011); *Illinois v. Krull*, 480 U.S. 340, 349-60, 107 S. Ct. 1160, 1166-72 (1987). Additionally, to the extent that

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11. We specify that this is the federal good faith exception to the exclusionary rule because in *State v. Carter* this Court declined to adopt a good faith exception to the state constitution's exclusionary rule. 332 N.C. 709, 724, 370 S.E.2d 553, 562 (1988).

the Court of Appeals conflated the state action analysis with the independent source and inevitable discovery analysis in concluding that "the nurse cannot be an independent lawful source," we clarify that whether a third party is acting as an agent of the State and whether the independent source exception to the exclusionary rule applies are separate determinations.

In sum, we hold that N.C.G.S. § 20-16.2(b) is unconstitutional under the Fourth Amendment as applied to defendant in this case. We also hold that the State's state action, good faith, and independent source claims are not properly before us.

For the foregoing reasons we affirm as modified herein the Court of Appeals' opinion affirming the trial court's order suppressing any testing of defendant's blood. We remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

Chief Justice MARTIN dissenting.

Subsection 20-16.2(b) of our General Statutes authorizes the police to direct the drawing of blood from an unconscious defendant who is suspected of impaired driving in order to determine the defendant's blood-alcohol content, based on the defendant's implied consent to a blood test. *See generally* N.C.G.S. § 20-16.2(a)-(b) (2015). In this case, Sergeant Ann Fowler, a supervising sergeant in the Asheville-Buncombe DWI task force, relied in good faith on this statutory provision when she accepted a portion of defendant's blood that the attending nurse drew on the day of defendant's arrest for impaired driving. At that time, the provision had never been held unconstitutional. It may now be unconstitutional, at least as applied to defendant, but only because of a decision that the Supreme Court of the United States issued after the State had filed a petition for review of this case in this Court. The search that was conducted in this case therefore falls into the good faith exception to the exclusionary rule under federal law. Because of that, and because—contrary to what the majority says—the State preserved its good faith exception argument for appeal, I respectfully dissent.

First, let me address the preservation issue. To understand why the majority is wrong to say that the State failed to preserve its good faith exception argument, it helps to look at what happened when.

In 1993, more than two decades before this case arose, our Court of Appeals upheld subsection 20-16.2(b) against a Fourth Amendment challenge. In *State v. Garcia–Lorenzo*, the Court of Appeals ruled that the defendant in that case, who—like defendant here—was sedated for medical reasons and then subjected to a blood draw while unconscious, "had no constitutional right to refuse to submit to chemical analysis." 110 N.C. App. 319, 327-30, 430 S.E.2d 290, 294-96 (1993). Citing an opinion of this Court, the Court of Appeals indicated that the General Assembly had simply "given the right to refuse to submit to chemical analysis as a matter of grace." *Id.* at 330, 430 S.E.2d at 296 (citing *State v. Howren*, 312 N.C. 454, 456, 323 S.E.2d 335, 337 (1984)). The Court of Appeals also analyzed whether the defendant's statutory rights had been violated and found that they had not been. *Id.* at 330-32, 430 S.E.2d at 296-97. It then held that the evidence derived from the blood draw was admissible. *See id.* at 327, 332, 430 S.E.2d at 294, 297.[1]

Twenty years later, in 2013, the Supreme Court of the United States decided *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013). *McNeely* held that, in drunk-driving investigations, the dissipation of alcohol in the bloodstream through natural metabolic processes does not create a per se exigency that would permit a warrantless blood draw in every case. *Id.* at ___, 133 S. Ct. at 1556. Instead, the government has to show, on a case-by-case basis, that exigent circumstances other than the mere dissipation of alcohol are present. *See id.* at ___, ___, 133 S. Ct. at 1556, 1568.

In 2014, the search and arrest pertinent to this case took place. Defendant was detained for impaired driving, taken to a hospital for medical treatment, and subjected to a warrantless blood draw while unconscious.

In January 2015, defendant filed his motion to suppress. At the suppression hearing, which took place the next month, Sergeant Fowler testified that she relied on subsection 20-16.2(b) when she took custody

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1. The majority downplays *Garcia–Lorenzo*'s significance by claiming that *Garcia–Lorenzo* did not "specifically address[ ] or discuss[ ] the constitutionality of" subsection 20-16.2(b). That is true in a strictly formal sense, but not in any practical sense. In *Garcia–Lorenzo*, the Court of Appeals discussed whether the admission of evidence obtained under the subsection was constitutional, but not whether the subsection *itself* was constitutional. *See id.* at 330, 430 S.E.2d at 296. As I have just noted, however, the Court of Appeals ruled that an unconscious defendant did not have a constitutional right to refuse a blood draw. *See id.* at 328-30, 430 S.E.2d at 295-96. It necessarily followed that, in the Court of Appeals' view, subsection 20-16.2(b) was constitutional.

of defendant's blood, and the State argued that subsection 20-16.2(b) was constitutional. Defendant responded that, under *McNeely*, subsection 20-16.2(b) was unconstitutional because it created a per se exigent circumstances exception to the warrant requirement. The trial court agreed with defendant, found that no other exigency to justify a warrantless search was present in this case, and excluded the blood test results.

The State appealed. In its brief to the Court of Appeals, the State again argued that subsection 20-16.2(b) was constitutional. It also argued in its brief to the Court of Appeals that, even if that subsection were unconstitutional, the good faith exception to the exclusionary rule would make the evidence in question admissible. In April 2016, the Court of Appeals affirmed the trial court's decision. *See State v. Romano*, ___ N.C. App. ___, ___, 785 S.E.2d 168, 175 (2016). The State filed a petition for discretionary review with this Court.

In June 2016, while the State's petition was pending in this Court, the Supreme Court of the United States decided *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016). *Birchfield* addressed whether implied-consent laws that make it a crime for a lawfully arrested drunk-driving suspect to refuse to take a breath test or a blood test comply with the Fourth Amendment. *Id.* at ___, ___, 136 S. Ct. at 2166-67, 2184. Early in the *Birchfield* opinion, the Court suggested that this analysis hinged on whether a warrantless search of breath or blood is constitutional and said that, if it is, then refusing to submit to the search can be criminalized. *See id.* at ___, 136 S. Ct. at 2172-73. Later on in the opinion, the Court found that warrantless breath tests can be criminalized because they are searches incident to arrest, but that warrantless blood tests cannot be criminalized under either a search-incident-to-arrest theory or an implied-consent theory. *Id.* at ___, 136 S. Ct. at 2184-86. Read together, these two parts of *Birchfield* may indicate that it is unconstitutional to conduct a warrantless blood draw of a suspected drunk driver based only on the driver's statutorily inferred consent. If so, then it would be unconstitutional to conduct a warrantless blood draw based only on implied consent even when the suspected drunk driver is unconscious.

After *Birchfield* was handed down, this Court allowed the State's petition for discretionary review. In its briefing before this Court, the State all but concedes that subsection 20-16.2(b) is unconstitutional under *Birchfield* but also argues that it preserved its good faith argument for appeal, and it continues to argue that the good faith exception applies here.

It is beyond dispute that the State briefed the exclusionary rule's good faith exception before the Court of Appeals and again before this Court. So the majority's ruling that the State's good faith argument has not been preserved rises or falls on whether the State adequately raised that argument before the trial court. The State's *only* justification for accepting the blood drawn by the nurse that Sergeant Fowler testified about at the suppression hearing, and that the State argued to the trial court at that hearing, was that Sergeant Fowler had relied on N.C.G.S. § 20-16.2(b). Because the State clearly argued that Sergeant Fowler relied on this statutory provision, the majority can maintain that the State failed to preserve its good faith argument only if, in the majority's view, the State had to couch its statutory-reliance argument in the language of the good faith exception. In other words, the majority must think that it was wrong for the State to do what the State in fact did: argue before the trial court that Sergeant Fowler reasonably relied on the statute and that the statute was constitutional.[2]

But why should the State have to do otherwise? As we have seen, when the State opposed defendant's motion to suppress before the trial court, binding precedent from our own Court of Appeals seemed to make it clear that subsection 20-16.2(b) withstood Fourth Amendment scrutiny. Did the State really have to make an alternative argument, in the face of then-binding caselaw that supported its main argument, that assumed the statute's invalidity and that used the magic words "good faith exception"?

Remember, it was not until *Birchfield* was decided—and thus not until this case had already been appealed to this Court—that the Supreme Court called subsection 20-16.2(b) into constitutional doubt. When this case was still before the trial court, therefore, the State had every reason to think that Sergeant Fowler had relied on a *constitutionally permitted* statute that justified the search of defendant.

The majority suggests that *McNeely* changed the equation. Granted, *McNeely* had already been handed down when the trial court held the suppression hearing here. *McNeely*'s holding, however, was about exigency—specifically, whether exigency always exists when the police

2. The majority also cites *State v. Rodrigues*, a 1985 case from Hawaii, to support its argument. *See* 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (per curiam). But in *Rodrigues*, the State of Hawaii relied only on actual consent when arguing before the trial court that the evidence in question there was admissible. *See id.* at 497-98, 692 P.2d at 1157-58. Hawaii did not "even hint[ ]" at the trial court level "that [it] was also relying . . . on a 'good faith' exception theory." *Id.* at 498, 692 P.2d at 1158.

suspect a person of driving drunk because alcohol in the bloodstream naturally dissipates over time. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1556. Exigency, of course, is an exception to the warrant requirement, *see*, *e.g.*, *id.* at ___, 133 S. Ct. at 1558, meaning that an officer does not need a warrant to conduct a search when exigent circumstances exist, *see*, *e.g.*, *Kentucky v. King*, 563 U.S. 452, 460 (2011). But an officer who has *consent* to conduct a search does not need a warrant either. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). In other words, consent and exigency are two separate exceptions to the warrant requirement. It follows that an officer with consent to conduct a search does not need exigent circumstances to justify it.

This case has always been about consent. As the majority admits, "Sergeant Fowler did not . . . believe any exigency existed. Instead, she expressly relied upon the statutory authorization set forth in [subsection] 20-16.2(b) . . . ." (Brackets in original; internal quotation marks omitted.) And subsection 20-16.2(b) allows an officer to direct the drawing of blood from an unconscious suspect based on the suspect's implied consent. *See* N.C.G.S. § 20-16.2(a)-(b). *McNeely*'s holding thus has no bearing on this case, which hinges on defendant's consent or lack thereof, not on exigent circumstances.

So, given the state of the law as it existed at the time of the suppression hearing, the State had absolutely no reason to weaken its case by conceding that the statute on which Sergeant Fowler relied might be unconstitutional. Controlling caselaw from our Court of Appeals settled the issue—at least for the purposes of any proceedings before the trial court—and no higher court had done anything to undermine that caselaw. In that situation, the State should be allowed to oppose a suppression motion by depending exclusively on the argument that a statute relied on for a Fourth Amendment search is in fact constitutional. By refusing to give the State this tactical option—even when the State has based its whole argument on an officer's good faith reliance on a facially valid statute—the majority has effectively penalized the State for having a strong case.

To support its anti-preservation argument, the majority cites Rule 10 of the North Carolina Rules of Appellate Procedure. But, far from supporting the majority's argument, that rule only bolsters my point. It states that, "[i]n order to preserve an issue for appellate review, a party must . . . stat[e] the specific grounds for the ruling the party desired the court to make *if the specific grounds were not apparent from the context.*" N.C. R. App. P. 10(a)(1) (emphasis added). This rule squarely applies here. When the State is exclusively arguing before the trial court

that an officer relied on a statute to conduct a search, how could the State *not* want the trial court to rule that the officer relied on the statute *in good faith*? As I will discuss below, as long as the statute in question is not clearly unconstitutional, that is all that is required for the good faith exception to apply. So Rule 10 shows that, in this particular context, the State does not even need to expressly make a good faith exception argument in order to preserve that argument. A trial court should recognize that if the State loses on the Fourth Amendment merits, the State will still want the trial court to rule in its favor based on the good faith exception.

For all of these reasons, I would hold that the State has preserved its good faith exception argument for appeal. I now turn to the substantive constitutional question, which is governed exclusively by federal law.[3]

In *United States v. Leon*, the Supreme Court of the United States held that evidence obtained through a Fourth Amendment violation should not be excluded if, when conducting the search that led to the evidence, the police rely in good faith on a search warrant issued by a neutral and detached magistrate, even if the warrant is later found to lack probable cause. *See* 468 U.S. 897, 900, 925-26 (1984). The Court explained that the good faith standard is one of objective, not subjective, reasonableness. *Id.* at 919 n.20. *Illinois v. Krull* then held, based on the principles announced in *Leon*, that the good faith exception to the exclusionary rule also applies when the police rely in good faith on a *statute* authorizing warrantless searches that is later found to be unconstitutional. *See* 480 U.S. 340, 342, 349-55 (1987).

Although *Krull* pertained specifically to an administrative search, *id.* at 342, the rationale for the good faith exception that both *Leon* and *Krull* provide plainly extends to other kinds of searches as well. The Court in *Leon* noted that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916. And in *Krull*, the Court said that "[t]he approach used in *Leon* is equally applicable to the present case" because "suppress[ing] evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect" as suppressing evidence obtained "in objectively reasonable reliance on a warrant." *Krull*, 480 U.S. at 349. Paraphrasing *Leon*, the Court in *Krull* commented that "[p]enalizing the officer for the [legislature's] error,

3. Defendant's written motion to suppress does not refer to the state constitution, and his arguments at the suppression hearing were based solely on the Fourth Amendment.

rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 350 (second brackets in original) (quoting *Leon*, 468 U.S. at 921).

Other cases that the Supreme Court has handed down since *Leon* reinforce the good faith exception's broad applicability. In *Arizona v. Evans*, for instance, the Court addressed whether the good faith exception applies when a police officer reasonably relies on a police record that indicates the existence of an outstanding arrest warrant but that is later shown to be erroneous. 514 U.S. 1, 3-4 (1995). Noting that an employee of a Clerk of Court's office was the source of the error in that case, the Court held that the good faith exception applied. *Id.* at 4, 14-16. More recently, the Court held that the good faith exception applies "when the police conduct a search in compliance with binding precedent that is later overruled." *Davis v. United States*, 564 U.S. 229, 232 (2011). The reason that all of these cases are decided as they are boils down to the same core principle: that the exclusionary rule is designed to deter *police* misconduct, not misconduct or mistakes by other government actors. *See id.*; *Evans*, 514 U.S. at 14; *Krull*, 480 U.S. at 349-50; *Leon*, 468 U.S. at 916.

In this case, although Sergeant Fowler did not exactly "direct the taking of a blood sample," as subsection 20-16.2(b) contemplates, she still relied on that subsection when she took custody of excess blood from a vial that the attending nurse had drawn for medical purposes. After all, if subsection 20-16.2(b) permits a blood draw from an unconscious defendant, it must also permit the lesser intrusion entailed by taking custody of blood that has already been drawn for other purposes, which is what Sergeant Fowler did here.

Sergeant Fowler's reliance on subsection 20-16.2(b) was objectively reasonable, too. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Krull*, 480 U.S. at 349-50. To reiterate, not only was subsection 20-16.2(b) not clearly *unconstitutional* when defendant's blood was drawn; it had already been held *constitutional* by our Court of Appeals.

The good faith exception to the exclusionary rule applies in instances where "suppression would do nothing to deter police misconduct . . . and . . . would come at a high cost to both the truth and the public safety." *Davis*, 564 U.S. at 232. Because Sergeant Fowler relied in good faith on N.C.G.S. § 20-16.2(b) when she took custody of blood drawn by the attending nurse, and because the State preserved its argument to this

effect, I would hold that the good faith exception applies here. I would therefore reverse the decision of the Court of Appeals and remand for a trial in which the blood test results that defendant seeks to suppress are deemed admissible under the Fourth Amendment. As a result, I respectfully dissent.

Justices NEWBY and JACKSON join in this dissenting opinion.

Justice NEWBY dissenting.

I fully agree with and join the dissenting opinion, which correctly applies our waiver precedent and thoughtfully discusses the good faith exception. I am also of the view, however, that, on the record before us, the medical staff who drew defendant's blood were not state actors. State action is a threshold consideration in any Fourth Amendment analysis. Because the constitutional protections against unreasonable searches and seizures apply only to actions by governmental officials and their agents, and defendant failed to establish that the medical personnel were such agents, the blood draw at issue was not a search contemplated by the Fourth Amendment.

Defendant received treatment for severe intoxication at a private hospital. Upon arrival there, defendant was belligerent and combative toward the medical staff and the officers present. Irrespective of any criminal investigation, "medical staff determined it was necessary to medicate" defendant and draw his blood, though they knew law enforcement might require a blood sample for their DWI investigation. Officers were not present when medical staff drew defendant's blood. Importantly, nothing in the record suggests the officers coerced, enticed, induced, or otherwise instructed medical staff to draw defendant's blood or to draw more than was medically necessary.

The Fourth Amendment declares, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; *see also State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510-11 (1992) (adopting the inevitable discovery exception to the exclusionary rule and noting that our state constitution's limitation against unreasonable searches and seizures does not confer protections beyond those afforded by the Fourth Amendment). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that

property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984) (footnotes omitted).

Though a blood draw can constitute a search under the Fourth Amendment, *e.g.*, *Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696, 704 (2013), the Fourth Amendment protects against unreasonable searches or seizures by state actors exclusively, *e.g.*, *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 576, 65 L. Ed. 1048, 1051 (1921) (concluding that the Fourth Amendment proscribes only unreasonable governmental action); *see also State Action*, *Black's Law Dictionary* (10th ed. 2014) ("Anything done by a government; . . . an intrusion on a person's rights . . . by a governmental entity . . . ."). The Fourth Amendment generally does not apply to a search or seizure, even an unreasonable one, by a private person. *See Burdeau*, 256 U.S. at 475, 41 S. Ct. at 576, 65 L. Ed. at 1051. Thus, evidence obtained from an unreasonable private search need not be excluded from a criminal trial. *See Walter v. United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 2401, 65 L. Ed. 2d 410, 417 (1980) (plurality opinion) ("[A] wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and . . . does not deprive the government of the right to use evidence that it has acquired lawfully." (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90, 91 S. Ct. 2022, 2048-50, 29 L. Ed. 2d 564, 595-96 (1971))).

In certain cases, however, the Fourth Amendment may limit private conduct when private persons become state actors, thereby acting as " 'instrument[s]' or agent[s] of the state." *Coolidge*, 403 U.S. at 487, 91 S. Ct. at 2048-49, 29 L. Ed. 2d at 595 (citations omitted). Whether a private party becomes a state actor "turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.' " *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614-15, 109 S. Ct. 1402, 1411-12, 103 L. Ed. 2d 639, 658 (1989) (internal citations omitted) (quoting *Coolidge*, 403 U.S. at 487, 91 S. Ct. at 2049, 29 L. Ed. 2d at 595). Relevant factors include "the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police." *State v. Sanders*, 327 N.C. 319, 334, 395 S.E.2d 412, 422 (1990), *cert. denied*, 498 U.S. 1051, 111 S. Ct. 763, 112 L. Ed. 2d 782 (1991). The defendant, not the State, bears the burden of establishing state action, thus triggering the protections of the Fourth Amendment. *See State v. Taylor*, 298 N.C. 405, 415, 259 S.E.2d 502, 508 (1979) ("[I]t is well settled that the burden is on defendant to establish [Fourth Amendment] standing." (citing, *inter alia*, *Jones v. United States*, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed. 2d 697,

702 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980))); *see, e.g.*, *Sanders*, 327 N.C. at 334, 395 S.E.2d at 422 (admitting the evidence because the defendant "failed to show that [a private citizen's] seizure specifically of the topaz ring and white gold watch was" "attributable to the State").

Though the State is on solid legal ground in making its statutory argument, our precedent "requires that we first determine whether, under the facts of this case, there has been a search." *State v. Reams*, 277 N.C. 391, 396, 178 S.E.2d 65, 68 (1970), *cert. denied*, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), *overruled on other grounds by State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994); *see State v. Raynor*, 27 N.C. App. 538, 540, 219 S.E.2d 657, 659 (1975) ("Before the legality of an alleged search may be questioned, it is necessary to first determine whether there has actually been a search."); *see also Reams*, 277 N.C. at 396, 178 S.E.2d at 68 ("[W]hen the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures."). Because the Fourth Amendment's prohibition on unreasonable searches operates only against the government and its agents, *Burdeau*, 256 U.S. at 475, 41 S. Ct. at 576, 65 L. Ed. at 1051, the nature of the actor remains a threshold question.

Here the record before us does not support the existence of an agency relationship between the medical staff of a private hospital and law enforcement. Nothing in the record suggests the government had anything to do with the blood draw, and defendant fails to persuasively argue that the blood draw was the result of state action. To the contrary, the record reflects that law enforcement never asked the medical staff to draw defendant's blood and were not in the room during the blood draw. Nothing suggests that law enforcement prompted, enticed, or induced the medical staff to draw more blood than medically necessary. Instead, medical staff drew defendant's blood for purposes of his medical treatment, irrespective of any criminal investigation. Whether medical staff knew that law enforcement would eventually need a sample of defendant's blood is irrelevant. *See State v. Kornegay*, 313 N.C. 1, 10-12, 326 S.E.2d 881, 890-91 (1985) (concluding that a private citizen who copied a defendant's records to turn over to the State Bureau of Investigation in exchange for prosecutorial immunity was not a state agent). When the nurse, "of her own accord," produced the blood sample, "it was not incumbent on the police to stop her or avert their eyes." *Coolidge*, 403 U.S. at 489, 91 S. Ct. at 2049, 29 L. Ed. 2d at 596. Accordingly, there was nothing wrongful about the State's "acquisition of the [vial of blood]

or its examination of [its] contents to the extent that [the blood] had already been examined by third parties." *Walter*, 447 U.S. at 656, 100 S. Ct. at 2401, 65 L. Ed. 2d. at 417.

The majority's puzzling attempt to avoid this issue concludes, in a few lines of dismissive prose, that the State waived any state action argument. The purpose of the waiver rule is to "prevent . . . errors . . . that [a] court could have corrected if brought to its attention at the proper time." *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984). Here it is beyond dispute that the State briefed the issue of state action before the Court of Appeals and again before this Court.[1] Moreover, the trial court recognized that "[t]he issue with regard to the blood . . . [being] drawn by a third party" was before the court and concluded that "the blood draw . . . [was] a part of the normal course of treatment and would have occurred without any subsequent police action." It is our duty as a jurisprudential court to address state action as the threshold legal question in any Fourth Amendment analysis.

Even assuming that a Fourth Amendment search occurred, defendant fails to persuasively argue that he retained any ongoing expectation of privacy in the vial of blood. *See State v. Barkley*, 144 N.C. App. 514, 518-19, 551 S.E.2d 131, 134-35, *appeal dismissed*, 354 N.C. 221, 554 S.E.2d 646 (2001). The sample here was lawfully removed from his body, and the State's analysis of the blood sample did not involve any further search and seizure of defendant's person. *See id.* at 518-20, 551 S.E.2d at 134-35; *see also Washington v. State*, 653 So. 2d 362, 364 (Fla. 1994) (per curiam) (concluding that once the samples were validly obtained in one case, the State was not prohibited from using them in another case), *cert. denied*, 516 U.S. 946, 116 S. Ct. 387, 133 L. Ed. 2d 309 (1995); *Bickley v. State*, 227 Ga. App. 413, 415, 489 S.E.2d 167, 170 (1997) (finding no constitutional violation when the defendant's blood was drawn pursuant to a warrant and used in an unrelated case, noting that, "[i]n this respect,

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1. Before the Court of Appeals, the State argued, *inter alia*, that the blood draw was for medical purposes and was not "government action." Before this Court, the State argued, *inter alia*, that the blood draw was conducted by a third party actor, not an agent of the police.

The State has also advanced an argument based upon the independent source exception to the exclusionary rule. This exception is distinct from the state action requirement and permits the introduction of evidence initially discovered from an unlawful search "but later obtained independently from activities untainted by the initial illegality." *Murray v. United States*, 487 U.S. 533, 537, 108 S. Ct. 2529, 2533, 101 L. Ed. 2d 472, 480 (1988). Regardless, the independent source doctrine presupposes that the invasion of privacy involved a state actor and that a search occurred.

DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations" (brackets in original)); *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001) (stating that once a DNA profile is obtained, the owner no longer has any possessory or ownership interest in it); *Wilson v. State*, 132 Md. App. 510, 550, 752 A.2d 1250, 1272 (2000) (concluding that the lawful use of the defendant's DNA in an unrelated case did not violate his Fourth Amendment rights because the defendant lost "[a]ny legitimate expectation of privacy that [he] had in his blood . . . when that blood was validly seized").

To be sure, "an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.' " *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1558, 185 L. Ed. 2d at 704 (quoting *Winston v. Lee*, 470 U.S. 753, 760, 105 S. Ct. 1611, 1616, 84 L. Ed. 2d 662, 668 (1985)). Such an expectation should be jealously guarded from unreasonable government intrusion. Nevertheless, the Fourth Amendment proscribes only unreasonable governmental action and does not apply to a search or seizure, even an unreasonable one, effectuated by a private party not acting as a governmental agent.

In sum, the threshold question in any Fourth Amendment analysis is whether a person's reasonable expectation of privacy was invaded by a governmental official or agent. The majority's analysis erroneously overlooks this foundational principle. Because the constitutional protections against unreasonable searches and seizures apply only to actions by governmental officials and their agents, and defendant failed to establish that the medical staff were such agents, the blood draw at issue was not a search contemplated by the Fourth Amendment.

STATE OF NORTH CAROLINA
v.
PARIS JUJUAN TODD

No. 18A14-2

Filed 9 June 2017

1. Appeal and Error—Court of Appeals dissent and motion for appropriate relief—Supreme Court supervisory authority

The Supreme Court exercised the supervisory authority granted by Article IV, Section 12 of the North Carolina Constitution where the case involved a dissent in the Court of Appeals and a motion for appropriate relief. Although the plain language of N.C.G.S. § 7A-28 precludes Supreme Court review when there is a dissent in the Court of Appeals and the case involves a motion for appropriate relief, a statute cannot restrict the Supreme Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise jurisdiction to review any decision of the courts below.

2. Constitutional Law—effective assistance of appellate counsel—failure to raise sufficiency of evidence

The record was insufficient to determine whether defendant received ineffective assistance of counsel in the Court of Appeals where there was no determination of whether defendant's appellate counsel had a strategic reason to refrain from addressing the sufficiency of the evidence supporting the conviction. The case was remanded to the Court of Appeals.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 790 S.E.2d 349 (2016), reversing an order denying defendant's motion for appropriate relief entered on 15 January 2015 by Judge Donald W. Stephens in Superior Court, Wake County, and remanding the case for entry of an order granting defendant's motion for appropriate relief and vacating his prior conviction. Heard in the Supreme Court on 12 April 2017.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

N.C. Prisoner Legal Services, Inc., by Reid Cater, for defendant-appellee.

BEASLEY, Justice.

In this appeal we consider whether this Court has jurisdiction to decide an appeal taken from a divided decision of the Court of Appeals pursuant to N.C.G.S. § 7A-30(2) arising from a trial court's ruling granting or denying a motion for appropriate relief (MAR) and whether the Court of Appeals erred by reversing the trial court's decision that defendant received effective assistance of appellate counsel. The Court of Appeals concluded that the State presented insufficient evidence to show that defendant committed the underlying offense and further concluded that, if defendant's appellate counsel had raised the sufficiency of the evidence issue in the previous appeal, defendant's conviction would have been reversed. We hold that this Court has jurisdiction to hear this matter and conclude that the record should be further developed before a reviewing court can adequately address the ineffective assistance of counsel claim. Accordingly, we reverse and remand the decision of the Court of Appeals.

On 2 April 2012, Paris Jujuan Todd (defendant) was indicted for robbery with a dangerous weapon and conspiracy to commit the same offense. After a trial beginning on 12 June 2012, defendant was convicted of robbery with a dangerous weapon. Defendant appealed that conviction to the Court of Appeals, arguing that the trial court erred by denying his motion to continue and that he received ineffective assistance of trial counsel. *See State v. Todd*, 229 N.C. App. 197, 749 S.E.2d 113 2013 WL 4460143 (2013) (unpublished) (*Todd I*). The Court of Appeals disagreed with defendant and held that the trial court did not err in denying defendant's motion to continue and that defendant did not receive ineffective assistance of trial counsel. *Todd*, 2013 WL 4460143, at *5.

On 21 October 2014, defendant filed a motion for appropriate relief (MAR) in the trial court, arguing that the evidence was insufficient to support his conviction and that his appellate counsel was ineffective for failing to raise this claim on appeal. On 15 January 2015, the trial court, without conducting an evidentiary hearing on defendant's ineffective assistance of counsel claim, entered an order denying defendant's MAR. The trial court found that "[a] review of all the matters of record, including the opinion of the North Carolina Court of Appeals . . . clearly demonstrates that the evidence was sufficient to support the jury verdict and appellate counsel rendered effective assistance to Defendant in his appeal." Defendant filed a petition for writ of certiorari to the Court of Appeals seeking review of the trial court's order denying his MAR, which the Court of Appeals allowed on 27 March 2015.

Defendant argued to the Court of Appeals that in the first appeal his appellate counsel performed below an objective standard of reasonableness by failing to argue that the evidence was insufficient to support defendant's conviction. A divided panel of the Court of Appeals held that defendant received ineffective assistance of appellate counsel in his first appeal and concluded that defendant likely would have been successful had his counsel raised the sufficiency of the evidence issue in his first appeal. *State v. Todd*, ___ N.C. App. ___, ___, 790 S.E.2d 349, 364 (2016) (*Todd II*). More specifically, after concluding that, "the State presented insufficient evidence that defendant committed the underlying offense," the majority held that the trial court erred in denying defendant's MAR. *Id.* at ___, 790 S.E.2d at 364. Accordingly, the Court of Appeals reversed the trial court's order and remanded the case to the trial court with instructions to grant defendant's MAR and vacate his conviction. *Id.* at ___, 790 S.E.2d at 364.

Nonetheless, according to the dissent, defendant failed to show that appellate counsel's performance was deficient. *Id.* at ___, 790 S.E.2d at 365 (Tyson, J., dissenting). The dissent noted that "[e]ffective appellate advocates winnow out weaker arguments and focus on those more likely to prevail on appeal." *Id.* at ___, 790 S.E.2d at 367 (citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983)). Because "[t]his accepted discretionary process lies within the professional judgment of appellate counsel," *id.* at ___, 790 S.E.2d at 367, the dissent concluded that defendant could not show that his appellate counsel was deficient in not raising a sufficiency of the evidence argument in the first appeal, *id.* at ___, 790 S.E.2d at 368. The State gave timely notice of appeal based upon the dissenting opinion.[1]

[1] As a threshold matter, we must consider whether this Court has jurisdiction to decide this appeal. Generally N.C.G.S § 7A-30(2) provides an automatic right of appeal to this Court based on a dissent at the Court of Appeals. N.C.G.S. § 7A-30(2) (2015). But, that automatic right of appeal is limited by N.C.G.S. § 7A-28, which states that "[d]ecisions of the Court of Appeals upon review of motions for appropriate relief listed in G.S. 15A-1415(b) are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise." *Id.*,

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1. Additionally, on 9 December 2016, we ordered the parties to brief and argue (1) whether the Court of Appeals erred in reversing and remanding the trial court's judgment, and (2) whether this Court has jurisdiction to hear and decide an appeal taken from a decision of the Court of Appeals that arose from a trial court ruling granting or denying a motion for appropriate relief pursuant to N.C.G.S. § 7A-30(2), in light of the provisions of N.C.G.S. §§ 7A-28(a) and 15A-1422(f).

§ 7A-28(a) (2015). We acknowledge that the plain language of N.C.G.S. § 7A-28 precludes this Court's review of a case in which there is a dissent in the Court of Appeals when the case involves review of a motion for appropriate relief; however, we maintain the authority granted to us by the state constitution and recognize that "it is beyond question that a statute cannot restrict this Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise 'jurisdiction to review upon appeal any decision of the courts below.' " *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007) (quoting N.C. Const. art. IV, § 12). "This Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice." *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975) (citations omitted). Thus, we exercise the supervisory authority granted by Article IV, Section 12 of the North Carolina Constitution to decide this matter.

[2] Having determined that we have jurisdiction to hear this matter, we next consider whether defendant received ineffective assistance of appellate counsel. Before this Court, the State argues that defendant's appellate counsel apparently made a strategic decision not to challenge the sufficiency of the evidence. Because the lower courts did not determine whether there was a strategic reason for defendant's appellate counsel to refrain from addressing the sufficiency of the evidence supporting defendant's conviction, we reverse and remand the decision of the Court of Appeals.

A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771 & n.14, 90 S. Ct. 1441, 1449 & n. 14 (1970)). When challenging a conviction on the basis that counsel was ineffective, a defendant must show that counsel's conduct "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984); *see also Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248. In *Strickland* the United States Supreme Court set forth a two-pronged test for determining whether a defendant has received ineffective assistance of counsel. 466 U.S. at 687, 104 S. Ct. at 2064. *Strickland* requires that a defendant first establish that counsel's performance was deficient. *Id.* at 687, 104 S. Ct. at 2064. This first prong requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S. Ct. at 2064. Second, a defendant must demonstrate that the deficient

performance prejudiced the defense, which requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S. Ct. at 2064. Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim.

In this case defendant's claim stems from appellate counsel's decision not to argue in his first appeal that the evidence was insufficient to support defendant's conviction. Defendant contends that he would have won his appeal had this dispositive issue been raised. Conversely, the State argues that defendant's appellate counsel "apparently made a strategic decision not to challenge the sufficiency of the evidence."

Rather than articulating specific guidelines for appropriate attorney conduct, the Court in *Strickland* emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688, 104 S. Ct. at 2065. *Strickland* notes that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91, 104 S. Ct. at 2066. Simply put, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S. Ct. at 2066. In considering the merits of any claim for ineffective assistance of counsel, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691, 104 S. Ct. at 2066.

As to the first prong of the *Strickland* test, the Court of Appeals acknowledged the State's argument that defendant's prior appellate counsel "apparently made a strategic decision" not to challenge the sufficiency of the evidence. *Todd II*, ___ N.C. App. at ___, 790 S.E.2d at 364 (majority opinion). But the Court of Appeals majority opinion noted that the State failed to explain how the failure to challenge the sufficiency of the evidence in the first appeal could be a strategic decision. *Id.* at ___, 790 S.E.2d at 364. Neither of our lower courts, however, addressed whether there was an actual strategic reason for defendant's appellate counsel not to address the sufficiency of the evidence issue, and if so, whether the strategic decision was reasonable. Specifically, the trial court did not address whether this was a strategic decision because that court summarily denied defendant's MAR without

a hearing. Additionally, the Court of Appeals did not fully address this issue. While "winnowing out weaker arguments on appeal and focusing on one central issue" is an important aspect of appellate advocacy, *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3313 (1983), the determination of whether a defendant's appellate counsel made a particular strategic decision remains a question of fact, and is not something which can be hypothesized, *see Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir.), *reh'g en banc denied*, 162 F.3d 100 (11th Cir. 1998). Thus, the record before this Court is not thoroughly developed regarding defendant's appellate counsel's reasonableness, or lack thereof, in choosing not to argue sufficiency of the evidence.

We therefore hold that the record before us is insufficient to determine whether defendant received ineffective assistance of counsel. On remand the Court of Appeals should further remand this matter to the trial court with instructions to fully address whether appellate counsel made a strategic decision not to raise a sufficiency of the evidence argument, and, if such a decision was strategic, to determine whether that decision was a reasonable decision. Further, if the trial court finds that defendant's appellate counsel's performance was deficient, that court should then determine whether counsel's performance prejudiced defendant.

For the reasons stated herein, the decision of the Court of Appeals is reversed, and that court is instructed to remand this matter to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

THOMAS A. STOKES, III
v.
CATHERINE C. CRUMPTON (FORMERLY STOKES)

No. 168A16

Filed 9 June 2017

Divorce—equitable distribution—arbitration and settlement—allegations of fraud—interlocutory appeal—settlement

In an action involving equitable distribution and arbitration in which fraud in the valuation of a business was alleged after a settlement, plaintiff had a right to appeal the trial court's order denying discovery under the substantial rights analysis of N.C.G.S. § 7A-27(b)(3)(a), and a right to appeal may exist under section 7A-27 even if the order is not appealable under the arbitration statute itself. The trial court had discretion to award discovery because the action was pending pursuant to sections 50-53 and 50-54 of the Family Law Arbitration Act.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 784 S.E.2d 537 (2016), dismissing an appeal from an order entered on 7 August 2014 by Judge Anna E. Worley in District Court, Wake County. On 22 September 2016, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 20 March 2017.

Shanahan Law Group, PLLC, by Kieran J. Shanahan, Christopher S. Battles, and John E. Branch, III, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, K. Edward Greene, and Robert A. Ponton, Jr., for defendant-appellee.

BEASLEY, Justice.

This case is about whether a trial court has discretion to order post-confirmation discovery in an action under the Family Law Arbitration Act and a party's right to an interlocutory appeal of the trial court's denial of such a motion. We hold that plaintiff had a right to appeal the trial court's denial of his motion to engage in discovery and that the trial court has discretion to order post-confirmation discovery in this case. Accordingly, we reverse the decision of the Court of Appeals and remand this case with instructions for the Court of Appeals to vacate the

trial court's order and remand the matter for reconsideration of plaintiff's motion consistent with this opinion.

In April 2011, Thomas A. Stokes, III (plaintiff) and Catherine C. Stokes (now Crumpton) (defendant) separated. Plaintiff filed an action in July 2011 seeking equitable distribution of the parties' marital assets and child support. Shortly thereafter, the parties agreed to arbitrate the action under North Carolina's Family Law Arbitration Act (FLAA), N.C.G.S. §§ 50-41 to 50-62. On 13 August 2011, the trial court entered a Consent Order to Arbitrate Equitable Distribution and Child Support. One of the main issues to be settled during arbitration was the value of defendant's stake in Drug Safety Alliance, Inc. (DSA),[1] a company in which defendant was the President, CEO, and majority shareholder.

As part of the agreed-upon pre-arbitration discovery, plaintiff's counsel deposed defendant, seeking information, *inter alia*, on the value of DSA. During the deposition, defendant testified that she had "no intention of selling" DSA at that time, although she had been contacted by parties interested in purchasing the company. In response to questions regarding the possible sale, merger, or acquisition relating to DSA, defendant, for the most part, responded that she did not know or could not answer the question. During discovery, plaintiff's valuation expert also interviewed defendant and specifically inquired about "any written or oral offers to purchase DSA"; defendant said there were none. Plaintiff's expert also requested production of documents from DSA, including buy-sell agreements, written offers to purchase stock, and any major sale or purchase contracts. No such documents were ever produced.

On 18 May 2012, plaintiff and defendant entered into an Equitable Distribution Arbitration Award by Consent (the Award). That same day, the trial court entered an order and judgment in District Court, Wake County, confirming the award. The Award, *inter alia*, distributed to defendant all stock held by her in DSA and any other interest claimed by either party in the company. In return, defendant would pay plaintiff a lump sum of $1,000,000.00, plus an additional $650,000.00 over a six year period. The entire balance would become immediately due and payable, however, if defendant sold her ownership interest in DSA.

Less than two months later, on 5 July 2012, defendant signed a Letter of Intent to sell DSA to another company, United Drug, PLLC. In August

1. DSA managed adverse event reporting for pharmaceutical, biotech, animal health, and over-the-counter dietary supplement companies.

2012, United Drug purchased DSA for $28,000,000.00, of which defendant received approximately $14,000,000.00 for her shares. Plaintiff claims to have learned about the sale through the media, without any prior knowledge of it during arbitration.

On 26 November 2012, plaintiff filed a Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery.[2] Plaintiff's motion was predicated on an allegation of fraud, that defendant "intentionally induced [p]laintiff to settle through misrepresentation and/or concealment of material facts related to the sale, possible sale, discussions, negotiations and existence of documents related to the possible sale of DSA to a third party." Specifically, plaintiff alleged that defendant intended to sell DSA while arbitration was under way and that she fraudulently induced plaintiff to accept a distribution of only $1,650,000.00 for DSA based on her representations about the company during arbitration. According to plaintiff, during arbitration "the parties were arguing over a valuation of the marital interest in DSA as being between approximately two and five million dollars" and eventually stipulated to a value of $3,485,000.00 for DSA.[3] Plaintiff contends that he never would have agreed to DSA's value had defendant disclosed the sale opportunity.

As part of these motions, plaintiff requested leave "to conduct discovery regarding discussions, negotiations and activity by and involving [d]efendant and her company DSA, its agents and United Drug and its agents that led to the July 5, 2012 Letter of Intent and subsequent sale of DSA to United Drug." On 7 August 2014, the trial court entered an order denying plaintiff's motion for leave to engage in discovery. The trial court concluded:

> 1. There is no pending action between Plaintiff and Defendant in which discovery may be propounded.
>
> 2. Plaintiff's Verified Motion to Vacate Arbitration Award is not a claim within which discovery may be conducted. Plaintiff's [request for] written discovery is therefore inappropriate.

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2. Plaintiff amended his motion on 13 December 2013 to clarify that the motions were brought under the FLAA.

3. As pointed out by defendant, the parties never stipulated to a value for DSA. Plaintiff contends, however, that the parties reached a mutual understanding as to DSA's value prior to consenting to the Award.

3. All of Plaintiff's Motions to Compel [Discovery] . . . should be denied.

Plaintiff appealed to the Court of Appeals, which filed a divided opinion dismissing the appeal on 5 April 2016.

As a preliminary matter, the Court of Appeals addressed whether the trial court's order denying discovery was immediately appealable as an interlocutory order. *Stokes v. Crumpton*, ___ N.C. App. ___, ___, 784 S.E.2d 537, 539 (2016). Agreeing with defendant, the majority concluded that the order was not appealable under either the FLAA's appeal provision, N.C.G.S. § 50-60 (2015), or the substantial rights analysis of N.C.G.S. § 7A-27(b)(3)(a) (2015). *See id.* at ___, 784 S.E.2d at 540. In regards to the FLAA, the majority held that the discovery order did not fall under any of the types of orders enumerated in subsection 50-60(a) of the statute under which a right of appeal lies. *Id.* at ___, 784 S.E.2d at 540. Specifically, the majority also concluded that the order at issue here "is not a judgment" for purposes of subdivision 50-60(a)(6). *Id.* at ___, 784 S.E.2d at 541. The majority then rejected plaintiff's argument that he was separately entitled to appeal from the order under N.C.G.S. § 7A-27, which governs interlocutory appeals. *Id.* at ___, 784 S.E.2d at 541-42. The majority concluded that plaintiff "failed to demonstrate that he would be deprived of a substantial right without appellate review of the order before a final judgment has been entered," as required under section 7A-27. *Id.* at ___, 784 S.E.2d at 541-42.

The dissent disagreed with the majority's conclusion that the discovery order was not immediately appealable. *Id.* at ___, 784 S.E.2d at 543 (Calabria, J., dissenting). Specifically, the dissent concluded that the order denying discovery was appealable under subdivision 50-60(a)(6), which the dissent deemed to be a "catch-all" provision that permits appeal from "[a] judgment entered pursuant to provisions of this Article." *Id.* at ___, 784 S.E.2d at 543. According to the dissent, "judgment" as used in this provision is not limited to "final judgments," but includes judgments that are interlocutory as well. *Id.* at ___, 784 S.E.2d at 543-44. The dissent also concluded that plaintiff had a right to appeal under section 7A-27 because plaintiff demonstrated that, if the order was not immediately reviewed, he would be deprived of a substantial right, consisting of any ability to prove the alleged fraud at the hearing on his motion to vacate, without some limited discovery. *Id.* at ___, 784 S.E.2d at 544-47.

Next, the dissent disagreed with the trial court's conclusion that "[t]here is no pending action between Plaintiff and Defendant in which

discovery may be propounded." *Id.* at ___, 784 S.E.2d at 546. According to the dissent, "plaintiff's Motion to Vacate Arbitration Award and Set Aside Order based on allegations that the arbitration award was procured by fraud is pending." *Id.* at ___, 784 S.E.2d at 546. In response, the majority addressed the pending action issue in a footnote, disagreeing with the dissent's interpretation and stating that "[i]t is correct that Plaintiff's *motion* to vacate was pending, but the trial court concluded, and we agree, that the *action*—the arbitration of the parties' equitable distribution action—had concluded, and the pending motion was 'not a claim within which discovery may be conducted.' " *Id.* at ___ n.1, 784 S.E.2d at 539 n.1 (majority opinion).

Plaintiff filed an appeal of right based on the dissenting opinion, and on 22 September 2016, this Court allowed plaintiff's petition for discretionary review as to an additional issue. The issues before this Court are whether plaintiff has a right to appeal the trial court's order and whether the trial court had discretion to award discovery in this case.

As a threshold matter we consider whether plaintiff had a right to immediately appeal the trial court's order denying discovery. We hold that he did.

Plaintiff contends that the trial court's interlocutory order may be appealed if it affects a substantial right, pursuant to N.C.G.S. § 7A-27(b)(3)(a), even if plaintiff has no right to appeal under the FLAA.[4] We agree. This Court has never explicitly addressed the interplay between appeals under an arbitration statute and section 7A-27. The Court of Appeals case law on this issue is unclear and somewhat contradictory. We take this opportunity to clarify the relationship between N.C.G.S. §§ 50-60 and 7A-27.

In *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 314 S.E.2d 291 (1984), the threshold issue before the court was whether there is an immediate right to appeal an order compelling arbitration under the Uniform Arbitration Act (UAA), which the court held did not exist. 68 N.C. App. at 286, 314 S.E.2d at 293. The court began its analysis by reviewing the bases for appeal enumerated in N.C.G.S. § 1-567.18(a) and concluding

4. Plaintiff did not argue to this Court that he had a right to appeal under the FLAA itself. Assuming *arguendo* that the majority at the Court of Appeals correctly determined that plaintiff did not have a right to appeal under subdivision 50-60(a)(6) of the FLAA, we hold that plaintiff had a right to appeal the interlocutory order under N.C.G.S. § 7A-27 because the order affected a substantial right.

that an order compelling arbitration does not fall under the statute. *Id.* at 285, 314 S.E.2d at 292-93. After reaching this conclusion, the court then addressed whether the order affected a substantial right. *Id.* at 285-86, 314 S.E.2d at 293. Ultimately, the court held that an order compelling arbitration is not appealable under either the UAA[5] or section 7A-27. *Id.* at 285, 314 S.E.2d at 293.

Subsequent Court of Appeals cases relying on *Wysocki* have followed a similar analytical framework—conducting a substantial rights analysis under section 7A-27 *after* concluding that the order at issue did not fall under the enumerated bases for appeal set out in the relevant arbitration statute. *See, e.g.*, *Smith v. Shipman*, 153 N.C. App. 200, 569 S.E.2d 34, 2002 WL 31055991 (2002) (unpublished); *N.C. Elec. Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 381 S.E.2d 896, *disc. rev. denied*, 325 N.C. 709, 388 S.E.2d 461 (1989). *Wysocki* and its progeny do not explicitly address the relationship between appeals under an arbitration statute and interlocutory appeals under section 7A-27. Implicit in these cases, however, is support for the conclusion that a right to appeal can be based on section 7A-27 even if there is no right to appeal under the arbitration statute.

In the present case the Court of Appeals majority based its decision, in part, on the fact that the FLAA appeal provision does not include an order denying discovery as one of the enumerated bases for appeal. *Stokes*, ___ N.C. App. at ___, 784 S.E.2d at 540. The majority in *Stokes* relied on *Bullard v. Tall House Building, Co.*, 196 N.C. App. 627, 676 S.E.2d 96 (2009), quoting specifically the statement "that the list enumerated in [N.C.G.S.] § 1-569.28(a) includes the only possible routes for appeal under the [Revised UAA]." *Id.* at ___, 784 S.E.2d at 540-41 (quoting *Bullard*, 196 N.C. App. at 635, 676 S.E.2d at 102) (emphasis added)). The court in *Bullard* concluded that the order was not appealable under the Revised UAA and then conducted a substantial rights analysis under section 7A-27. 196 N.C. App. at 635-39, 676 S.E.2d at 102-04. The court held that an order compelling arbitration: (1) was not appealable under the Revised UAA; *and* (2) did not impair a substantial right justifying immediate appeal under section 7A-27. *Id.* at 635-39, 676 S.E.2d at 102-04.

Therefore, despite this quoted language, the court in *Bullard* followed the same analysis used in *Wysocki* and its progeny, further

5. Although an order compelling arbitration is not appealable under the UAA, *Wysocki*, 68 N.C. App. at 285, 314 S.E.2d at 292-93, the Revised UAA does provide a basis for appeal from an order denying a motion to compel arbitration, N.C.G.S. § 1-569.28(a)(1) (2015) ("An appeal may be taken from . . . [a]n order denying a motion to compel arbitration . . . .").

supporting the inference that an appeal can lie from either statute. Additionally, the Court of Appeals majority in this case similarly analyzed whether a substantial right was affected by the trial court's order, despite quoting *Bullard* and despite previously concluding that plaintiff had no right to appeal under the FLAA itself. *Stokes*, ___ N.C. App. at ___, 784 S.E.2d at 541-42. We hold that an appeal can be justified under section 7A-27 even if there is no right to appeal under the relevant arbitration statute. To the extent *Bullard* suggests otherwise, it is abrogated.

Having determined that a substantial rights analysis under section 7A-27 may be conducted notwithstanding that no right to appeal lies under the arbitration statute itself, we turn now to whether the trial court's order denying discovery to plaintiff in this case affected a substantial right justifying immediate appeal. We hold that the trial court's order denying discovery affected a substantial right.

An interlocutory order is generally not immediately appealable unless the order "[a]ffects a substantial right," *id.* § 7A-27(b)(3)(a). *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 578-79 (1999) (discussing two avenues for immediate appeal of an interlocutory order, including N.C.G.S. § 7A-27). Discovery orders are "generally not immediately appealable because [they are] interlocutory and do[ ] not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Id.* at 163, 522 S.E.2d at 579 (citations omitted). Such orders, however, are immediately appealable when "the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is *highly material to a determination of the critical question* to be resolved in the case." *Dworsky v. Travelers Ins.*, 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980) (emphasis added) (citing *Tenn.-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977)). In these situations, "an order denying such discovery does affect a substantial right and is appealable." *Id.* at 448, 271 S.E.2d at 523 (citing *Tenn.-Carolina*, 291 N.C. 618, 231 S.E.2d 597).

Here there is no dispute that the trial court's order is interlocutory, as it was made while plaintiff's motion to vacate was still pending. *See Sharpe*, 351 N.C. at 161, 522 S.E.2d at 578. As such, the interlocutory order must be shown to affect a substantial right in order to justify immediate appeal.

Plaintiff's motion requested limited discovery in the form of information relating to the timeline, details, and discussions between DSA

and United Drug regarding the August 2012 sale. This information is "highly material" to a determination on plaintiff's motion to vacate based on allegations that defendant fraudulently concealed the true value of her shares in DSA. Generally, a motion to vacate an arbitration award based on fraud must be proved by clear and convincing evidence. *See MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 858 (4th Cir. 2010) (stating that vacatur under the Federal Arbitration Act based on an allegation of "undue means" requires that the fraud or corruption be established by clear and convincing evidence); *Trafalgar House Constr., Inc. v. MSL Enters.*, 128 N.C. App. 252, 257-59, 494 S.E.2d 613, 617 (1998) (holding that the plaintiff failed to meet its burden of proof that grounds existed to vacate an arbitration agreement under the FAA on the basis of fraud). Fraud is generally defined as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Fraud*, *Black's Law Dictionary* (10th ed. 2014). Due to the concealment and deception inherent in fraud, it is unlikely that plaintiff will be able to obtain information necessary to support his motion to vacate without conducting some limited discovery. Thus, because the limited discovery requested by plaintiff is "highly material to a determination of the critical issue" in his motion to vacate, the order denying discovery affects a substantial right justifying immediate appeal under N.C.G.S. § 7A-27(b)(3)(a). *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 523 (citing *Tenn.-Carolina*, 291 N.C. 618, 231 S.E.2d 597).

Having determined that plaintiff had a right to immediately appeal the trial court's order denying discovery, we reverse the Court of Appeals holding on this issue. We now consider whether the trial court had the discretion to order discovery in the case at hand. We hold that it did.

Plaintiff contends that his motion to vacate the arbitration award under the FLAA is a pending action under which discovery may be propounded. We agree. Under the FLAA, "upon a party's application, the court shall confirm an award, *except* when within time limits imposed under G.S. 50-54 . . . grounds are urged for vacating . . . the award, in which case the court *shall* proceed as provided in G.S. 50-54." N.C.G.S. § 50-53(a) (2015) (emphases added). Section 50-54 sets forth various reasons for which "the court *shall* vacate an award," including that "[t]he award was procured by corruption, fraud, or other undue means." *Id.* § 50-54(a)(1) (2015) (emphasis added). A timely motion to vacate under section 50-54 predicated on corruption, fraud, or other undue means "shall be made within 90 days after these grounds are known or should have been known." *Id.* § 50-54(b) (2015). Plaintiff's motion to vacate was timely filed, thus triggering the provisions of section 50-54.

Contrary to defendant's contention, there is no law prohibiting the trial court from utilizing its discretion to order discovery in this case. The plain language of the FLAA itself provides a mechanism for vacating an arbitration award upon proof of fraud. *See id.* §§ 50-53, -54. As stated above, clear and convincing evidence is needed to succeed on a motion to vacate based on allegations of fraud. Given this high standard, and the concealment and deception inherent in fraud, post-confirmation discovery naturally follows. Moreover, there is no provision of the FLAA that prohibits post-confirmation discovery, and nothing within the statute limits section 50-54 solely to claims of fraud made pre-confirmation.

Section 50-53 explicitly provides an alternative, mandatory path for courts to take if a timely motion to vacate is filed, in which event the court *shall* proceed according to section 50-54. Here there is no debate that plaintiff timely filed his motion to vacate based on an allegation of fraud. Defendant argues that this alternative path only applies in the pre-confirmation context; nothing, however, in the language of sections 50-53 or 50-54 supports this conclusion. Reading an exception into the statute for post-confirmation motions would appear to create a right without a remedy. We decline to limit the statute in such a manner without clear indication of the General Assembly's intent.

Under the terms of the FLAA, a motion to vacate based on allegations of fraud disrupts the general process for confirming arbitration awards and creates a vehicle by which confirmed awards can be vacated. Accordingly, a motion to vacate under section 50-54 is pending because it seeks a remedy made available by the FLAA related to the underlying arbitration, to which plaintiff has availed himself. Therefore, the motion to vacate was a pending action under which the trial court had the discretion to order discovery.

We hold, therefore, that plaintiff had a right to appeal the trial court's order denying discovery under the substantial rights analysis of N.C.G.S. § 7A-27(b)(3)(a), and that a right to appeal may exist under section 7A-27 even if the order is not appealable under the arbitration statute itself. Additionally, we hold that the trial court had discretion to award discovery in this case because the action was pending pursuant to sections 50-53 and 50-54 of the FLAA. For the reasons stated, we reverse the decision of the Court of Appeals and remand this matter with instructions to the Court of Appeals to vacate the trial court's order denying discovery and remand this case to the trial court for further consideration of plaintiff's motion consistent with this opinion.

REVERSED AND REMANDED.

TOWN OF BEECH MOUNTAIN
v.
GENESIS WILDLIFE SANCTUARY, INC.

No. 230A16

Filed 9 June 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 335 (2016), affirming an order granting summary judgment to defendant entered on 5 September 2014 by Judge Gary M. Gavenus; and finding no error in an order entered on 30 October 2013 by Judge Mark E. Powell, and in judgments entered on 29 September 2014 and 24 November 2014 and an order entered on 27 October 2014 by Judge J. Thomas Davis, all in Superior Court, Watauga County. On 7 July 2016, the Supreme Court allowed plaintiff's petition for writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an additional issue. Heard in the Supreme Court on 10 April 2017.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Patrick H. Flanagan; and Eggers, Eggers, Eggers, & Eggers, PLLC, by Stacy C. Eggers, IV, for plaintiff-appellant.

John J. Korzen, Wake Forest University School of Law; and Clement Law Office, by Charles E. Clement and Charles A. Brady, III, for defendant-appellee.

Morningstar Law Group, by William J. Brian, Jr., for Pacific Legal Foundation, amicus curiae.

PER CURIAM.

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

AFFIRMED; CERTIORARI IMPROVIDENTLY ALLOWED.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the C-BASS MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-RP2
v.
WILLIE LEE PINKNEY, CLARA PINKNEY, SIDDCO, INC., and POORE SUBSTITUTE TRUSTEE, LTD

No. 229PA16

Filed 9 June 2017

Mortgages and Deeds of Trust—foreclosure—pleadings

The trial court erred by dismissing plaintiff's foreclosure claim under N.C.G.S. § 1A-1, Rule 12(b)(6) where it applied requirements applicable to non-judicial foreclosures by power of sale to a judicial foreclosure. Foreclosure by action or "judicial foreclosure," unlike non-judicial foreclosure by power of sale, is an ordinary civil action governed by the liberal standard of notice pleading. A missing indorsement at the initial notice-pleading stage did not preclude the bank from proceeding with its civil action.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 464 (2016), affirming an order entered on 5 March 2015 by Judge Patrice A. Hinnant in Superior Court, Forsyth County. Heard in the Supreme Court on 11 April 2017.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, for plaintiff-appellant.

Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for defendant-appellees Willie Lee Pinkney and Clara Pinkney.

NEWBY, Justice.

Foreclosure by action or "judicial foreclosure," unlike non-judicial foreclosure by power of sale, is an ordinary civil action governed by the liberal standard of notice pleading. As such, a complaint is sufficient if it alleges a debt secured by a deed of trust, a default, and the plaintiff's right to enforce the deed of trust. Here plaintiff's complaint adequately states a cause of action for judicial foreclosure. The Court of Appeals erred by applying the requirements applicable in non-judicial foreclosure by power of sale to the plaintiff's judicial foreclosure action and, accordingly, we reverse the decision of that court.

In December 1997, defendants Willie Lee Pinkney and Clara Pinkney (collectively borrower) executed a promissory note with Ford Consumer Finance Company, Inc. (the Note) in the principal amount of $257,256.89 to purchase real property situated in Forsyth County. The debt is repayable through monthly installments due on the seventeenth of the month and matures on 17 December 2027. The Note includes default and acceleration provisions. The debt is secured by a deed of trust on the underlying real property, identified "as Lot No. 2, . . . SHERWOOD FOREST, . . . recorded in Plat Book 29, Page 22, in the Office of the Register of Deeds of Forsyth County." U.S. Bank National Association (the Bank)[1] alleges that it "is the present holder of the Note and Subject Deed of Trust and is the party entitled to enforce the same."

In September 2014, the Bank filed its complaint against borrower and the substitute trustee under the deed of trust in Superior Court, Forsyth County, seeking judicial foreclosure and judgment on the Note.[2] The Bank alleges, *inter alia*, that "the Note evidences a valid debt owned [sic] by [borrower] to [the Bank]," that borrower "defaulted under the terms of the Note for failure to make payments," and that the Bank "has given [borrower] written notice of default," but that borrower has "refused . . . to make the payments required." The Bank claims that the outstanding balance on the Note is $268,171.13 plus "past due interest" of $118,055.05.

In regard to the Bank's authority to enforce the terms of the deed of trust, the complaint states that the Note was "transferred" several times, ultimately to the Bank. Ford Consumer Finance "endorsed" the Note to Credit Based Asset Servicing and Securitization, LLC (Credit Asset), which "assigned" the Note to the "Salomon Mortgage Loan Trust" Indenture, which "specifically endorsed" the Note to the Bank.[3]

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1. U.S. Bank National Association acts as Trustee for the C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-RP2.

2. The Bank alleges that defendant Poore Substitute Trustee, LTD is substitute trustee under the deed of trust and "is named in this action solely for notice purposes." The Bank successfully moved for default judgment against defendant Siddco, Inc. regarding its priority of interest claim on a previously recorded deed of trust, which is not a subject of this appeal.

3. Ford Consumer Finance Company, Inc. merged into Associates Home Equity Services, Inc., which executed the endorsement. Credit Asset assigned the Note to U.S. Bank "as Indenture Trustee under the Indenture, dated as December 14, 2001, Between Salomon Mortgage Loan Trust 2001-CB4, and U.S. Bank National Association, C-Bass Mortgage Loan Asset-Backed Notes," herein referred to as the "Salomon Mortgage Loan Trust Indenture."

The Bank also attached exhibits to its complaint, including Exhibit E (the Note), which includes allonges evidencing the two endorsements, and Exhibit G ("Assignment of Mortgage/Deed of Trust") evidencing the assignment, which states that Credit Asset "for value received, does by these presents grant, bargain, sell, assign, transfer and set over unto: [the Salomon Mortgage Loan Trust Indenture] . . . all of [its] right, title and beneficial interest in and to that certain Deed of Trust."

Borrower moved to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Because the Bank "is not the original payee" under the Note, borrower argued that the Exhibits reveal a "lack of indorsement from the predecessor in the chain of title[, which] is fatal to the Plaintiff's claim of being holder entitled to enforce the instrument."[4] The trial court dismissed the action with prejudice, and the Bank appealed.

The Court of Appeals affirmed the trial court's dismissal order. *U.S. Bank v. Pinkney*, ___ N.C. App. ___, 787 S.E.2d 464, 2016 WL 2647709 (2016) (unpublished). Applying the requirements of N.C.G.S. § 45-21.16(d) applicable to non-judicial foreclosures by power of sale, the Court of Appeals found that the Bank failed to establish its status as a holder of the Note and therefore did not have the right to foreclose. *Pinkney*, 2016 WL 2647709, at *3-5 (citing and quoting *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 490, 711 S.E.2d 165, 170 (2011) (requiring holdership status to foreclose under subsection 45-21.16(d))). Because the Bank "was not the original holder of the Note," *id.* at *4, the court reasoned that "each transfer required indorsement of the Note from one holder to the next," *id.* (quoting *In re Foreclosure of Bass*, 366 N.C. 464, 469, 738 S.E.2d 173, 176 (2013)). Though "plaintiff alleged . . . that it was the present holder of the Note and Subject Deed of Trust," *id.* at *6, the court nonetheless concluded that the Exhibits lacked an essential "indorsement from Credit Asset"—in other words, that the assignment was an inadequate indorsement, *id.* at *5. Therefore, the court found that "plaintiff cannot establish that it is the holder of the Note." *Id.*[5] We allowed the Bank's petition for discretionary review.

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4. Borrower also argued that Exhibit E (the Note) failed to establish a negotiable instrument or an instrument under seal, and that the statute of limitations therefore barred "any cause of action against the Defendants on the Note."

5. Having so held, the Court of Appeals did not reach borrower's statute-of-limitations argument. *Pinkney*, 2016 WL 2647709, at *6.

We review dismissals under Rule 12(b)(6) de novo, *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013), "view[ing] the allegations as true and . . . in the light most favorable to the non-moving party," *Kirby v. NCDOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016) (citing *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). The complaint is construed liberally, and dismissal is appropriate "if it appears certain that plaintiffs could prove no set of facts which would entitle them to relief under some legal theory," *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) (citations omitted), or "no law exists to support the claim made," *id.* at 225, 695 S.E.2d at 440 (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

The precise question presented is whether the complaint reveals sufficient allegations to survive borrower's motion to dismiss the Bank's judicial foreclosure claim. Here the complaint provides adequate notice of the claim. Because the Court of Appeals applied the requirements applicable to non-judicial foreclosure by power of sale, not judicial foreclosure, we conclude that the court erred and that dismissal on that basis was improper.

North Carolina law has long recognized a creditor's right to proceed with non-judicial foreclosure by power of sale or foreclosure by action (judicial foreclosure). *In re Foreclosure of Lucks*, ___ N.C. ___, ___, 794 S.E.2d 501, 504-05 (2016); *e.g.*, *Blackledge v. Nelson*, 16 N.C. (1 Dev. Eq.) 418, 419 (1830). "Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding." *In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 504 (citation omitted). Judicial foreclosure, on the other hand, is an ordinary civil action. *See Shaw v. Wolf*, 23 N.C. App. 73, 76, 208 S.E.2d 214, 216 (1974) ("A proceeding to foreclose a mortgage under an order of court is a civil action." (quoting 1 Thomas Johnston Wilson, II & Jane Myers Wilson, *McIntosh North Carolina Practice and Procedure* § 239(4), at 151 (2d ed. 1956))); *see also* N.C.G.S. § 1-339.1(a)(1) (2015) ("A judicial sale . . . is not . . . [a] sale made pursuant to a power of sale . . . [c]ontained in a mortgage, deed of trust . . . .").[6] As such, the Rules of Civil Procedure apply, and the parties are entitled to all the benefits

6. Generally, judicial foreclosure is favored when non-judicial foreclosure by power of sale is impracticable, for example "where a poorly drafted mortgage or deed of trust omits the granting of an express power of sale to the [creditor]," James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13.30[1], at 13 56.4 n.213 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2016), or "when a lien priority is disputed," 1 Grant S. Nelson et al., *Real Estate Finance Law* § 7:12, at 904 (6th ed. 2014), which may obviate "title problems for the sale purchaser," *id.*

and procedures available in a civil action, including the opportunity for discovery, to present and defend evidence, and to make legal arguments. *See In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 503 (The Rules are "applicable to formal judicial actions [for foreclosure]."); *see also* N.C.G.S. § 1A-1, Rule 1 (2015) ("These rules shall govern . . . all actions and proceedings of a civil nature . . . .").

Procedurally, to pursue a claim for judicial foreclosure, the creditor files a complaint "in the county in which the subject [property] of the action, or some part thereof, is situated," N.C.G.S. § 1-76 (2015), "praying that the real property be sold under judicial process and that the proceeds be applied to the mortgage debt," James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13.30[1], at 13-56.4 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2016) [hereinafter Webster's]; *see In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 505 (Unlike judicial foreclosure, "non-judicial foreclosure does not require the filing of an action."); *see also* N.C.G.S. § 1A-1, Rule 3(a) (2015) ("Commencement of action."). The complaint must allege, at minimum, a debt, default on the debt, a deed of trust securing the debt, and the plaintiff's right to enforce the deed of trust. *See Webster's* § 13.30[4], at 13-57 ("The complaint . . . must set forth the mortgage contract, alleging facts entitling the plaintiff to a money judgment by reason of a breach or default, identifying the mortgaged property, and asking for a foreclosure of the mortgage security.").

If successful, the creditor obtains a judgment on the debt and a foreclosure decree, culminating in judicial sale of the mortgaged property. *See* N.C.G.S. § 1-243 (2015) ("The Supreme and other courts [may] order [ ] a judicial sale . . . ."); *id.* § 1-339.3A (2015) (allowing the court to order public or private sale); *id.* § 1-339.4 (2015) (allowing the court to appoint various persons, including the trustee under the deed of trust, to hold the sale); *see also Webster's* § 13.30[4], at 13-57 ("The decree contains not only an order for a sale of real property to satisfy the debt, but . . . the court's directions for conduct of the sale."). Article 29A of Chapter 1 of our General Statutes governs judicial sale and foreclosure of the mortgaged property. *See* N.C.G.S. § 1 339.1(a) ("A judicial sale is a sale of property made pursuant to an order of [the court] . . . , including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust . . . ."); *see also A Survey of Statutory Changes in North Carolina in 1949*, 27 N.C. L. Rev. 405, 479-81 (1949) (discussing the purpose of Article 29A, judicial sales, and sales under a power of sale).

As with any other civil action, a creditor seeking judicial foreclosure is not required to prove its entire case at the initial pleading stage. *See In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 505 (Non-judicial foreclosure by

power of sale, on the other hand, requires that the "creditor must show the existence of" all the subsection 45-21.16(d) elements to proceed.). The complaint need only contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series [thereof], intended to be proved showing that the [creditor] is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a) (2015). Thus, the complaint "is adequate if it gives sufficient notice of the claim asserted 'to enable the [borrower] to answer and prepare for trial . . . and to show the type of case brought.' " *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (quoting 2A James Wm. Moore et al., *Moore's Federal Practice* § 8.13 (2d ed. 1968)). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules . . . ." *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988) (citing *Sutton*, 277 N.C. at 102, 176 S.E.2d at 165).

Here the Bank pled the facts and circumstances necessary to give borrower adequate notice of the judicial foreclosure claim. The complaint states that borrower "executed a Note in the principal amount of $257,256.89," which "evidences a valid debt owned [sic] by [borrower] to [the Bank]," "secured by a Deed of Trust" on the underlying real property. The Bank further alleged that it "is the holder of the Note" and listed a series of Note transfers that ultimately ended with the Bank. The Bank expressly requested "to foreclose its lien by way of judicial foreclosure pursuant to the Subject Deed of Trust . . . as provided by N.C.G.S. § 1-339 et seq.," and prayed "that the Subject Property be sold under and [through] judicial process." These allegations are plainly sufficient to satisfy the substantive elements for a judicial foreclosure claim. *Cf. Embree Constr. Grp. v. Rafcor, Inc.*, 330 N.C. 487, 501, 411 S.E.2d 916, 926 (1992) (finding "under the liberal concept of notice pleading" that the allegations gave "sufficient notice of the events" and substantive elements of the plaintiff's tort claim).

Though the Bank elected to attach additional Exhibits in support of its claim, the Exhibits do not deprive borrower of adequate notice of foreclosure by judicial action. *See Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979) ("[W]hen the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal."). The Bank is entitled to submit and prove by evidence at trial its right to foreclose in a number

of ways.[7] Borrower is free to defend the action, such as by raising evidentiary objections and testing the legal sufficiency of the Bank's case. *See Thompson v. Osborne*, 152 N.C. 408, 410, 67 S.E. 1029, 1029 (1910) (noting that the defendant was entitled to assert legal and equitable defenses in response to an action on the note at trial). A missing indorsement at this initial notice-pleading stage does not preclude the Bank from proceeding with its civil action. *See In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 506. The Court of Appeals therefore erred by applying the statutory requirements of N.C.G.S. § 45-21.16(d) applicable to non-judicial foreclosure by power of sale to the Bank's judicial foreclosure action *sub judice*.

In sum, the Bank adequately pled its claim for judicial foreclosure. Because the Court of Appeals failed to analyze the complaint under the notice-pleading standard applicable to judicial foreclosures, we reverse the decision of that court and remand this case to the Court of Appeals for consideration of borrower's remaining issue on appeal.

REVERSED AND REMANDED.

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7. *See, e.g.*, N.C.G.S. § 25-3-301 (2015) (" 'Person entitled to enforce' an instrument" includes holder and nonholder in possession); *id.* § 25-3-309 (2015) (allowing "[a] person not in possession" to enforce an instrument when it is lost, destroyed, or stolen); *see also, e.g.*, 25-3-203(b) (2015) (vesting transferee with transferor's rights to enforce the instrument); id. § 25-3-203(c) (2015) (providing transferee for value the "enforceable right to the unqualified indorsement of the transferor"); *see also Norfolk Shipbuilding & Drydock Corp. v. Carlyle*, 242 B.R. 881, 887 (Bankr. E.D. Va. 1999) ("[T]he absence of an endorsement does not . . . deprive a transferee of the right to enforce the instrument."); *Pierce v. DeZeeuw*, 824 P.2d 97, 100 (Colo. App. 1991) (applying the indorsement exception under the predecessor of U.C.C. § 3-203(c) to an assignment), *cert. denied*, Colo. Sup. Ct., (Feb. 18, 1992) (unpublished); *Fleming v. Caras*, 170 Ga. App. 579, 580, 317 S.E.2d 600, 602 (1984) (reversing dismissal because the plaintiff was "entitled to an indorsement" under the predecessor of U.C.C. § 3-203(c)).

JOHNNIE WILKES, EMPLOYEE
v.
CITY OF GREENVILLE, EMPLOYER, SELF-INSURED
(PMA MANAGEMENT GROUP, THIRD-PARTY ADMINISTRATOR)

No. 368PA15

Filed 9 June 2017

1. Workers' Compensation—Form 60 compensable injuries—additional medical treatment sought—presumption in favor of plaintiff

Where plaintiff-employee sustained significant physical injuries as a result of an automobile accident that occurred during the course and scope of his employment, and defendant-employer filed a Form 60 accepting that plaintiff had suffered compensable injuries by accident and began paying temporary total compensation and medical compensation for his injuries, the Industrial Commission erred by failing to give plaintiff the benefit of a presumption that the additional medical treatment he sought was for conditions related to his compensable injuries. Plaintiff was entitled to a presumption that additional medical treatment for tinnitus, anxiety, and depression was related to his compensable conditions.

2. Workers' Compensation—compensable condition—effect on wage-earning capacity

In a Workers' Compensation case, the Industrial Commission erred by failing to address the effects of plaintiff-employee's tinnitus in determining whether he lost wage-earning capacity. The case was remanded to the Commission for findings addressing plaintiff's wage-earning capacity, considering plaintiff's compensable tinnitus in the context of all the preexisting and coexisting conditions bearing upon his wage-earning capacity.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 282 (2015), reversing in part and vacating and remanding in part an opinion and award filed on 9 April 2014 by the North Carolina Industrial Commission. Heard in the Supreme Court on 15 February 2017.

Hunt Law Firm, PLLC, by Anita B. Hunt; and Patterson Harkavy LLP, by Narendra K. Ghosh, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Matthew P. Blake, for defendant-appellant.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson; and Sumwalt Law Firm, by Vernon Sumwalt, for North Carolina Advocates for Justice, amicus curiae.

Young Moore and Henderson, P.A., by Angela Farag Craddock; and Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for North Carolina Association of Defense Attorneys, North Carolina Chamber, North Carolina Retail Merchants Association, North Carolina Home Builders Association, Employers Coalition of North Carolina, Property Casualty Insurers of America, and American Insurance Association, amici curiae.

Lewis & Roberts, PLLC, by J. William Crone and J. Timothy Wilson, for all amici; Teague, Campbell, Dennis & Gorham, LLP, by Bruce Hamilton, for North Carolina Association of Self-Insurers, and by Tracey Jones, for North Carolina Association of County Commissioners; Allison B. Schafer, Legal Counsel, and Christine T. Scheef, Staff Attorney, for N.C. School Boards Association; and Kimberly S. Hibbard, General Counsel, for N.C. League of Municipalities, amici curiae.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner; and Law Office of David P. Stewart, by David P. Stewart, for Workers' Injury Law & Advocacy Group, amicus curiae.

HUDSON, Justice.

Plaintiff Johnnie Wilkes appealed the opinion and award of the North Carolina Industrial Commission concluding that: (1) plaintiff failed to meet his burden of establishing that his anxiety and depression were a result of his work-related accident; and (2) plaintiff was not entitled to disability payments made after 18 January 2011. *Wilkes v. City of Greenville*, ___ N.C. App. ___, ___, ___, 777 S.E.2d 282, 284-85, 289 (2015). On appeal, the Court of Appeals unanimously vacated and remanded in part, holding that on remand in reviewing plaintiff's entitlement to medical treatment, the Commission should give plaintiff the benefit of a presumption that his anxiety and depression were related to his injuries, and reversed in part, holding that plaintiff had met his burden of establishing disability. *Id.* at ___, ___, 777 S.E.2d at 285-91.

Because we agree that plaintiff was entitled to a presumption of compensability in regards to his continued medical treatment, we affirm that portion of the decision of the Court of Appeals. Because we conclude further that the Commission failed to address the effects of plaintiff's tinnitus in determining whether he lost wage-earning capacity, we modify and affirm that portion of the Court of Appeals' decision, and remand for further proceedings not inconsistent with this opinion.

Background

Plaintiff was employed by defendant as a landscaper for approximately nine years before 21 April 2010, when he was involved in a motor vehicle wreck while on the job. Plaintiff was driving a truck owned by defendant when a third party ran a red light and struck plaintiff's vehicle. The truck then collided with a tree, causing the windshield to break and the airbags to deploy. Plaintiff was taken to the emergency room at Pitt County Memorial Hospital and treated for his injuries, which included an abrasion on his head, three broken ribs, and injuries to his neck, back, pelvis, and hip. The following day, plaintiff returned to the ER complaining of dizziness; an MRI revealed that plaintiff had suffered a concussion from the accident. Slightly over a week later, on 29 April 2010, defendant filed a Form 60 with the North Carolina Industrial Commission, in which defendant accepted plaintiff's claim as compensable under the Workers' Compensation Act (Act), and described the injury as "worker involved in MVA and had multiple injuries to ribs, neck, legs and entire left side." Defendant began paying plaintiff compensation for temporary total disability and provided medical compensation for plaintiff's injuries.

Plaintiff saw numerous physicians over the next year for treatment and evaluation of continuing complaints of pain in his back and leg, ringing in his ears (tinnitus), anxiety and depression, and sleep loss. On 18 January 2011, defendant filed a Form 33 requesting that plaintiff's claim be assigned for a hearing before the Commission, stating that the "[p]arties disagree about the totality of plaintiff's complaints related to his compensable injury and need for additional medical evaluations." On 28 January 2011, plaintiff filed a Form 33 requesting an "Expedited Medical Motion" hearing, listing his work-related injuries as "head, back, depression, ringing in ears [tinnitus], memory loss, speech changes, dizziness, balance, etc.," and stating that he was "in need of additional medical treatment . . . specifically an evaluation by a neurosurgeon." After a conference call hearing on 4 February 2011, plaintiff saw Robert Lacin, M.D., a neurosurgeon; the Commission held a subsequent conference call hearing on 7 April 2011, and declined to refer plaintiff to a neuropsychiatrist.

Eventually, the matter was heard in person before Deputy Commissioner Mary C. Vilas on 21 September 2011, after which depositions of medical personnel were taken. On 1 February 2013, Deputy Commissioner Vilas entered an opinion and award determining that plaintiff's low back and leg pain, anxiety, depression, sleep disorder, tinnitus, headaches, and temporomandibular joint pain were causally related to his 21 April 2010 compensable injury. Deputy Commissioner Vilas also determined that plaintiff had established temporary total disability by demonstrating "that he is capable of some work but that it would be futile to seek work at this time because of preexisting conditions of his age, full-scale IQ of 65, education level and reading capacity at grade level 2.6, previous work history of manual labor jobs, and his physical conditions resulting from his April 21, 2010 compensable injury." Accordingly, the deputy commissioner ordered defendant to pay plaintiff temporary total disability until he returned to work or until further order of the Commission and to pay all medical expenses reasonably required to effect a cure or lessen plaintiff's period of disability. Defendant appealed to the Full Commission (Commission).

The Commission heard the case on 4 November 2013, and considered the parties' stipulations, exhibits, testimony from multiple witnesses, including plaintiff and plaintiff's wife, and depositions taken from Doctors Albernaz, Tucci, Lacin, Schulz, Hervey, and Gualtieri. The Commission found that plaintiff suffered tinnitus as a result of the 21 April 2010 accident, but that the evidence regarding his alleged anxiety and depression was conflicting. The Commission noted, for example, that "Dr. Schulz diagnosed Plaintiff with malingering along with possible mild depression," and that "Dr. Gualtieri concurred with Dr. Schulz's diagnosis of symptom exaggeration and malingering." On the other hand, "Dr. Hervey disagreed with Dr. Schulz's malingering diagnosis . . . . Dr. Hervey noted 'apparent distress' and diagnosed Plaintiff with depression and anxiety," while Dr. Tucci diagnosed Plaintiff with "severe tinnitus" and testified that the tinnitus was "wrapped up with the anxiety or depression." Accordingly, the Commission found, in relevant part:

> 34. Based on the preponderance of the evidence, including testimony by Doctors Albernaz and Tucci, the Full Commission concludes that Plaintiff has not reached maximum medical improvement with regard to his tinnitus.
>
> 35. Testimony by Plaintiff, Plaintiff's wife, and Doctors Lacin, Schulz, Hervey, and Gualtieri is conflicting

> as to whether Plaintiff is currently suffering from anxiety and depression. Based upon a preponderance of all the evidence of record, the Full Commission concludes that Plaintiff's alleged anxiety and depression was not caused by the 21 April 2010 work-related accident.

Based on these findings of fact, the Commission concluded that while plaintiff was entitled to medical compensation for his tinnitus, plaintiff had failed to meet his burden of establishing that he had anxiety and depression caused by his work-related accident, and that therefore, plaintiff was not entitled to medical compensation for those conditions. The Commission further concluded that plaintiff was not entitled to any disability payments made after 18 January 2011 (the date defendant filed a Form 33 requesting a hearing on plaintiff's claims), and that defendant was entitled to a credit for any payments it had made after that date. More specifically, the Commission made the following relevant conclusions of law:

> 2. . . . Based upon all credible evidence, the Full Commission concludes that Plaintiff has met his burden of showing that on 21 April 2010 he suffered compensable injuries [to] his head and ears leading to tinnitus as a result of a traffic accident arising out of the course and scope of his employment with Employer-Defendant.
>
> . . . .
>
> 4. Plaintiff is entitled to the payment of past and future medical expenses incurred for treatment that was reasonably required to effect a cure, provide relief or lessen any disability, including such further treatment for his tinnitus that may be recommended by Doctors Tucci and Albernaz.
>
> 5. Where depression or other emotional trauma has been caused by a compensable accident and injury, and such depression or trauma has caused disability, then total disability benefits may be allowed. Here, the evidence is conflicting as to whether Plaintiff has suffered from depression and whether any depression was caused by the 21 April 2010 work-related accident. Based upon the preponderance of the evidence, the Full Commission concludes that Plaintiff has not met his burden of showing that his alleged depression and anxiety is a result of

> the 21 April 2010 work-related accident or has caused him any temporary disability.
>
> 6. . . . The Full Commission concludes that Plaintiff has not presented evidence of a reasonable job search and has presented insufficient evidence that a job search would be futile. Thus, the Full Commission concludes that Plaintiff is entitled to temporary total disability benefits from the 21 April 2010 work-related injury until 18 January 2011, the date that Employer-Defendant filed a Form 33 requesting a hearing on Plaintiff's claims.

(Citations omitted.) On 9 April 2014, the Commission issued its opinion and award, from which plaintiff appealed.

In a unanimous opinion, the Court of Appeals first vacated the portion of the opinion and award concerning plaintiff's request for additional medical treatment for anxiety and depression. *Wilkes*, ___ N.C. App. at ___, ___, 777 S.E.2d at 287-88, 292. In light of the court's previous decisions in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), and *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005), *disc. rev. improvidently allowed per curiam*, 360 N.C. 587, 634 S.E.2d 887 (2006), the court held that the Commission erred by not applying the rebuttable *Parsons* presumption to plaintiff's anxiety and depression, and instead placing the burden on plaintiff to demonstrate causation of those conditions. *Wilkes*, ___ N.C. App. at ___, 777 S.E.2d at 285-88. The court remanded the matter to the Commission to "apply the *Parsons* presumption and then make a new determination as to whether Plaintiff's psychological symptoms are causally related to the 21 April 2010 injury." *Id.* at ___, 777 S.E.2d at 287-88.

Additionally, the court reversed the portion of the Commission's opinion and award terminating plaintiff's total temporary disability benefits. *Id.* at ___, 777 S.E.2d at 292. Noting the testimony of Kurt Voos, M.D., who "authorized Plaintiff to return to work at sedentary duty with permanent restrictions including lifting up to 10 lbs with occasional walking and standing," the court stated that based on this testimony the Commission had found that plaintiff was "incapable of returning to his previous job but is capable of working in sedentary employment." *Id.* at ___, 777 S.E.2d at 289. The court also took note of other facts found by the Commission:

> Specifically, the Commission found that Plaintiff (1) was 60 years old at the time of the hearing; (2) had been employed as a landscaper with Defendant since 2001; (3) had been

> employed in medium and heavy labor positions throughout his entire adult life; (4) attended school until the tenth grade; (5) was physically incapable of performing his former job as a landscaper/laborer; (6) has "difficulty reading and comprehending" written material as evidenced during his evaluation with Dr. Peter Schulz; and (7) has "an IQ of 65, putting him in the impaired range."

Id. at ___, 777 S.E.2d at 289. The court held that with this evidence, plaintiff had met his initial burden of showing that a job search would be futile so as to shift the burden to his employer to show that suitable jobs were available. *Id.* at ___, 777 S.E.2d at 289-90. Because defendant made no such showing, the court concluded that "the Commission erred in ruling that Plaintiff was not temporarily totally disabled," and that the Commission's "conclusions of law reaching the opposite result were not supported by the findings of fact contained within its Opinion and Award." *Id.* at ___, 777 S.E.2d at 291.

Defendant filed a petition for discretionary review, which this Court allowed on 13 April 2016.

I. Medical Compensation

[1] Here defendant argues that the Court of Appeals erred in holding that plaintiff was entitled to a presumption that his anxiety and depression were causally related to his compensable injuries. We do not agree, and affirm the Court of Appeals on this issue.

Our review of an order of the Commission is limited to determining "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *see also* N.C.G.S. § 97-86 (2015). But, "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citing, *inter alia*, *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930)). "When considering a case on discretionary review from the Court of Appeals, we review the decision for errors of law." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citing N.C. R. App. P. 16(a)).

In construing the provisions of the Workers' Compensation Act, "[w]e have held in decision after decision that our Workmen's

Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependants, and its benefits should not be denied by a technical, narrow, and strict construction." *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) (citing 3 Strong's North Carolina Index: Master and Servant § 45 (1960)). But, we are mindful that the Act "was never intended to be a general accident and health insurance policy." *Weaver v. Swedish Imports Maint., Inc.*, 319 N.C. 243, 253, 354 S.E.2d 477, 483 (1987). We have also noted that "[t]he primary purpose of legislation of this kind is to compel industry to take care of its own wreckage." *Barber v. Minges*, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943); *see also Deese v. Se. Lawn & Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E.2d 140, 143 (1982) ("[I]n all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit.").

A claim for benefits under the Workers' Compensation Act "is the right of the employee, at his election, to demand compensation for such injuries as result from an accident." *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953). Under the terms of the Act, an "injury" is compensable when it is: (1) by accident; (2) arising out of employment; and (3) in the course of employment. N.C.G.S. § 97-2(6) (2015); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

When the employee suffers a compensable injury, "[m]edical compensation *shall be provided by the employer.*" N.C.G.S. § 97-25(a) (2015) (emphasis added); *Mehaffey v. Burger King*, 367 N.C. 120, 124, 749 S.E.2d 252, 255 (2013) ("The Act places upon an employer the responsibility to furnish 'medical compensation' to an injured employee."). "Medical Compensation" includes any treatment that "may reasonably be required to effect a cure or give relief" or "tend to lessen the period of disability." N.C.G.S. § 97-2(19) (2015); *see also Little v. Penn Ventilator Co.*, 317 N.C. 206, 213, 345 S.E.2d 204, 209 (1986) ("In our judgment relief embraces not only an affirmative improvement towards an injured employee's health, but also the prevention or mitigation of further decline in that health due to the compensable injury."); *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869 (" 'Logically implicit' in this statute is the requirement that the future medical treatment be 'directly related to the original compensable injury.' " (quoting *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. rev. denied*, 343 N.C. 513, 472 S.E.2d 18 (1996))). The employee's "*right to medical*

compensation" continues until "two years after the employer's last payment of medical or indemnity compensation." N.C.G.S. § 97-25.1 (2015) (emphasis added). At that point, the right to medical compensation terminates, unless, before the end of that period: "(i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation." *Id.*

The question here concerns whether, when an injury has previously been established as compensable, a presumption arises that additional medical treatment is related to the compensable injury. While we have yet to address whether a presumption arises in the context of medical compensation, the Court of Appeals first addressed this issue in *Parsons v. Pantry, Inc.*

In *Parsons* the plaintiff was working in the defendant's store late at night when two men entered. 126 N.C. App. at 540-42, 485 S.E.2d at 868. One of the men struck the plaintiff in the forehead and shot her multiple times with a stun gun. *Id.* At a hearing before the Commission, the plaintiff met her burden of establishing that as a result of the incident she suffered compensable injuries, which consisted primarily of headaches. *Id.* at 540-42, 485 S.E.2d at 868-69. Accordingly, the Commission entered an opinion and award ordering the defendant to pay the plaintiff's medical expenses and to provide additional treatment "which tends to effect a cure, give relief, or lessen the plaintiff's period of disability." *Id.* at 540-41, 485 S.E.2d at 868. When the plaintiff subsequently requested a hearing because of the defendant's failure to pay medical expenses, the Commission denied her any further medical treatment on the basis that she had "not introduced any evidence of causation between her injury and her headache complaints at the time of the hearing." *Id.* at 541, 485 S.E.2d at 868-69. On appeal, the Court of Appeals reversed and remanded, holding that it was error to place the burden on the plaintiff to prove causation in order to obtain additional medical treatment. *Id.* at 542-43, 485 S.E.2d at 869. The court explained that the plaintiff had met her burden at the initial hearing, and that "[t]o require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." *Id.* at 542, 485 S.E.2d at 869. This presumption that additional medical treatment is directly related to the compensable injury has since become known as the "*Parsons* presumption." *See Wilkes*, ___ N.C. App. at ___, 777 S.E.2d at 286 ("Once the employee meets this initial burden, however, a presumption arises—often referred

to as the *Parsons* presumption—that 'additional medical treatment is directly related to the compensable injury.' " (quoting *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292)).

The Court of Appeals has since held that the *Parsons* presumption applies both to agreements to pay compensation by means of a Form 21 ("Agreement for Compensation for Disability") and to cases involving "direct payment" accompanied by a Form 60 ("Employer's Admission of Employee's Right to Compensation (G.S. § 97-18(b))"). *See Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259-60, 523 S.E.2d 720, 723-24 (1999); *see also Perez*, 174 N.C. App. at 135-37, 620 S.E.2d at 292-94. With the filing of a Form 21, the employer agrees after a workplace injury to accept the claim as compensable pursuant to N.C.G.S. §§ 97-18 and 97-82. The statutes require the employer to file a "memorandum of agreement" in the form prescribed by the Commission; once approved, that document constitutes an award of the Commission. N.C.G.S. §§ 97-82, -87(a)(2) (2015); *see also Watkins v. Cent. Motor Lines, Inc.*, 279 N.C. 132, 138, 181 S.E.2d 588, 593 (1971) ("The agreement between the parties on Form 21, approved by the Commission . . . . constituted an award by the Commission . . . ."). The statutes also permit "direct payment" by the employer, which requires no approval either from the Commission or the employee, and allows the employer to promptly initiate payments to the employee following an injury. N.C.G.S. § 97-18(b), (d) (2015); *id.* § 97-82. In 1994, the legislature enacted direct payment by amending subsection 97-18(b), adding subsection 97-18(d), and amending N.C.G.S. § 97-82(b). The Workers' Compensation Reform Act of 1994, ch. 679, secs. 3.1, 3.2, 1993 N.C. Sess. Laws (Reg. Sess. 1994) 394, 400-03. Under the current statutory framework, when the employer proceeds with direct payment, the employer can file with the Commission a Form 60 "admit[ting] the employee's right to compensation" under N.C.G.S. § 97-18(b). *See, e.g., Clark v. Wal-Mart*, 360 N.C. 41, 42, 619 S.E.2d 491, 492 (2005). In the alternative, the employer can file a Form 63 under N.C.G.S. § 97-18(d), in which the employer may initiate payments without prejudice and without admitting liability, after which the employer has ninety days to contest or accept liability for the claim. *See, e.g., Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 702, 599 S.E.2d 508, 510 (2004). Notably, N.C.G.S. § 97-82(b) provides that "[p]ayment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made."

We hold that plaintiff here is entitled to a presumption that additional medical treatment is related to his compensable conditions. This holding is consistent both with the statutory language and with cases pointing out that "compensability" and "disability" are separate issues. We have recognized that a presumption of ongoing disability arises only in limited circumstances—specifically, once the disability has been admitted or proved to the Industrial Commission. *Johnson*, 358 N.C. at 706, 599 S.E.2d at 512. This judicial construction of a presumption of ongoing disability arising based upon an "award of the Commission" dates back to at least 1951. *Tucker v. Lowdermilk*, 233 N.C. 185, 189, 63 S.E.2d 109, 112 (1951) ("However, if an award is made, payable during disability, and there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work."); *see also Watkins*, 279 N.C. at 137, 181 S.E.2d at 592 ("If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work . . . ."). On that basis, we held that while the employer admits *compensability* by filing a Form 60, or a Form 63 when the employer fails to contest compensability within the ninety-day period, no presumption of *disability* arises in those circumstances. *Clark*, 360 N.C. at 43-46, 619 S.E.2d at 492-94; *Johnson*, 358 N.C. at 706-07, 599 S.E.2d at 512-13.

Nonetheless, on the issue of compensability in the same circumstances, we view the plain language of N.C.G.S. § 97-82(b) as dispositive. Subsection 97-82(b) provides that "[p]ayment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, *shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made.*" (Emphasis added.) Continually placing the burden on an employee to prove that his symptoms are causally related to his admittedly compensable injury before he can receive further medical treatment "ignores this prior award." *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. Accordingly, we conclude that an admission of compensability approved under N.C.G.S. § 97-82(b) entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury. In reaching this conclusion, we note the mandatory language of N.C.G.S. § 97-25(a) (stating that "[m]edical compensation *shall be provided* by the employer" (emphasis added)), as well as the fact that medical compensation encompasses any treatment that "may reasonably be required to effect a cure or give relief," *Id.* § 97-2(19).

Defendant contends that the "award" under N.C.G.S. § 97-82(b) is merely an admission that the employee has suffered an accident arising out of and in the course of employment, and that the specifics of any injury must still be determined by an adjudication of the Commission. We conclude otherwise. Requiring the employee to repeatedly "build claims for medical compensation" for an admittedly compensable injury, as argued by defendant, would be inconsistent with the language of N.C.G.S. §§ 97-25, 97-2(19), and 97-82(b), as well as the purpose and spirit of the Act. We decline to adopt such a narrow interpretation of the Act.

Moreover, defendant's proposed interpretation would allow the employer, by "admitting" that the employee has suffered a compensable injury, to enjoy the right to direct the employee's medical treatment without accepting the accompanying responsibility to provide medical compensation for any treatment until the employee has proved its relatedness to the compensable injury. We have observed that, concomitant with the employer's duty under N.C.G.S. § 97-25 to provide, and the employee's right to receive, medical compensation, is the employer's right to direct the medical treatment that it furnishes. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 586-87, 264 S.E.2d 56, 60 (1980); *see* N.C.G.S. § 97-25 (2015). Even before compensability is established, when the employee claims compensation after an injury, the employer has the right to direct the employee to submit to an independent medical examination by one of its authorized physicians. N.C.G.S. § 97-27(a) (2015); *see also Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000) ("One of the implicit purposes of this requirement is to enable the employer to ascertain whether the injury is work-related or not and thus whether the claim is indeed compensable."), *disc. rev. denied*, 356 N.C. 303, 570 S.E.2d 725 (2002).

Finally, defendant argues that applying the *Parsons* presumption to a Form 60 filing will discourage direct payment, upset the framework of the Act, and convert the Act into general health insurance. We are unconvinced. Applying the rebuttable presumption merely removes from the employee seeking medical treatment the burden of proving every time that such treatment is for injuries or symptoms causally related to the admittedly compensable condition. *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292. The employer may rebut this presumption with evidence that the condition or treatment is not directly related to the compensable injury. *Id.* at 135, 620 S.E.2d at 292. Defendant has not identified

any marked decrease in the use of Form 60s, or any increase in related litigation and costs, since Perez was decided in 2004.[1]

Certainly, medical issues can be complex and the extent of an employee's injuries may be difficult to determine at the time of the accident. However, with N.C.G.S. § 97-27(a) (providing that an employee alleging a compensable injury is required to submit to a medical examination by the employer's authorized physician) and N.C.G.S. § 97-18(d) (authorizing payment without prejudice to later contest liability), the legislature has wisely given employers who are uncertain about the compensability of an employee's injuries the methods to investigate such injuries without admitting any liability under the Act while still providing prompt payments to injured employees.

In addition, the legislature has provided more recently for an expedited "medical motions" procedure, which was utilized here and can quickly be used to rebut the presumption if appropriate.[2] In 2007 the General Assembly amended N.C.G.S. § 97-78 to require the Commission to implement a plan to expeditiously resolve disputes involving medical compensation. Current Operations and Capital Improvements Appropriations Act of 2007, ch. 323, sec. 13.4A.(a), 2007 N.C. Sess. Laws 616, 787-88. And in 2013 the legislature amended N.C.G.S. § 97-25(f) to set forth such an expedited procedure. Act of July 9, 2013, ch. 294, sec. 4, 2013 N.C. Sess. Laws 802, 803-04. Thus, our holding on this issue is consistent with both the statutory mandate to provide treatment to the employee and with any employer's need to quickly rebut the presumption.

Here, as a result of a motor vehicle crash that occurred within the course and scope of his employment, plaintiff sustained injuries that included an abrasion on his head, three broken ribs, and injuries to

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1. To the contrary, following the enactment of direct payment and our holdings in *Johnson* and *Clark*, Forms 60 and 63 have essentially replaced Forms 21 and 26. *See North Carolina Workers' Compensation Law: A Practical Guide to Success at Every Stage of a Claim* 155-56 (Valerie A. Johnson & Gina E. Cammarano eds., 3d ed. 2016) ("The use of [Form 21 and Form 26], however, has declined dramatically since the 1994 amendments to the Act. Employers and insurance carriers instead use a Form 60 or Form 63 procedure to admit liability for a claim and pay weekly benefits, without giving rise to any presumption of disability. Thus, the presumption of continuing disability, while it still exists, is increasingly irrelevant." (citations omitted)).

2. Here, where plaintiff utilized these expedited procedures, the matter might well have been concluded speedily, had the presumption been properly applied.

his neck, back, pelvis, hip, and entire left side, as well as a concussion. Defendant filed a Form 60 accepting that plaintiff suffered compensable injuries by accident and began paying temporary total compensation and medical compensation for plaintiff's injuries. Accordingly, when plaintiff sought additional medical treatment for tinnitus, anxiety, and depression, alleging that these conditions were directly related to his compensable injuries, he was entitled to a rebuttable presumption to that effect. It is clear from the Commission's Conclusions of Law that did it not apply any presumption, and instead placed the initial burden on plaintiff to prove causation for any medical compensation he sought:

> 2. The claimant in a workers' compensation case bears the initial burden of proof, and must establish "each and every element of compensability," including a causal relationship between the injury and his employment. Based upon all credible evidence, the Full Commission concludes that Plaintiff has met his burden of showing that on 21 April 2010 he suffered compensable injuries [to] his head and ears leading to tinnitus as a result of a traffic accident arising out of the course and scope of his employment with Employer-Defendant. N.C. Gen. Stat. § 97-2(6).
>
> . . . .
>
> 5. . . . Based upon the preponderance of the evidence, the Full Commission concludes that Plaintiff has not met his burden of showing that his alleged depression and anxiety is a result of the 21 April 2010 work-related accident . . . .

(Citation omitted.) Because the Commission acted under a misapprehension of law, the Court of Appeals vacated the opinion and award on this issue and remanded for application of the presumption; we affirm this portion of the Court of Appeals' opinion. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685. We note that plaintiff was evaluated by several physicians and that the Commission found the evidence regarding plaintiff's anxiety and depression to be "conflicting." Like the Court of Appeals, "[w]e express no opinion on the question of whether the evidence of record is sufficient to rebut the presumption that Plaintiff's current complaints are directly related to his initial compensable injury." *Wilkes*, ___ N.C. App. at ___, 777 S.E.2d at 288. We leave this determination to the Commission on remand.

II. Disability

[2] On the issue of disability, the Court of Appeals, relying in part on *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), held that the uncontroverted evidence establishing plaintiff's cognitive limitations adequately demonstrated that any attempt by him to find other employment would be futile, and therefore, plaintiff was entitled to total disability benefits. Defendant argues that the Court of Appeals erred in reversing the Commission's termination of plaintiff's temporary total disability benefits. We modify and affirm that decision, and remand for further proceedings.

As we explained in *Medlin v. Weaver Cooke Construction, LLC*, "disability" is defined by the Act in N.C.G.S. § 97-2(9) as:

> "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." *Id.* §§ 97-2(9) (2013), -2(i) (1930). This definition, we have long and consistently held, specifically relates to the incapacity to earn wages, rather than only to physical infirmity. *See, e.g.*, *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 378-79 (1986); *Fleming v. K-Mart Corp.*, 312 N.C. 538, 541, 324 S.E.2d 214, 216 (1985). In *Hilliard* [*v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)], we articulated again the three factual elements that a plaintiff must prove to support the legal conclusion of disability:
>
> ["]We are of the opinion that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.["]

367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014). In 1993 the Court of Appeals issued its decision in *Russell*, apparently to provide examples of methods[3] by which a plaintiff could prove disability as defined above.

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3. "The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, *Peoples*, 316 N.C. at 443, 342 S.E.2d at 809; (2) the production of evidence that he is capable of some work, but that he has, after a

Here we emphasize that this Court has not adopted *Russell*, and that the approaches taken therein are not the only means of proving disability. *See id.* at 422, 760 S.E.2d at 737 (stating that "*Hilliard* was grounded explicitly in the statutory definition of disability in section 97-2; *Russell expanded upon, and perhaps diverged from*, that grounding" and that the *Russell* methods "are neither statutory nor exhaustive" (emphases added)). In fact, the issue in Russell was "whether an injured employee seeking an award of total disability under N.C.G.S. § 97-29, who is *unemployed, medically able to work, and possesses no preexisting limitations which would render him unemployable*," presented sufficient evidence that he was unable to find work. *Russell*, 108 N.C. App. at 764-65, 425 S.E.2d at 456-57 (emphasis added). Here, where plaintiff has numerous preexisting limitations as found by the Commission (over the age of sixty, limited IQ of sixty-five, limited education and work experience), *Russell* is inapposite. Again, we have stated that, in determining loss of wage-earning capacity, the Commission must take into account age, education, and prior work experience as well as other preexisting and coexisting conditions. *Little v. Anson Cty. Sch. Food Serv.*, 295 N.C. 527, 532, 246 S.E.2d 743, 746 (1978). While plaintiff here bears the burden of proof to establish disability, once plaintiff has done so, the burden shifts to defendant "to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Johnson*, 358 N.C. at 706, 708, 599 S.E.2d at 512, 513 (quoting *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (emphasis omitted)).

Defendant argues that, in reversing the Commission, the Court of Appeals erroneously overruled an earlier decision of that court in *Fields v. H&E Equipment Services, LLC*, 240 N.C. App. 483, 771 S.E.2d 791 (2015). It is unclear whether defendant, in relying on *Fields*, is arguing that plaintiff was required to produce expert testimony to prove that engaging in a job search would be futile under *Russell*. *See Fields*, 240 N.C. App. at 483, 771 S.E.2d at 792 (concluding that the plaintiff did not establish futility because he "failed to provide competent evidence

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reasonable effort on his part, been unsuccessful in his effort to obtain employment, *id.* at 444, [342] S.E.2d at 809; 1C Arthur Larson, *The Law of Workmen's Compensation* § 57.61(d) (1992); (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment, *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury[,] *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)." *Russell*, 108 N.C. App. at 765-66, 425 S.E.2d at 457.

through expert testimony of his inability to find any other work as a result of his work-related injury" (emphasis added)). Because we have held that *Russell* does not apply here, this argument is misplaced; however, we have never held, and decline to do so now, that an employee is required to produce expert testimony in order to demonstrate his inability to earn wages. A plaintiff's own testimony, as well as that of his lay witnesses, can be quite competent to explain how a plaintiff's injury and any related symptoms have affected his activities. *See Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 31, 398 S.E.2d 677, 681 (1990) ("Testimony by the plaintiff him/herself has also been found to be competent on the issue of wage earning capacity." (citing *Singleton v. D.T. Vance Mica Co.*, 235 N.C. 315, 325, 69 S.E.2d 707, 714 (1952))). If plaintiff shows total incapacity for work, taking into account his work-related conditions combined with the other factors noted above, he is not required to also show that a job search would be futile. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986) ("In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment.").

We have often stated that the Commission must make specific findings that address the "crucial questions of fact upon which plaintiff's right to compensation depends." *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955); *see also*, *e.g.*, *Singleton v. Durham Laundry Co.*, 213 N.C. 32, 34-35, 195 S.E. 34, 35 (1938) ("It is the duty of the Commission to make such specific and definite findings upon the evidence reported as will enable this Court to determine whether the general finding or conclusion should stand, particularly when there are material facts at issue."). Here the Commission found the evidence conflicting on whether plaintiff was actually suffering from anxiety and depression, and as a result, the Commission determined that plaintiff had failed to establish that his anxiety and depression were compensable or that they affected his ability to work, thus resulting in disability. The Commission found as fact, in relevant part that:

> 35. Testimony by Plaintiff, Plaintiff's wife, and Doctors Lacin, Schulz, Hervey, and Gualtieri is conflicting as to whether Plaintiff is currently suffering from anxiety and depression. Based upon a preponderance of all the evidence of record, the Full Commission concludes that Plaintiff's alleged anxiety and depression was not caused by the 21 April 2010 work-related accident.

The Commission concluded as a matter of law that:

> 5. Where depression or other emotional trauma has been caused by a compensable accident and injury, and such depression or trauma has caused disability, then total disability benefits may be allowed. Here, the evidence is conflicting as to whether Plaintiff has suffered from depression and whether any depression was caused by the 21 April 2010 work-related accident. Based upon the preponderance of the evidence, the Full Commission concludes that Plaintiff has not met his burden of showing that his alleged depression and anxiety is a result of the 21 April 2010 work-related accident or *has caused him any temporary disability*.

(Emphasis added and citations omitted.)

On the other hand, the Commission found credible plaintiff's evidence that he was actually suffering from tinnitus, noting plaintiff's numerous complaints dating back to May 2010, and found that he had not reached maximum medical improvement with regard to his tinnitus at the time of the Commission's opinion and award in April 2014. The Commission specifically found:

> 26. On 27 December 2011, Plaintiff saw Dr. Debara Tucci, a board-certified otolaryngologist at Duke University Medical Center, for an evaluation. Dr. Tucci reviewed Plaintiff's previous medical records, audiograms and physically examined Plaintiff's head and ears. Dr. Tucci diagnosed Plaintiff with severe tinnitus and testified that this condition was likely caused by the accident. Dr. Tucci further testified that the tinnitus was "wrapped up with the anxiety or depression" diagnosed in Dr. Hervey's report, which she reviewed.
>
> 27. Dr. Tucci testified that Plaintiff's tinnitus was "more likely than not" a result of the 21 April 2010 accident and was part of the "symptomatology that occurred as a result of the accident."

The Commission awarded plaintiff medical compensation for his tinnitus, including any treatment "reasonably required to effect a cure, provide relief or *lessen any disability*." (Emphasis added.) Yet, having found credible evidence of plaintiff's "severe tinnitus," the Commission made no related findings on how plaintiff's compensable tinnitus and

any related symptoms may have affected his ability to engage in wage-earning activities. Accordingly, we remand this case to the Commission to take additional evidence if necessary and to make specific findings addressing plaintiff's wage-earning capacity, considering plaintiff's compensable tinnitus in the context of all the preexisting and coexisting conditions bearing upon his wage-earning capacity. *See Medlin*, 367 N.C. at 420, 760 S.E.2d at 736; *Peoples*, 316 N.C. at 441, 342 S.E.2d at 808 ("If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience." (citing *Little*, 295 N.C. at 532, 246 S.E.2d at 746)).

Conclusion

In sum, we hold that the Commission erred in failing to give plaintiff the benefit of a presumption that the additional medical treatment he sought was for conditions related to his compensable injuries. The Commission will reevaluate its decision, applying the correct presumption. As the Court of Appeals correctly addressed this error, we affirm on this issue. On the issue of plaintiff's entitlement to additional disability benefits, we hold that the evidence raises factual issues regarding the effect of plaintiff's compensable tinnitus on his ability to earn wages, and that, on remand, the Commission must find these facts. Accordingly, on this second issue we modify and affirm the decision of the Court of Appeals. We remand this case to the Court of Appeals for further remand to the Commission for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; MODIFIED AND AFFIRMED IN PART, AND REMANDED.

[369 N.C. 749 (2017)]

DAWSON F. NECKLES	)	
	)	
v.	)	From Wake County
	)	
HARRIS TEETER, ET AL.	)	

No. 23P17

ORDER

Defendants' petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *Wilkes v. City of Greenville*, ___ N.C. ___, ___ S.E.2d ___ (2017) (368PA15).

By Order of the Court in Conference, this 8th day of June, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of June, 2017.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

8 June 2017

003P17	Kelly F. Lewis, Employee v. Transit Management of Charlotte, Employer, Self-Insured (Compensation Claims Solutions, Third-Party Administrator)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-69) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Joint Motion for Leave to Withdraw Petitions for Discretionary Review	1. --- 2. --- 3. Allowed
007P17	In the Matter of J.A.M.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-563) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for *Writ of Supersedeas*	1. Allowed 2. Allowed **01/10/2017** 3. Allowed
015P16-2	State v. Jose Luis Dominguez	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of the COA (COA16-919) 2. Def's *Pro Se* Motion to Proceed I*n Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot **Jackson, J., recused**
023P17	Dawson F. Neckles v. Harris Teeter and Travelers	Defs' PDR Under N.C.G.S. § 7A-31 (COA16-569)	Special Order
034P17	Danny Keith Hopper, Employee v. Charlton L. Allen, Chairman, The North Carolina Industrial Commission	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COAP16-921) 2. Petitioner's Petition in the Alternative for *Writ of Certiorari* to Review Order of COA 3. Petitioner's Motion for Writ of Prohibition 4. Petitioner's Motion for Addendum to PDR, Petition for *Writ of Certiorari* and Motion for Writ of Prohibition	1. Dismissed 2. Denied 3. Denied 4. Dismissed as moot
049P17	William G. Larsen and Robert Stephen Allen v. The Arlington Condominium Owners Association, Inc. and Arlington Residential Holdings, LLC	Def's (The Arlington Condominium Owners Association, Inc.) PDR Under N.C.G.S. § 7A-31 (COA16-618)	Denied

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

8 JUNE 2017

056P17	Dr. Robert Corwin as Trustee for the Beatrice Corwin Living Irrevocable Trust, on Behalf of a Class of Those Similarly Situated v. British American Tobacco PLC; Reynolds American, Inc.; Susan M. Cameron; John P. Daly; Neil R. Withington; Luc Jobin; Sir Nicholas Scheele; Martin D. Feinstein; Ronald S. Rolf; Richard E. Thornburgh; Holly K. Koeppel; Nana Mensah; Lionel L. Nowell, III; John J. Zillmer; and Thomas C. Wajnet	1. Def's (British American Tobacco PLC) Motion for Temporary Stay (COA15-1334) 2. Def's (British American Tobacco PLC) Petition for *Writ of Supersedeas* 3. Def's (British American Tobacco PLC) PDR Under N.C.G.S. § 7A-31 4. Gary A. Bornstein's Motion to be Admitted *Pro Hac Vice* 5. Jason M. Leviton's Motion to be Admitted *Pro Hac Vice* 6. W. Andrew Copenhaver's Consent Motion for Leave to Withdraw	1. Allowed **02/20/2017** 2. Allowed 3. Allowed 4. Allowed 5. Allowed 6. Allowed
064P17	In re the Appeal by Toney L. Harrell and Harrell's Land Development Co., Inc. v. The Midland Board of Adjustment and the Town of Midland	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA16-646) 2. Respondent's (Town of Midland) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
065P17	State v. Jeffrey Robert Parisi	1. State's Motion for Temporary Stay (COA16-635) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/24/2017** Dissolved **06/08/2017** 2. Denied 3. Denied
067P17	Robbie Dean Terry, et al. v. State of North Carolina, et al.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-153) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot

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

8 JUNE 2017

074P17	Nathaniel Bryant and Joseph L. Gillespie v. Charles Wilbur Bryant and Carl Bryant	1. Plt's (Nathaniel Bryant) *Pro Se* Motion for Temporary Stay 2. Plt's (Nathaniel Bryant) *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's (Nathaniel Bryant) *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Chatham County	1. Denied **03/13/2017** 2. Denied **03/14/2017** 3. Dismissed
079P17	State v. Jimmy Allen Roberts	1. Def's *Pro Se* Motion for Notice of Appeal (COAP17-135) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion for Judicial Notice	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed as moot **Ervin, J., recused**
088P17	G.S.C. Holdings, LLC; T and A Amusements, LLC; and Crazie Overstock Promotions, LLC v. Patrick McCrory, in his Official Capacity as Governor of the State of North Carolina; Frank L. Perry, in his Official Capacity as Secretary of the North Carolina Department of Crime Control and Prevention; Mark J. Senter, in his Official Capacity as Branch Head of the Alcohol Law Enforcement Division; Shannon Craddock, in his Official Capacity as the Chief of Police of the City of Archdale, North Carolina; and Maynard B. Reid, Jr., in his Official Capacity as the Sheriff of Randolph County	Defs' (McCrory, Perry, Senter and Craddock) PDR Under N.C.G.S. § 7A-31) (COA16-160)	Denied

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

8 JUNE 2017

089P17	T and A Amusements, LLC; and Crazie Overstock Promotions, LLC v. Patrick McCrory, in his Official Capacity as Governor of the State of North Carolina; Frank L. Perry, in his Official Capacity as Secretary of the North Carolina Department of Public Safety; Mark J. Senter, in his Official Capacity as Branch Head of the Alcohol Law Enforcement Division; Jody Williams, in his Official Capacity as the Chief of Police of the City of Asheboro, North Carolina; and Maynard B. Reid, Jr., in his Official Capacity as the Sheriff of Randolph County	Defs' (McCrory, Perry, Senter, and Williams) PDR Under N.C.G.S. § 7A-31) (COA16-161)	Denied
091P17	Arvel Lee Gentry, a/k/a Arvel Lee, Orville Gentry v. Gary Brooks, Steven Franklin, Sandy McDevitt, Van Franklin (Life Tenant), and J.C. Gentry	Respondents' (Brooks, Franklin, McDevitt, and Franklin) PDR Under N.C.G.S. § 7A-31 (COA16-614)	Denied
099P17	Mary N. Gurganus v. Charles M. Gurganus	Def's PDR Under N.C.G.S. § 7A-31 (COA16-163)	Denied
104P17	Alonza H. Ward, Jr., and Marie W. Ward v. Laura C. Ward	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-832) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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

8 June 2017

106P17	Tropic Leisure Corp., Magen Point Inc. d/b/a Magens Point Resort v. Jerry A. Hailey	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA15-1254-2) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Virgin Islands Bar Association's Conditional Motion for Leave to File *Amicus* Brief	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
107P17	State v. Teon Jamell Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA16-592)	Denied
113P17	State v. Linzie Lee Swink	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-89) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
116P17	State v. Kevin Antwan Shepherd	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-9335) 2. Def's *Pro Se* PDR Under 77A	1. Dismissed *ex mero motu* 2. Denied
118P17	State v. Herbert Lee Stroud	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-59) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
119P17	State v. Tardra Eterell Bouknight	Def's PDR Under N.C.G.S. § 7A-31 (COA16-544)	Denied
121P17	State v. Manuel Enrique Santana, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-691)	Denied
124A16	Jillian Murray v. The University of North Carolina at Chapel Hill	1. Def's Motion for Judicial Notice (COA15-375) 2. State's Motion for Withdrawal of Counsel	1. Allowed 2. Allowed **12/08/2016**
125P17	State v. Paul Anthony Ramey	Def's *Pro Se* Motion for Petition for Rehearing *En Banc* (COA16-876)	Dismissed
126P17	State v. John Owen Jacobs	Def's PDR Under N.C.G.S. § 7A-31 (COA16-464)	Allowed
127P17	Plasman v. Decca Furniture (WA), Inc., et al.	Plt's Motion for Extension of Time to Respond to Motion to Dismiss Portions of PDR that are Untimely	Allowed **05/15/2017**

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

8 JUNE 2017

127P17	Christian G. Plasman, in his Individual Capacity and Derivatively for the Benefit of, on Behalf of and Right of Nominal Party Bolier & Company, LLC. v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang C. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co. Ltd., Darren Hudgins, Decca Home, LLC and Elan by Decca, LLC and Bolier & Company, LLC. v. Christian J. Plasman (a/k/a Barrett Plasman)	1. Plaintiff and Third Party Defendant's PDR Prior to a Decision of COA 2. Plaintiff and Third Party Defendant's Motion to Consolidate Appeals 3. Defs' Motion to Dismiss Portions of PDR that are Untimely	1. Denied 2. Denied 3. Allowed
128P17	In Re Alex Ohara King	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
130P17	Joan A. Meinck v. City of Gastonia, a North Carolina Municipal Corporation	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-892) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
131P17	State v. Francisco Echeverria	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-673)	Denied
133P17	State v. Michael Todd Walker	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-109) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
134A17	Hildebran Heritage & Development Association, Inc., et al. v. The Town of Hildebran, et al.	Plts' Motion to Dismiss Appeal	Allowed **05/16/2017**
139P17	State v. Mohammed Nasser Jilani	Def's *Pro Se* Motion for Writ of Prohibition	Denied

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

8 June 2017

141P17	State v. William Anthony Lesane, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-147)	Denied **05/05/2017**
142P17	State v. Terance Germaine Malachi	1. State's Motion for Temporary Stay (COA16-752) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/04/2017** 2.
144P17	State v. Kenrick J. Battle	1. State's Motion for Temporary Stay (COA16-1002) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/08/2017** Dissolved **06/08/2017** 2. Denied 3. Denied
145P17	In the Matter of A.P.	1. Petitioner's Motion for Temporary Stay (COA16-1010) 2. Petitioner's Petition for *Writ of Supersedeas*	1. Allowed **05/09/2017** 2.
147P17	State v. Salim Abdu Gould	Def's *Pro Se* Motion for Appellate Review	Dismissed
149P17	State v. Mohammed N. Jilani	Def's *Pro Se* Motion for Petition for Writ of Prohibition	Denied
152P17	Steven M. McKenzie v. District Court	Plt's *Pro Se* Motion for Interlocutory Appeal	Dismissed
153P17	State v. Ailkeem Anthony Norman	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/17/2017** 2.
154P17	State v. Jermaine Derrick Carson, Jr.	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/18/2017**
155P17	State v. Joe Robert Reynolds	1. Def's Motion for Temporary Stay (COA16-149) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **05/19/2017** 2.
156P17	DiCesare, et al. v. The Charlotte-Mecklenburg Hospital Authority	Plts' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari*	Allowed **05/26/2017**
158P06-12	State v. Derrick D. Boger	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/12/2017**

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

8 JUNE 2017

158P06-13	State v. Derrick D. Boger	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Writ for En Banc 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied 2. Denied **05/30/2017** 3. Denied
171A17	State v. Daryl Williams	1. State's Motion for Temporary Stay (COA16-684) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/01/2017** 2.
173P17	State v. Melvin Leroy Fowler	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/05/2017** 2.
175P17	In the Matter of T.K.	1. State's Motion for Temporary Stay (COA16-1047) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/05/2017** 2.
219P16	Yili Tseng v. Harold Martin, Individually and as Chancellor of North Carolina A&T State University, Benjamin Uwakweh, Individually and as Dean of North Carolina A&T State University, and North Carolina A&T State University	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-739)	Denied
264P16	In the Matter of Appeal of Corning Incorporated from the decisions of the Cabarrus County Board of Equalization and Review concerning the valuations of certain real property for tax years 2012 and 2013	Cabarrus County's PDR Under N.C.G.S. § 7A-31 (COA15-954)	Denied

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

8 JUNE 2017

282P16-3	Jeremy Bruns and Jenny Bruns v. Rhonda Bryant, Dalton Bryant, Sr., Dalton Bryant, Jr., Pat McCrory, as Governor of North Carolina, Frank Perry, as Secretary of the North Carolina Department of Public Safety, Anthony Tata, as Secretary of the North Carolina Department of Transportation, Veronica McClain, USAA, and State of North Carolina	1. Plts' *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-699) 2. Plts' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's (Dalton Bryant, Jr.) Motion to Dismiss Appeal 4. Plts' Motion to Reject, Dismiss, and Strike Response to Notice of Appeal and PDR.	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Denied
309P15-2	State v. Reginald Underwood Fullard	Def's *Pro Se* Motion for Petition for Direct Review (COAP14-265)	Dismissed
330P13-3	State v. William Curtis Lowery, Jr.	Def's *Pro Se* Motion for Appropriate Relief	Dismissed **Ervin, J., recused**
335PA16	State v. Gyrell Shavonta Lee	1. Motion to Admit Ilya Shapiro *Pro Hac Vice* 2. Cato Institute's Motion for Leave to File Amicus Brief	1. Allowed **05/18/2017** 2. Allowed **05/18/2017**
341P14-2	State v. Robert McPhail	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
345P16-4	State v. Dwayne Demont Haizlip	1. Def's *Pro Se* Motion for Petition for Rehearing 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **05/31/2017** 2. Allowed **05/31/2017** **Ervin, J., recused**

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

8 JUNE 2017

376P02-6	State v. Robert Wayne Stanley	1. State's Motion for Temporary Stay (COA16-436) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Vacate the Temporary Stay 5. Def's Motion to Dismiss State's PDR	1. Allowed **11/17/2016** Dissolved **06/08/2017** 2. Denied 3. Denied 4. Dismissed as moot 5. Dismissed as moot **Ervin, J., recused**
393P08-2	State v. Dewayne Parker	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/17/2017**
393P08-3	State v. Dewayne Parker	Def's *Pro Se* Motion for Writ for *En Banc*	Denied **06/01/2017**
427A16	Abrons Family Practice & Urgent Care, P.A., et al. v. N.C. Department of Health and Human Services and Computer Sciences Corporation	Def's (Computer Sciences Corporation) Motion to Withdraw Van H. Beckwith, Bryant C. Boren, and the Firm of Baker Botts, LLP as Counsel	Allowed **05/17/2017**
461P16	Bolier & Company, LLC and Christian G. Plasman v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang C. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co., Ltd., Darren Hudgins and Decca Home v. Christian J. Plasman a/k/a Barrett Plasman, Third-Party Defendant	Plt's (Christian G. Plasman) and Third-Party Defendant's PDR Under N.C.G.S. § 7A-31 (COA15-1219)	Denied
514PA11-2	State v. Harry Sharod James	Motion to Admit Marsha L. Levick *Pro Hac Vice*	Allowed **05/19/2017**

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

8 June 2017

597P01-3	State v. Maechel Shawn Patterson	Def's Pro Se Petition for Writ of Certiorari to Review Order of COA (COA17-245)	Dismissed **Ervin, J., recused**

ORDER AMENDING RULE 7 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Pursuant to the authority vested in this Court by Article IV of the Constitution of North Carolina, Rule 7 of the North Carolina Rules of Appellate Procedure is amended as follows:

Rule 7. Preparation of the Transcript; Court Reporter's Duties

(a) **Ordering the Transcript.**

(1) **Civil Cases.** Within fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to produce the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript contract with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record and upon the person designated to produce the transcript. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within fourteen days after the service of the written documentation of the appellant, shall contract for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed and the name and address of the court reporter or other neutral person designated to produce the transcript. In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

(2) **Criminal Cases.** In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall contract for the transcription of the proceedings as in civil cases.

When there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to produce the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the name, address, telephone number, and e-mail address of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) **Production and Delivery of Transcript.**

(1) **Production.** In civil cases: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript in non-capital cases and one-hundred-twenty days to produce and electronically deliver the transcript in capitally-tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the appeal entries as the "Date order delivered to transcriptionist," that person shall have sixty-five days to produce and electronically deliver the transcript in non-capital cases and one-hundred-twenty-five days to produce and electronically deliver the transcript in capitally-tried cases.

The transcript format shall comply with ~~Appendix B of these rules~~ standards set by the Administrative Office of the Courts.

Except in capitally-tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion and for good cause shown by the appellant, may, pursuant to Rule 27(c)(1), extend the time to produce the transcript for an additional thirty days. Any subsequent motions for additional time required to produce the transcript may only be made pursuant to Rule 27(c)(2) to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally-tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant.

(2) **Delivery.** The court reporter, or person designated to produce the transcript, shall electronically deliver the completed transcript to the parties, including the district attorney and Attorney General of North Carolina in criminal cases, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the transcript has been so delivered ~~and shall send a copy of such certification to the appellate court to which the appeal is taken~~. The appellant shall promptly notify the court reporter when the record on appeal has been filed. Once the court reporter, or person designated to produce the transcript, has been notified by the appellant that the record on appeal has been filed with the appellate court to which the appeal has been taken, the court reporter must electronically file the transcript with that court using the docket number assigned by that court.

(3) **Neutral Transcriptionist.** The neutral person designated to produce the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

This amendment to the North Carolina Rules of Appellate Procedure shall be effective immediately.

This amendment shall be promulgated by publication in the North Carolina Reports and posted on the Court's web site.

Ordered by the Court in Conference, this the 16th day of March, 2017.

s/Michael R. Morgan
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of March, 2017.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT BARS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0900 Organization of the Judicial District Bars

.0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. §84-18.1(b), the following procedures shall apply:

(a) Notice to State Bar. The judicial district bar shall notify the North Carolina State Bar of its election to assess an annual membership fee each year at least thirty days prior to mailing to its members the first invoice therefore, specifying the amount of the annual membership fee, the date after which payment will be delinquent, and the amount of any late fee for delinquent payment.

(b) Accounting to State Bar. …

(c) Delinquency Date. The date upon which the annual membership fee shall be delinquent if not paid shall be not later than ninety days after, and not sooner than thirty days after, the date of the first invoice for the annual membership fee. The delinquency date shall be stated on the invoice and the invoice shall advise each member that failure to pay the annual membership fee must be reported to the North Carolina State Bar and may result in suspension of the member's license to practice law.

(d) Late Fee. Each judicial district bar may impose, but shall not be required, to impose a late fee of any amount not to exceed fifteen dollars ($15.00) for non-payment of the annual membership fee on or before the stated delinquency date.

(e) Members Subject to Assessment. ….

(f) Members Exempt from Assessment…..

(g) Hardship Waivers. ….

(h) Reporting Delinquent Members to State Bar. ~~Twelve~~ Three to six months after the delinquency date ~~of the first invoice~~ for the annual membership fee, the judicial district bar shall report to the North Carolina State Bar all of its members who have not paid the annual membership fee or any late fee.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2017.

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

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0116 Proceedings Before the Disciplinary Hearing Commission: Formal Hearing

(a) Public Hearing

(1) The defendant will appear in person before the hearing panel at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing panel may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant.

(2) Media Coverage -- Absent a showing of good cause, the chairperson of the hearing panel shall permit television, motion picture and still photography cameras, broadcast microphones and recorders (electronic media) to record and broadcast formal hearings. A media outlet shall file a motion with the clerk of the commission seeking permission to utilize electronic media to record or broadcast a hearing no less than 48 hours before the hearing is scheduled to begin. The chairperson will rule on the motion no less than 24 hours before the hearing is scheduled to begin. Any order denying a motion to permit the use of electronic media to record or broadcast a formal hearing shall contain written findings of fact setting forth the facts constituting good cause to support that decision. Except as otherwise provided in this paragraph, the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts (Electronic Media and Still Photography Coverage of Public Judicial Proceedings) shall apply to electronic media coverage of hearings before the commission.

(b) Continuance After a Hearing Has Commenced …

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2017.

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

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 17th day of March, 2017.

s/Michael R. Morgan
For the Court

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

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Plan of Legal Specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2500 Certification Standards for the Criminal Law Specialty

Section .2505 Standards for Certification as a Specialist

Each applicant for certification as a specialist in criminal law or the sub-specialty of state criminal law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice - ….

(b) ….

(c) ….

(d) Peer Review

(1) Each applicant for certification as a specialist in criminal law and the subspecialty of state criminal law must make a satisfactory showing of qualification through peer review.

(2) …..

(3) …..

(4) Each applicant must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in ~~last~~ eight recent cases ~~serious (Class G or higher) felony cases~~ tried by the applicant to verdict or entry of order.

(5) ….

(e) Examination - ….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2017.

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

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATIONS PRACTICING LAW

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning organizations practicing law, as particularly set forth in 27 N.C.A.C. 1E, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Section .0100, Regulations for Organizations Practicing Law

.0103 Registration with the North Carolina State Bar

(a) Registration of Professional Corporation ….

(b) Registration of a Professional Limited Liability Company ….

(e) Renewal of Certificate of Registration - The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) Renewal of Certificate of Registration for Professional Corporation

….

(2) Renewal of Certificate of Registration for a Professional Limited Liability Company …

(3) Renewal Fee - An application for renewal of a certificate of registration for either a professional corporation or a professional limited liability company shall be accompanied by a renewal fee of $25;

(4) Refund of Renewal Fee

…

(5) Failure to Apply for Renewal of Certificate of Registration - In the event a professional corporation or a professional limited liability

company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, ~~the secretary shall send a notice to shows cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee and a late fee of $10, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application, the renewal fee, and the late fee within said thirty days, or to show cause within said time period, shall result in the suspension of~~ the certificate of registration for the delinquent professional corporation or professional limited liability company shall be suspended and ~~the issuance of a notification to~~ the secretary of state will be notified of the suspension of said certificate of registration;

(6) Reinstatement of Suspended Certificate of Registration - Upon (a) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees and late fees; and (b) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

(7) Inactive Status Pending Dissolution

...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of March, 2017.

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

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendment to the Rules of Professional Conduct of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 1.6, Confidentiality of Information, be amended as follows (additions are underlined, deletions are interlined):

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

Rule 1.6, Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) …

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client, ~~and~~ Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients, and Rule 8.6 for a lawyer's duty to disclose information to rectify a wrongful conviction.

[2] …

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules of Professional Conduct of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of March, 2017.

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

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 3.8, Special Responsibilities of a Prosecutor, be amended as follows (additions are underlined, deletions are interlined):

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

Rule 3.8, Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) ….

(g) When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:

(1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence or information to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction; or

(2) if the conviction was obtained in another jurisdiction, promptly disclose that evidence or information to the prosecutor's office in the jurisdiction of the conviction or to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction of conviction.

(h) A prosecutor who concludes in good faith that evidence or information is not subject to disclosure under paragraph (g) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict or to uphold a conviction. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence….

[2] ….

[8] When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a defendant did not commit an offense for which the defendant was convicted in the prosecutor's district, paragraph (g)(1) requires prompt disclosure to the defendant. However, if disclosure will harm the defendant's interests or the integrity of the evidence or information, disclosure should be made to the defendant's lawyer if any. Disclosure must be made to North Carolina Indigent Defense Services (NCIDS) or, if appropriate, the federal public defender, under all circumstances regardless of whether disclosure is also made to the defendant or the defendant's lawyer. If there is a good faith basis for not disclosing the evidence or information to the defendant, disclosure to NCIDS or the federal public defender and to any counsel of record satisfies this rule. If the conviction was obtained in another jurisdiction, paragraph (g)(2) allows the prosecutor promptly to disclose the evidence or information to the prosecutor's office in the jurisdiction of conviction in lieu of any other disclosure. The prosecutor in the jurisdiction of the conviction then has an independent duty of disclosure under paragraph (g)(1). In lieu of disclosure to the prosecutor's office in the jurisdiction of conviction, paragraph (g)(2) requires disclosure to the defendant or to the defendant's lawyer, if any, and to NCIDS or, if appropriate, the federal public defender.

[9] The word "new" as used in paragraph (g) means evidence or information unknown to a trial prosecutor at the time of the conviction or, if known to a trial prosecutor at the time of the conviction, never previously disclosed to the defendant or defendant's legal counsel. When analyzing new evidence or information, the prosecutor must evaluate the substance of the information received, and not solely the credibility of the source, to determine whether the evidence or information creates a reasonable likelihood that the defendant did not commit the offense.

[10] Nevertheless, a prosecutor who receives evidence or information relative to a conviction may disclose that evidence or information as directed in paragraph (g)(1) and (2) without examination to determine whether it is new, credible, or creates a reasonable likelihood that a convicted defendant did not commit an offense. A prosecutor who receives evidence or information subject to disclosure under paragraph (g) does

not have a duty to undertake further investigation to determine whether the defendant is in fact innocent.

[11] A prosecutor's independent judgment, made in good faith, that the new evidence or information is not of such nature as to trigger the obligations of paragraph (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2017.

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

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 17th day of March, 2017.

s/Michael R. Morgan
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct be amended to include an entirely new rule concerning a lawyer's duty upon receiving information about a possible wrongful conviction, which will be codified as 27 N.C.A.C. 2, Rule 8.6 and will read as follows:

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

Rule 8.6, Information About a Possible Wrongful Conviction

(a) Subject to paragraph (b), when a lawyer knows of credible evidence or information, including evidence or information otherwise protected by Rule 1.6, that creates a reasonable likelihood that a defendant did not commit the offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence or information to the prosecutorial authority for the jurisdiction in which the defendant was convicted and to North Carolina Office of Indigent Defense Services or, if appropriate, the federal public defender for the district of conviction.

(b) Notwithstanding paragraph (a), a lawyer shall not disclose evidence or information if:

(1) the evidence or information is protected from disclosure by law, court order, or 27 N.C. Admin. Code Ch. 1B §.0129;

(2) disclosure would criminally implicate a current or former client or otherwise substantially prejudice a current or former client's interests; or

(3) disclosure would violate the attorney-client privilege applicable to communications between the lawyer and a current or former client.

(c) A lawyer who in good faith concludes that information is not subject to disclosure under this rule does not violate the rule even if that conclusion is subsequently determined to be erroneous.

(d) This rule does not require disclosure if the lawyer knows an appropriate governmental authority, the convicted defendant, or the defendant's lawyer already possesses the information.

COMMENT

[1] The integrity of the adjudicative process faces perhaps no greater threat than when an innocent person is wrongly convicted and incarcerated. The special duties of a prosecutor with respect to disclosure of potentially exonerating post-conviction information are set forth in Rule 3.8(g) and (h). However, as noted in the comment to Rule 3.3, *Candor Toward the Tribunal*, the special obligation to protect the integrity of the adjudicative process applies to all lawyers. Under Rule 3.3(b), this obligation may require a lawyer to disclose fraudulent testimony to a tribunal even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. Similarly, the need to rectify a wrongful conviction and prevent or end the incarceration of an innocent person justifies extending the duty to disclose potentially exculpatory information to all members of the North Carolina State Bar, regardless of practice area and limited only by paragraph (b). It also justifies the disclosure of information otherwise protected by Rule 1.6. For prosecutors, compliance with Rule 3.8(g) and (h) constitutes compliance with this rule.

[2] This rule may require a lawyer to disclose credible evidence or information, whether protected by Rule 1.6 or not, if the evidence or information creates a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted. To determine whether disclosure is required, a lawyer must not only consider the credibility of the evidence or information and its source but must also evaluate the substance of the evidence or information to determine whether it creates a reasonable likelihood that the defendant did not commit the offense.

[3] The duty to disclose is qualified in paragraph (b) by legal obligations and client loyalty. A lawyer may not disclose evidence or information if prohibited by law, court order, or the administrative rule that makes the proceedings of the State Bar's Grievance Committee confidential (27 N.C. Admin. Code Ch. 1B §.0129). The latter prohibition insures a lawyer's response to a grievance does not inadvertently impose a duty to disclose on the lawyers in the State Bar Office of Counsel or on the State Bar Grievance Committee. In addition, paragraph (b) specifies that a lawyer may not disclose evidence or information if doing so would criminally implicate the lawyer's client or the evidence or information was received in a privileged communication between the client and the lawyer. Disclosure is also prohibited when it would result in substantial prejudice the client's interests. Substantial prejudice to a client's

interests includes bodily harm, loss of liberty, or loss of a significant legal right or interest such as the right to effective assistance of counsel or the right against self-incrimination.

[4] When disclosure of information protected by Rule 1.6 is permitted, the lawyer should counsel the client confidentially, advising the client of the lawyer's duty to disclose and, if possible, seeking the client's cooperation.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of March, 2017.

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

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of March, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by

the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 17th day of March, 2017.

s/Michael R. Morgan
For the Court

ORDER WAIVING RULE 2A, 2B, AND 7B OF THE RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT DURING PILOT CLERK MEDIATION PROGRAM

WHEREAS, on May 23, 2005, the General Assembly enacted G.S. § 7A-38.3B establishing a Clerk Mediation Program (Program) to provide for mediation of matters pending before clerks of superior court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) provided that this Court adopt program rules and amendments to rules implementing the Program, and

WHEREAS, this Court adopted Rules Implementing Mediation In Matters Before the Clerk of Superior Court (Rules) on January 26, 2006, and

WHEREAS, the Program was implemented without benefit of a pilot phase, and

WHEREAS, this Court is aware that the Program has been underutilized since its inception, and

WHEREAS, in an effort to reinvigorate the Program, the NC Dispute Resolution Commission (NCDRC) has established an Ad Hoc Clerk Mediation Program Committee (Committee) and charged it with establishing a pilot program to evaluate the viability and potential of the Program, and

WHEREAS, Rules 2.A and 2.B of the Rules provide that mediators conducting mediations referred to the Program are to be certified by the NCDRC, and

WHEREAS, Rule 7.B of the Rules provides that clerk appointed mediators conducting mediations referred to the Program shall be compensated at the rate of $150.00 per hour for mediation services, and

WHEREAS, Clerks who have agreed to participate in the pilot program have expressed concern that Rules 2.A, 2.B, and 7.B limit their ability to recruit mediators in whom they have the utmost confidence, who are willing to travel to their counties, and who are willing and able to volunteer their services, and

WHEREAS, the NCDRC has recommended that the requirements of Rules 2.A and 2.B and 7.B be waived during the duration of the pilot in order to permit parties and clerks in counties participating in the pilot maximum flexibility to select and appoint mediators in whom they have confidence, whether certified or not, and to permit those mediators to waive their fees for the first two hours of mediation.

PILOT CLERK MEDIATION PROGRAM

NOW, THEREFORE, pursuant to G.S. § 7A-38.3B and the Rules Implementing Mediation In Matters Before the Clerk of Superior Court, this Court waives the requirements of Rules 2A, 2B, and 7.B of the Rules Implementing Mediation In Matters Before the Clerk of Superior Court, in pilot site counties for the duration of the pilot in order to permit both certified and non-certified mediators, in the discretion of pilot site clerks and the Commission, to serve pilot sites and to permit mediators to waive their fees for the first two (2) hours of pilot program mediations.

Adopted by the Court in conference the 16th day of March, 2017.

s/Michael R. Morgan
For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 16th day of March, 2017.

s/J. Bryan Boyd
J. Bryan Boyd
Clerk of the Supreme Court