385 N.C.—No. 4 Pages 629-901

STATE BAR OFFICERS; CERTIFICATION STANDARDS FOR EMPLOYMENT LAW SPECIALTY; PROCEDURES FOR AUTHORIZED PRACTICE COMMITTEE; FEE DISPUTE RESOLUTION

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

## NORTH CAROLINA

*JUNE 13, 2024*

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

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**OF**
**NORTH CAROLINA**

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SUPREME COURT OF NORTH CAROLINA

## CASES REPORTED

### FILED 22 MARCH 2024



## ORDERS



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

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### ADMINISTRATIVE LAW

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**Class certification—inconsistent definitions of class—further issues for review on remand—**In a class action lawsuit arising from an allegedly deceptive promotional flyer that a car dealership sent to plaintiffs—who were led to believe that they had won either a large cash prize or a free car when, in fact, they had won only two dollars—the trial court's class certification order was vacated because of an internal inconsistency in the order that precluded meaningful appellate review. Specifically, the court's order defined the prospective class in one way—as individuals who called the hotline listed on the flyer and then went to the car dealership to claim their prize—when analyzing the certification criteria, but then defined the class differently—as individuals who went to the car dealership to claim the prize regardless of whether they called the hotline—when certifying the class. The matter was remanded with additional instructions for the trial court to determine whether

police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, the speed limit exemption in N.C.G.S. § 20-145—under which speed limits do not apply to police officers while chasing or apprehending violators of the law or to other vehicle operators traveling in response to an emergency—did not operate as a statutory waiver of governmental immunity. Section 20-145, with its focus on individual drivers and individual actions and inclusion of non-governmental actors, contained no plain or clear legislative mandate withdrawing immunity from a discrete government body. **Est. of Graham v. Lambert, 644.**

**Governmental—speed limit exceeded by police officer—official capacity suit—same waiver analysis as for city—**In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, where the Court of Appeals' decision was reversed because that court applied the wrong standard of review to the trial court's order denying summary judgment to defendants, the Court of Appeals was instructed on remand to treat the estate's claim against the officer in his official capacity as merged with the claim against the city. **Est. of Graham v. Lambert, 644.**

**Governmental—waiver by insurance—standard for reviewing summary judgment denial—**In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, the Court of Appeals erred by applying the wrong legal standard when it reversed the trial court's order denying summary judgment to defendants. Rather than analyzing whether the evidence raised a genuine issue of material fact regarding whether the city had waived governmental immunity by purchasing liability insurance, the Court of Appeals instead erroneously employed the standard under Civil Procedure Rule 12(b)(6) (motion to dismiss for failure to state a claim) by focusing on the sufficiency of the complaint to raise the issue of waiver. **Est. of Graham v. Lambert, 644.**

**JUDGES**

**Discipline—improper phone call to magistrate—to demand bond reduction for her son—closing down administrative courtroom without permission—suspension—**On the basis of two incidents, a district court judge was suspended without pay for 120 days for conduct in violation of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C.G.S. § 7A-376(b)). In the first incident, the judge called a magistrate's office, used her judicial title to ask if a particular criminal defendant had been placed into custody without disclosing that that defendant was her son, and then yelled at the magistrate while demanding a bond reduction for her son based on inaccurate information. In the second incident, the judge—while on notice of the disciplinary charges filed against her based on the first incident—demanded, without first notifying her chief district court judge, that an assistant district attorney and a presiding magistrate close their administrative courtroom for her own use despite an active administrative order mandating that the courtroom remain open; notably, the judge's conduct caused more than one hundred cases to be continued. **In re Foster, 675.**

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**PREMISES LIABILITY**

**Common law negligence—rental property—corroded gas line—requirement of notice to landlord—**In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's common law negligence claim, because there was no duty for defendant to repair absent actual knowledge or notice given by plaintiff about a dangerous condition on the property. Plaintiff, who had lived in the property for years, knew that there was a hole in the bathroom floor directly above the gas furnace through which water leaked and that the gas company and fire department had come to the home more than once after receiving reports of a gas smell coming from the home, but at no time did plaintiff inform defendant about these issues or request a repair. **Terry v. Pub. Serv. Co. of N.C., 797.**

**Negligence per se—rental property—corroded gas line—housing code violation—knowledge by landlord required—**In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's claim that defendant was negligent per se for violating the housing code, because there was no evidence that defendant knew or should have known that there was a housing code violation, particularly where plaintiff never informed defendant that the bathroom floor directly over the furnace had a large hole through which water leaked or that a smell of natural gas had been detected in the home. **Terry v. Pub. Serv. Co. of N.C., 797.**

**SEARCH AND SEIZURE**

**Warrantless search—standing to challenge—reasonable expectation of privacy—material fact questions—findings required—**In a prosecution for multiple drug offenses, where the trial court denied defendant's pretrial motion to suppress evidence that was found during a warrantless entry into defendant's uncle's house, but where the ruling was made orally and was never memorialized in a written order with findings of fact, the matter was remanded for the trial court to make the necessary findings of fact regarding the central question of whether defendant had standing to challenge the search of the home. There were material conflicts in the evidence requiring resolution by the trial court, although the record contained

## SCHEDULE FOR HEARING APPEALS DURING 2024

## NORTH CAROLINA SUPREME COURT

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

February 13, 14, 15, 20, 21, 22
April 9, 10, 11, 16, 17, 18
September 17, 18, 19, 24, 25, 26
October 22, 23, 24, 29, 30, 31

**BEAVERS v. McMICAN**

[385 N.C. 629 (2024)]

DAVID BEAVERS
v.
JOHN McMICAN

No. 294A22

Filed 22 March 2024

**Alienation of Affections—criminal conversation—unidentified lover—summary judgment—evidence of post-separation dating relationship—mere conjecture**

The trial court properly granted summary judgment for defendant on plaintiff's claims for alienation of affection and criminal conversation, where plaintiff's wife began a romantic relationship with defendant about three months after separating from plaintiff and over a year after admitting to plaintiff that, while they were still married, she had had sexual intercourse with an unidentified coworker. Although evidence of post-separation conduct may be used at the summary judgment phase to corroborate evidence of pre-separation conduct, plaintiff's evidence regarding the pre-separation affair between his wife and the unidentified coworker did not give rise to anything more than "mere conjecture" that defendant was that same coworker; consequently, the evidence failed to support the malice prong of plaintiff's alienation of affection claim and the sexual intercourse element of his criminal conversation claim.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 285 N.C. App. 31 (2022), reversing an order of summary judgment entered on 14 October 2020 by Judge Keith O. Gregory in Superior Court, Wake County, and remanding the case for further proceedings. Heard in the Supreme Court on 13 September 2023.

*Matheson & Associates, PLLC, by John R. Szymankiewicz and Jammie L. Wacenske, for plaintiff-appellee.*

*Batch, Poore & Williams, PC, by J. Patrick Williams, for defendant-appellant.*

EARLS, Justice.

This appeal raises a narrow legal issue of statutory interpretation involving the controversial heartbalm torts recognized in North Carolina.

Plaintiff David Beavers brought civil claims for alienation of affection and criminal conversation against his ex-wife's alleged paramour, defendant John McMican. The first question before this Court is whether the holding in *Rodriguez v. Lemus*, 257 N.C. App. 493 (2018)[1], concerning which evidence is relevant to prove pre-separation conduct, is inconsistent with the enacted language and legislative intent of N.C.G.S. § 52-13, which specifies that post-separation conduct cannot give rise to liability in these circumstances. The second related issue for this Court is whether the trial court improperly granted summary judgment in favor of Mr. McMican. After reviewing the text of section 52-13 and finding it unambiguous, we hold that the Court of Appeals' opinion in *Rodriguez* is consistent with legislative intent. Accordingly, evidence of post-separation conduct may be used to corroborate pre-separation conduct, so long as the evidence of pre-separation conduct gives rise to more than mere conjecture. *Rodriguez*, 257 N.C. App. at 498. Nonetheless, because we find the evidence of pre-separation conduct in this case does not give rise to more than mere conjecture regarding the identity of Mrs. Beavers' paramour, we reverse the decision of the Court of Appeals and hold that the trial court properly granted summary judgment in favor of Mr. McMican.

## I. Procedural History

On 13 December 2018, Mr. Beavers sued Mr. McMican on theories of alienation of affection and criminal conversation. On 14 January 2020, Mr. McMican filed a motion for summary judgment on both claims. On 17 August 2020, the trial court conducted a hearing on Mr. McMican's motion during which both parties referenced recent depositions of Mrs. Beavers and Mr. McMican's ex-wife, Jessica McMican; however, neither deposition was certified until 20 August 2020, three days later. On 14 October 2020, the trial court entered an order granting Mr. McMican's motion for summary judgment. Mr. Beavers timely appealed.

At the Court of Appeals, Mr. Beavers submitted a record supplement pursuant to Rule 11(c) of the Rules of Appellate Procedure containing, *inter alia*, the depositions of Mrs. Beavers and Mrs. McMican discussed by counsel during the summary judgment hearing. On 23 November 2021, the Court of Appeals entered an order remanding the matter to the trial court and inquiring which, if either, of the depositions the trial court considered in granting Mr. McMican's motion for summary judgment. *Beavers v. McMican*, 285 N.C. App. 31, 34 (2022). In response, on

1. This Court denied discretionary review and dismissed a petition for writ of certiorari to review the Court of Appeals' opinion in *Rodriguez*. *See* 371 N.C. 447 (2018).

24 February 2022, the trial court entered an amended order granting Mr. McMican's motion for summary judgment and confirming that it had not considered either of the depositions at the original hearing on the matter. *Id.* Accordingly, the Court of Appeals stated that neither deposition would inform its review of the trial court's order granting Mr. McMican's motion for summary judgment. *Id.* at 32, 35. We similarly do not consider any evidence not properly before the trial court when it decided Mr. McMican's motion for summary judgment.[2]

The Court of Appeals determined that Mr. Beavers presented sufficient evidence of post-separation conduct involving his former wife and defendant, and that under *Rodriguez*, such evidence is corroborative of pre-separation conduct even when the identity of a pre-separation extramarital sexual partner is unknown. *Id.* at 41. Thus, the Court of Appeals held that the trial court erred in granting Mr. McMican's motion for summary judgment. *Id.* Judge Jackson dissented, opining in relevant part that Mr. Beavers's allegations lacked evidentiary support, and thus, the trial court properly granted Mr. McMican's motion for summary judgment. *Id.* at 46, 63 (Jackson, J., dissenting). Based on Judge Jackson's dissent, Mr. McMican filed a notice of appeal with this Court on 21 September 2022, pursuant to N.C.G.S. § 7A-30(2).[3]

## II. Background

David and Alison Beavers were married on 23 October 2004. Together they had three children. On 18 January 2016, Mr. Beavers discovered text messages on Mrs. Beavers's phone in which she had sent nude pictures of herself to a person identified only as "Bestie." Until this discovery, Mr. Beavers believed he and his wife had a loving marriage. In addition to the pictures, Mrs. Beavers and "Bestie" had exchanged messages referencing an instance of sexual intercourse that had occurred before the exchange of the messages and pictures. At the time of this discovery, Mr. Beavers did not look at the phone number associated with the contact labeled "Bestie" or take any steps to determine "Bestie's" identity.

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2. Our decision is based on the principle that "[i]nformation adduced from counsel during oral arguments cannot be used to support a motion for summary judgment under Rule 56(c)." *Huss v. Huss*, 31 N.C. App. 463, 466 (1976). Therefore, we limit our consideration to "evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial." *Id.*, (citing *Koontz v. City of Winston-Salem*, 280 N.C. 513 (1972); *Singleton v. Stewart*, 280 N.C. 460 (1972)).

3. Judge Jackson's dissent also explained his rationale for eliminating heartbalm torts, but this issue was not raised or argued by either party in this appeal.

After confronting Mrs. Beavers, Mr. Beavers left the marital home to stay with his parents. When he returned several days later, he and Mrs. Beavers discussed the extramarital affair, and Mrs. Beavers admitted that she had engaged in sexual acts with the person identified as "Bestie." Nonetheless, she stated that she and "Bestie" had not engaged in sexual intercourse. Mrs. Beavers also told Mr. Beavers that her paramour was a coworker named "Dustin."

In the weeks that followed, Mr. Beavers, who was skeptical of the story Mrs. Beavers told during their first conversation, accused Mrs. Beavers of engaging in sexual intercourse with another man. In response, Mrs. Beavers ultimately admitted that she had engaged in sexual intercourse with someone from her workplace, but she did not specify if that person was "Dustin." Mr. Beavers was unable to discover Dustin's identity, and because Mrs. Beavers did not have anyone named "Dustin" in her contacts, Mr. Beavers guessed "Dustin" was a pseudonym. The Beaverses separated for the final time on 16 December 2016.

On 1 April 2017, three and a half months after she and her husband separated, and over a year after Mr. Beavers discovered the compromising text messages with "Bestie," Mrs. Beavers began openly dating her coworker, Mr. McMican. The two had known each other through work since the summer of 2011 and had attended work events together with other coworkers. The record shows that in October 2016, the two exchanged ninety-eight text messages. There is also evidence that Mrs. Beavers and Mr. McMican interacted via Facebook. After learning that Mrs. Beavers and Mr. McMican were dating, Mr. Beavers concluded that Mr. McMican was his then-estranged wife's alleged paramour. But while Mr. McMican admitted to becoming romantically and sexually involved with Mrs. Beavers in April 2017, there is no evidence the two were romantically involved before that time.

## III. Standard of Review

We apply de novo review to both issues in this case. Issues of statutory interpretation are legal issues subject to de novo review. *E.g.*, *Saunders v. ADP TotalSource Fi Xi, Inc.*, 372 N.C. 29, 38 (2019). Moreover, "[t]his Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 358 (2021). Rule 56(c) of the North Carolina Rules of Civil Procedure states that 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 (2021). When evaluating a trial court's decision to "grant or deny a summary judgment motion in a particular case, 'we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor.' " *Cummings*, 379 N.C. at 358 (quoting *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182 (2011)).

To prevail on summary judgment, the moving party must meet "the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982) (first citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467 (1979); and then citing *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24 (1974)). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Id.* (first citing *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200 (1980); then citing *Moore*, 296 N.C. at 470; and then citing *Zimmerman*, 286 N.C. at 29).

## IV. N.C.G.S. § 52-13 and the Court of Appeals' Decision in *Rodriguez v. Lemus*

Our Court and the Court of Appeals previously have held that sexual conduct which occurs after a married couple separates but before the couple divorces, can be used to support alienation of affection and criminal conversation claims. *See McCutchen v. McCutchen*, 360 N.C. 280, 284 (2006); *Jones v. Skelley*, 195 N.C. App. 500, 511–12 (2009).[4] But in 2009 the General Assembly enacted N.C.G.S. § 52-13, which supersedes these decisions. This statute applies to both alienation of affection and criminal conversation claims and states:

> No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.

4. Both of these decisions were superseded by statute N.C.G.S. § 52-13(a), as enacted by An Act to Clarify Procedures in Civil Actions for Alienation of Affection and Criminal Conversation, S.L. 2009-400, § 1, 2009 N.C. Sess. Laws 780, 780, *as recognized in Rodriguez*, 257 N.C. App. 493.

N.C.G.S. § 52-13(a) (2021). In other words, a defendant may be liable only for conduct that occurs during the marriage and before physical separation. *Id.*; *see also Rodriguez*, 257 N.C. App. at 496–97.

The Court of Appeals interpreted subsection 52-13(a) in *Rodriguez v. Lemus*, and determined that, based on the language of the statute, alienation of affection and criminal conversation claims could not be sustained without evidence of pre-separation conduct that met the elements of each respective claim. 257 N.C. App. at 496–97. There the court also determined that evidence of post-separation conduct could be used to corroborate evidence of pre-separation conduct in either an alienation of affection or criminal conversation claim, as long as the evidence of pre-separation conduct was "sufficient to give rise to more than mere conjecture." *Id.* at 498.

Defendant argues that *Rodriguez*'s holding is inconsistent with the legislative intent behind N.C.G.S. § 52-13. While it is true that the "principal goal of statutory construction is to accomplish the legislative intent," the General Assembly's intent "may be found first from the plain language of the statute." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001). "It is well settled that, '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.' " *In re Est. of Lunsford*, 359 N.C. 382, 391–392 (2005) (alteration in original) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990)).

Because the text of N.C.G.S. § 52-13 is unambiguous, there is no need for this Court to engage in statutory construction. Moreover, the Court of Appeals' holding in *Rodriguez* is consistent with our appellate precedent. In *In re Estate of Trogdon*, 330 N.C. 143 (1991), this Court in addressing an intestate succession claim and being tasked with determining how much evidence was necessary to show that sexual intercourse had occurred between the spouse and someone other than her now deceased husband, explained that "adultery is nearly always proved by circumstantial evidence . . . as misconduct of this sort is usually clandestine and secret." *Id.* at 148 (cleaned up). In that case the circumstantial evidence consisted of the spouse voluntarily moving from the marital home and then living with the suspected paramour, as well as the spouse's refusal to testify regarding the nature of her relationship with that person. *Id.* at 151.

Additionally, in *Pharr v. Beck*, 147 N.C. App. 268 (2001), *overruled by McCutchen*, 360 N.C. 280,[5] the Court of Appeals concluded that post-separation conduct, namely, sexual intercourse between the defendant and the plaintiff's spouse, could be used to corroborate the existence of a romantic pre-separation relationship between those parties. *Id.* at 274. Accordingly, the Court of Appeals' holding in *Rodriguez* is consistent with both the text of N.C.G.S. § 52-13(a), which requires that alienation of affection and criminal conversation claims arise from pre-separation conduct and our appellate precedent, which not only acknowledges the frequent need for circumstantial evidence to prove these types of claims but also expressly allows for evidence of post-separation conduct to corroborate pre-separation conduct. Essentially,

> N.C.G.S. § 52-13 prevents defendants in cases involving criminal conversation and alienation of affection from being held liable for acts taking place after two spouses have separated, and *Rodriguez* effectuates that policy by ensuring that, if a factfinder considers evidence of post-separation conduct, it does so only insofar as it contextualizes pre-separation conduct.

*Beavers*, 285 N.C. App. at 39. Thus, we hold that the Court of Appeals' opinion in *Rodriguez* is consistent with N.C.G.S. § 52-13's legislative intent, and evidence of post-separation conduct can be used to corroborate evidence of pre-separation conduct in alienation of affection and criminal conversation claims, if the pre-separation conduct gives rise to more than mere conjecture.

## V. Mr. Beavers's Alienation of Affection and Criminal Conversation Claims

To establish an alienation of affection claim, a plaintiff must prove: (1) that the plaintiff and his or her spouse "were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; and (3) that the wrongful and malicious acts of the defendant produced and brought about the loss and alienation of such love and affection." *McCutchen*, 360 N.C. at 283 (cleaned up). "A malicious act 'has been loosely defined to include any intentional conduct that would probably affect the marital relationship.' " *Rodriguez*, 257 N.C. App. at 495 (quoting *Pharr*, 147 N.C. App. at 272). In cases in which the defendant has engaged in sexual

5. *McCutchen* overruled *Pharr* "to the extent it requires an alienation of affection[] claim to be based on pre-separation conduct alone." 360 N.C. at 285.

intercourse with the plaintiff's spouse, "[m]alice is conclusively presumed." *Id.* at 495–96. To establish a claim for criminal conversation, a plaintiff must prove two elements: first, the plaintiff must show marriage between the spouses, and second, sexual intercourse between the defendant and the plaintiff's spouse during the marriage. *Id.* at 495 (citing *Coachman v. Gould*, 122 N.C. App. 443, 446 (1996)).

Moreover, "while a measure of certainty is required for guidance in deciding future cases," our Court has recognized that there is no "bright-line test for determining how much evidence is necessary to permit a jury or trial judge to infer adultery." *In re Est. of Trogdon*, 330 N.C. at 145. Instead, "each . . . case[ ] will demand a fact-specific inquiry." *Id.* Furthermore, "[a]dultery is nearly always proved by circumstantial evidence" because such evidence "is often the only kind of evidence available." *Id.* at 148 (cleaned up). Accordingly, "adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations." *Id.*

Importantly, and as noted above, if evidence of post-separation conduct is used to corroborate pre-separation conduct, the evidence of pre-separation conduct must "give rise to more than mere conjecture." *Rodriguez*, 257 N.C. App. at 498. Determining what constitutes more than "mere conjecture" is particularly important "[g]iven the highly emotional nature of the subject matter" in these types of cases. *Chappell v. Redding*, 67 N.C. App. 397, 401 (1984) (quoting *Horney v. Horney*, 56 N.C. App. 725, 727 (1982)). Thus, a "definite line must be drawn between permissible inference and mere conjecture." *Id.* (quoting *Horney*, 56 N.C. App. at 727).

In *In re Estate of Trogdon*, our Court addressed the issue of mere conjecture in the context of proving adultery. While this case did not involve an alienation of affection or criminal conversation claim, its analysis is instructive for both types of claims. There, this Court noted that the following evidence was sufficient to show adultery: (1) the wife, Mrs. Trogdon, began arriving home late at night, and began staying away from the marital home for days at a time until eventually moving out of the home to an apartment; (2) shortly thereafter, Mr. Winfrey, a man who lived in the same apartment complex as Mrs. Trogdon, moved into Mrs. Trogdon's apartment; (3) when asked about the two living together, Mrs. Trogdon noted that they "couldn't see paying rent for two different apartments"; (4) when asked to testify about their living arrangement, Mrs. Trogdon invoked her Fifth Amendment right against self-incrimination; (5) Mrs. Trogdon admitted to her son that she and Mr.

Winfrey were "living together"; (6) a private investigator testified that he saw Mrs. Trogdon and Mr. Winfrey stay in their apartment throughout the night and subsequently witnessed Mr. Winfrey leave the apartment to start Mrs. Trogdon's car before he returned to their shared apartment; and (7) a witness testified that one morning the two exited the apartment and left together. *Id.* at 145–46. Based on this evidence, this Court concluded that the conduct at issue amounted to more than conjecture. *Id.* at 151.

Regarding the opportunity and inclination prongs, this Court also noted that the above evidence amounted to "more than suspicion and conjecture." *Id.* In doing so, the Court explained that, while it would "not presume every male-female living together situation to be amorous," this living arrangement, when combined with the other factors present in *In re Estate of Trogdon*, permit[ted] a "reasonable inference of adultery." *Id.* Specifically, when taken together, the factors listed above supported an inference that Mrs. Trogdon had both an adulterous inclination and the opportunity to satisfy that inclination. *Id.* at 148.

Our Court of Appeals has also addressed the issue of mere conjecture in both alienation of affection and criminal conversation claims. In *Coachman v. Gould*, 122 N.C. App. 443 (1996), the court analyzed the following pre-separation conduct and determined that it did not rise above mere conjecture: (1) a car ride between the plaintiff's wife and the defendant; (2) phone calls between the plaintiff's wife and the defendant; and (3) a statement by the plaintiff's wife while she was in a "medicated stupor" that she had "been with" the defendant, which the court characterized as "ambiguous" and "subject to multiple interpretations." *Id.* at 446.

Regarding the criminal conversation claim, the court noted that, even after viewing the evidence in the light most favorable to the plaintiff, the interactions between the defendant and the plaintiff's wife amounted to no more than "mere conjecture" that the defendant and the plaintiff's wife had engaged in sexual intercourse. *Id.* at 447. To arrive at this conclusion, the court explained that telephone calls and a car ride were not the types of "opportunities" for sexual intercourse required under this Court's precedent in *In re Estate of Trogdon*. *Id.* Accordingly, "in this legal context," the defendant's conduct was "innocuous" and did not "amount to more than mere conjecture." *Id.* (cleaned up).

Regarding the plaintiff's alienation of affection claim, the court concluded that the only evidence that might support a finding that the defendant engaged in wrongful and malicious conduct was phone calls

the defendant made to the marital home. *Id.* at 447–48. But the defendant's phone calls could not support this element for two reasons. First, the defendant and the plaintiff's wife "had an ongoing business relationship" and the plaintiff had not met his burden of forecasting evidence that the phone calls were made for non-business purposes. *Id.* at 448. Second, even assuming the calls were of a non-business nature, the plaintiff's allegation that the phone calls were "only partially business" and the rest was just "talk, talk, talk, talk, talk" did not rise to the level of malicious conduct by the defendant designed to alienate the affections of the plaintiff's spouse. *Id.*

In contrast, in *Pharr v. Beck* the Court of Appeals addressed an alienation of affection claim and determined that the pre-separation conduct at issue rose above mere conjecture. That pre-separation evidence consisted of: (1) meetings between the defendant and the plaintiff's spouse; (2) the defendant holding the plaintiff's husband's hand in front of the plaintiff during the husband's hospitalization; (3) the defendant giving plaintiff's husband several gifts; (4) the defendant giving the plaintiff's husband flirtatious looks; (5) the defendant inviting the plaintiff's husband to her home and then offering to move out of the home when her husband found her there with the plaintiff's husband; (6) the defendant's husband observing the plaintiff's husband and the defendant coming out of the defendant's bedroom after the two consumed alcoholic beverages together; (7) the defendant giving the plaintiff's husband a calling card and instructions on how to call her while he was on vacation with the plaintiff; (8) the defendant allowing the plaintiff's husband to use her post office box; and (9) the defendant asking the plaintiff's husband to help her remodel the house that the two subsequently lived in together. *Id.* at 273–74. Based on this pre-separation conduct, which appears to give rise to more than mere conjecture, the court concluded that post separation sexual intercourse between the defendant and the plaintiff's husband could be used to corroborate the existence of a pre-separation relationship between the parties. *Id.* at 274. Thus, this evidence could be used to substantiate the malice element of the plaintiff's alienation of affection claim. *Id.* at 271–72, 274.

Moreover, in *Rodriguez* the Court of Appeals also concluded that the parties' pre-separation conduct gave rise to more than mere conjecture that they were engaged in an intimate relationship. 257 N.C. App. at 498–500. There the court addressed both alienation of affection and criminal conversation claims. *Id.* at 495–99. The pre-separation evidence in *Rodriguez* included: (1) 120 phone contacts, which took place over a one-month period, between the defendant and the plaintiff's husband

during times when the husband was away from the home; (2) two hotel charges on the plaintiff's husband's credit card; (3) a receipt from a third hotel stay and information from that hotel that the plaintiff's husband was there with a woman; (4) social media posts between the defendant and the plaintiff's husband, using their initials, which the plaintiff interpreted as a code used by the two to communicate. *Id.* at 498.

Because the pre-separation evidence in *Rodriguez* gave rise to more than mere conjecture, the Court of Appeals also reviewed post-separation evidence. *Id.* at 498–99. This evidence, as found by the trial court, consisted of: (1) the plaintiff's husband and the defendant living together; (2) the defendant giving birth to a child, which she named after the plaintiff's husband; (3) the plaintiff's husband having told the plaintiff that he loved the defendant; (4) the plaintiff's husband telling his wife they could not reconcile because the defendant was pregnant; and (5) the defendant admitting at trial that she and the plaintiff's husband had sexual intercourse after he had separated from the plaintiff. *Id.* Accordingly, the Court of Appeals held that the evidence of post-separation conduct in *Rodriguez* corroborated the evidence of pre-separation conduct and allowed for two "reasonable inference[s]" to be drawn: first, that the defendant was the woman who had accompanied the plaintiff's husband to the hotel on a specified occasion and, second, that the two engaged in sexual intercourse on that occasion, which preceded the plaintiff's separation from her husband. *Id.* at 499. Accordingly, this evidence could be used to meet the malice element of an alienation of affection claim and the sexual intercourse requirement of a criminal conversation claim. *Id.* at 495–96, 499.

In the present case the Court of Appeals determined, and the parties do not dispute, that whether a marriage existed, whether there was love and affection between the spouses, and whether that love and affection were alienated are not at issue here. *Beavers*, 285 N.C. App. at 36–37. Thus, evidence supports the first two elements of Mr. Beavers's alienation of affection claim and the first element of his criminal conversation claim. As for the alienation of affection claim, the issue is whether through "wrongful and malicious acts," Mr. McMican "produced and brought about the loss and alienation" of Mrs. Beavers's "love and affection" for her husband. *McCutchen*, 360 N.C. at 283. These circumstances can be shown through "any intentional conduct that would probably affect the marital relationship," *Rodriguez*, 257 N.C. App. at 495 (quoting *Pharr*, 147 N.C. App. at 272), or through sexual intercourse between Mr. McMican and Mrs. Beavers, *id.* at 495–96. Similarly, at issue for the criminal conversation claim is whether sexual intercourse occurred between Mr. McMican and Mrs. Beavers. *Id.* at 495.

It is also apparent that Mrs. Beavers admitted to having sexual relations with someone else before she and Mr. Beavers separated. The only question is whether there is any pre-separation evidence that Mr. McMican was that person. Mr. Beavers's complaint alleges that he first suspected Mr. McMican and his wife were having an affair in January 2016, and that he had "found detailed conversations" between his wife and Mr. McMican, which recounted sexual encounters between the two and included nude photos. Yet, the allegations in Mr. Beavers's complaint are refuted by his deposition testimony, which states that the communications at issue were between Mrs. Beavers and someone named "Bestie." Mr. Beavers also admitted that he did not know the phone number associated with "Bestie" nor did he have knowledge of "Bestie's" identity. In fact, the only information Mr. Beavers had about Mrs. Beavers's alleged paramour, was that the two worked together and that, according to Mrs. Beavers, his name was "Dustin." Moreover, Mr. Beavers did not suspect Mr. McMican was Mrs. Beavers's paramour until the two began openly dating in "the spring of 2017." Based on this information, Mr. Beavers states he "put two and two together."

But even taking this evidence in the light most favorable to Mr. Beavers, as is required under our summary judgment standard, *Cummings*, 379 N.C. at 358, this evidence is insufficient to survive summary judgment because there is no pre-separation evidence that Mr. John McMican is "Bestie," "Dustin," or any other iteration of the man with whom Mrs. Beavers had an affair before she and Mr. Beavers separated. *See* N.C.G.S. § 1A-1, Rule 56. The contact designated as "Bestie" in Mrs. Beavers's phone, as well as her description of her paramour as "Dustin," is "ambiguous" and "subject to multiple interpretations." *Coachman*, 122 N.C. App. at 446. Accordingly, the evidence does not give rise to more than mere conjecture that Mr. McMican is the man with whom Mrs. Beavers had an affair in January of 2016.

Mr. Beavers notes that, while there is no direct evidence showing that Mr. McMican is "Bestie" or "Dustin" such evidence is not required under *In re Estate of Trogdon*. Although it is true that *In re Estate of Trogdon* acknowledges that "[a]dultery is almost always proved by circumstantial evidence," in that case Mrs. Trogdon's paramour was conclusively identified. 330 N.C. at 148, 151. Thus, while circumstantial evidence may have been used to show that Mrs. Trogdon had an affair, there was no question as to whom Mrs. Trogdon had that affair with. *Id.* at 151. Without evidence of Mrs. Beavers's alleged paramour's identity, Mr. Beavers "cannot produce evidence to support an essential element of his . . . claim." *Lowe*, 305 N.C. at 369. Accordingly, the trial court was correct in granting summary judgment in Mr. McMican's favor.

Additionally, Mr. Beavers argues that Mr. McMican's malicious intent is evidenced by his phone and social media contacts with Mrs. Beavers; however, without evidence that Mr. McMican is "Bestie" or "Dustin," Mr. Beavers has not provided enough evidence to support the malice prong of his alienation of affection claim. Similar to the situation in *Coachman*, Mr. McMican and Mrs. Beavers worked together at Merck Durham. Thus, to meet the malice standard for an alienation of affection claim, Mr. Beavers needs to show that Mr. McMican's conversations with Mrs. Beavers "were marked by salacious whisperings, plans for clandestine meetings, or any other intonation of improper conduct by [the] defendant." *Coachman*, 122 N.C. App. at 448.

Mr. Beavers cannot meet this standard because he has produced only a wireless phone call record, which does not include any information regarding the content of Mrs. Beavers's and Mr. McMican's phone conversations. He also has produced no information regarding the content of Mr. McMican's and Mrs. Beavers's text messages. Moreover, the Facebook contacts between Mr. McMican and Mrs. Beavers are platonic in nature and consist of a "happy birthday" post from Mrs. Beavers to Mr. McMican, Mr. McMican's having added Mrs. Beavers to a Facebook group, and Mr. McMican "liking" Mrs. Beavers's posts. These Facebook contacts do not rise to the level of those present in *Rodriguez*, which included the parties' purported use of a secret communication code. *See* 257 N.C. App. at 498. Mrs. Beavers "had a right to speak" to Mr. McMican "if she chose to do so." *Coachman*, 122 N.C. App. at 448. Thus, without any verification of Mr. McMican as "Bestie" or "Dustin," the pre-separation conduct in this case does not give rise to more than mere conjecture that Mr. McMican was the person that Mrs. Beavers was seeing romantically in January of 2016.

While Mrs. Beavers admitted to having an adulterous relationship prior to her separation from Mr. Beavers, there is no pre-separation evidence sufficient to establish that Mr. McMican was the individual involved. Therefore, there is insufficient evidence to support either the sexual intercourse element of Mr. Beavers's criminal conversation claim against Mr. McMican, or an alienation of affection claim predicated on sexual intercourse with Mr. McMican. Moreover, the evidence presented is not sufficient to fulfill the inclination prong of *In re Estate of Trogdon*. While the evidence detailed above reflects communication between Mrs. Beavers and Mr. McMican, it does not reflect an "adulterous disposition[ ] or inclination." *In re Estate of Trogdon*, 330 N.C. at 148. Finally, under the opportunity prong in *In re Estate of Trogdon*, there is no evidence that Mrs. Beavers had the opportunity to commit

adultery with Mr. McMican because there is no evidence that she was ever alone with him in circumstances that reasonably could be inferred along with all the other evidence in the case to constitute an opportunity to engage in sexual intercourse. *See In re Estate of Trogdon*, 330 N.C. at 151; *Rodriguez*, 257 N.C. App. at 498-99; *Pharr*, 147 N.C. App. at 273.

Accordingly, because Mr. Beavers cannot show that Mr. McMican was Mrs. Beavers's paramour during the relevant period based on pre-separation evidence, nor can he show the malice prong of an alienation of affection claim or the sexual intercourse element of a criminal conversation claim, the trial court was correct to grant Mr. McMican's motion for summary judgment. *See Lowe*, 305 N.C. at 369 (stating that summary judgment is appropriate when the moving party shows "that the opposing party cannot produce evidence to support an essential element of his or her claim."). Thus, we reverse the decision of the Court of Appeals and instruct that court to reinstate the trial court's order granting summary judgment in favor of defendant.

REVERSED.

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JAMES W. BRADSHAW; CARLA O. BRADSHAW; RESORT RETAIL ASSOCIATES, INC.; E.C. BROADFOOT; CHRISTINA DUNN CHANDRA; THOMAS F. EGAN; CHARLES EGGERT; MARK P. GARSIDE; DR. JAMES J. GREEN, JR.; ROBERT K. GRUNEWALD; RONALD HOLMES; DAVID LAUCK; CURT W. LEMKAU, JR.; EVAN MIDDLETON; JOSHUA M. NELSON; CHRISTIAN C. NUGENT; REGINA H. PAKRADOONI, AS EXECUTRIX OF THE ESTATE OF PETER B. PAKRADOONI, DECEASED; FORD PERRY; MARCELLO G. PORCELLI; ADAN RENDON; RICHARD H. STEVENSON; PAUL STOKES; LAWRENCE J. THEIL; R. MITCHELL WICKHAM; WILLIAM H. WILLIAMSON, III; WILLIAM K. WRIGHT, JR.; ALEX M. WOLF; CHAFFIN FAMILY LIMITED PARTNERSHIP; AND SOLARIS CAPITAL LLC

v.

STEPHEN E. MAIDEN; MAIDEN CAPITAL, LLC; AND SS&C TECHNOLOGIES, INC., SUCCESSOR BY MERGER TO SS&C FUND ADMINISTRATION SERVICES, LLC (A/K/A SS&C FUND SERVICES)

No. 52A23

Filed 22 March 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 287 N.C. App. 393, 2022 WL 17985671 (2022), affirming orders and opinions dated 10 August 2015, 1 September 2020, and 15 September 2020, and entered on 20 August 2015, 4 September 2020, and 30 September 2020, respectively,

by Chief Business Court Judge Louis A. Bledsoe III in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 14 February 2024.

*Lewis & Roberts, PLLC, by Matthew D. Quinn and James A. Roberts, III, and Mauney PLLC, by Gary V. Mauney, for plaintiff-appellants.*

*Alston & Bird LLP, by Ryan P. Ethridge and Michael A. Kaeding; and Paul, Weiss, Rifkind, Wharton, & Garrison LLP, by Rober A. Atkins, pro hac vice, and Jeffrey J. Recher, pro hac vice, for defendant-appellee SS&C Technologies, Inc.*

PER CURIAM.

Justice DIETZ did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Batson v. Coastal Res. Comm'n*, 385 N.C. 328, 892 S.E.2d 589 (2023) (per curiam) (affirming by an equally divided vote a Court of Appeals decision without precedential value).

AFFIRMED.

ESTATE OF GREGORY GRAHAM
v.
ASHTON LAMBERT, INDIVIDUAL AND OFFICIAL CAPACITY,
FAYETTEVILLE POLICE DEPARTMENT, AND CITY OF FAYETTEVILLE

No. 113A22

Filed 22 March 2024

**1. Immunity—governmental—waiver by insurance—standard for reviewing summary judgment denial**

In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, the Court of Appeals erred by applying the wrong legal standard when it reversed the trial court's order denying summary judgment to defendants. Rather than analyzing whether the evidence raised a genuine issue of material fact regarding whether the city had waived governmental immunity by purchasing liability insurance, the Court of Appeals instead erroneously employed the standard under Civil Procedure Rule 12(b)(6) (motion to dismiss for failure to state a claim) by focusing on the sufficiency of the complaint to raise the issue of waiver.

**2. Immunity—governmental—speed limit exceeded by police officer—no statutory waiver of immunity**

In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who was struck and killed while the officer was driving to the scene of a domestic violence incident, the speed limit exemption in N.C.G.S. § 20-145—under which speed limits do not apply to police officers while chasing or apprehending violators of the law or to other vehicle operators traveling in response to an emergency—did not operate as a statutory waiver of governmental immunity. Section 20-145, with its focus on individual drivers and individual actions and inclusion of non-governmental actors, contained no plain or clear legislative mandate withdrawing immunity from a discrete government body.

**3. Immunity—governmental—speed limit exceeded by police officer—official capacity suit—same waiver analysis as for city**

In a negligence and wrongful death action filed against a city and a police officer (defendants) by the estate of a pedestrian who

was struck and killed while the officer was driving to the scene of a domestic violence incident, where the Court of Appeals' decision was reversed because that court applied the wrong standard of review to the trial court's order denying summary judgment to defendants, the Court of Appeals was instructed on remand to treat the estate's claim against the officer in his official capacity as merged with the claim against the city.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 269 (2022), reversing an order denying summary judgment entered on 16 July 2020 by Judge Mary Ann Tally in Superior Court, Cumberland County. Heard in the Supreme Court on 31 October 2023.

*Law Offices of Antonio F. Gerald, by Kevin Vidunas; and O'Malley Tunstall, PLLC, by Joseph P. Tunstall III and Peter J. Tomasek, for plaintiff-appellants.*

*Cranfill Sumner LLP, Steven A. Bader and James C. Thornton, for defendants-appellees.*

*Roberts & Stevens, PA, by David C. Hawisher, for North Carolina Association of Defense Attorneys, amicus curiae.*

*Tin Fulton Walker & Owen, PLLC, by Abraham Rubert-Schewel, for North Carolina Advocates for Justice, amicus curiae.*

EARLS, Justice.

Just before midnight on 24 July 2018, Officer Ashton Lambert struck Gregory Graham with his police cruiser while responding to a call. Mr. Graham died at the scene. After the collision, Mr. Graham's Estate sued Officer Lambert in his official and individual capacities, alleging negligence, gross negligence, and wrongful death. The Estate brought the same claims against the officer's employers—the City of Fayetteville (City) and the Fayetteville Police Department (Police Department). The Police Department was dismissed as an improper party. Before trial, the City and Officer Lambert moved for summary judgment, arguing that governmental and public officer immunity barred the Estate's claims. The trial court denied their motions; the Court of Appeals reversed. *Est. of Graham v. Lambert*, 282 N.C. App. 269, 271 (2022).

In reaching its conclusion, the Court of Appeals improperly analyzed the summary judgment order before it. To examine whether the City waived governmental immunity by buying liability insurance, the court focused on the sufficiency of the Estate's complaint, rather than the presence of a genuine factual dispute. *Id.* at 273–74. Put differently, the court imported the Rule 12(b)(6) standard into the realm of summary judgment. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2023).

That misguided analysis yielded a misguided result as to immunity. By statute, the City's insurance coverage dictates whether it has waived governmental immunity on the Estate's claim. *See* N.C.G.S. § 160A-485 (2023). The same is true for the official capacity suit against Officer Lambert, as that claim is—in effect—one against the City. We thus reverse the Court of Appeals as to the City's waiver of immunity and remand for it to analyze "whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact" on that point. *See Summey v. Barker*, 357 N.C. 492, 496 (2003).

We also clarify the legal framework for suits to which N.C.G.S. § 20-145 (2023) applies. That statute exempts police officers from speed limits when chasing or apprehending criminal absconders. *Id.* But it does not shield officers for their gross negligence. *See Young v. Woodall*, 343 N.C. 459, 462 (1996). The Estate contends—and the Court of Appeals assumed—that section 20-145 exposes the City to liability for Officer Lambert's conduct. In other words, that the statute waived governmental immunity. But because section 20-145 focuses on individual drivers and individual responsibility, it sets "gross negligence" as the metric for personal liability in personal capacity claims. There is no basis in the statute's plain language, however, to conclude that it also waives the City's immunity.

The dissenting Court of Appeals judge would have denied defendants' motion for summary judgment on the gross negligence claim. Viewing the evidence in the light most favorable to the Estate, the dissenting judge found a genuine issue of material fact on the question of whether Officer Lambert was grossly negligent. *See Est. of Graham*, 282 N.C. App. at 278–83 (Jackson, J., concurring in part and dissenting in part). Neither the majority nor the dissent below clarify whether they were analyzing the gross negligence claim as it applied to the individual capacity claims or the official capacity claims or both. At oral argument in this Court, the Estate's Counsel represented that the only claim on appeal is the claim against the City based on its alleged waiver of governmental immunity by securing insurance. Because the Estate does not appeal it, we do not reach the question of whether the evidence taken in

the light most favorable to the Estate raises a genuine issue of material fact on Officer Lambert's gross negligence as it relates to the individual capacity claim.

## I. Background

### A. The Accident

On 24 July 2018, Officer Lambert was on-duty as an officer with the City of Fayetteville Police Department. It was his first night shift. In fact, it was his first solo shift since joining the force the October before.

At 11:53 PM, Officer Lambert was one of three officers dispatched to a domestic disturbance. Of the officers, Officer Lambert was the farthest away and was thus providing backup. In his own words, he was "responding to a call for service," not "an emergency."

When he received the call, Officer Lambert was driving his police cruiser on Raeford Road—a flat multi-lane straightaway with no curves. He was traveling west in the middle lane. That night, the traffic was light, the weather clear, and the road well-lit by streetlights and nearby businesses. After receiving the call, Officer Lambert used the laptop in the front seat of his cruiser to find the address. He continued touching the computer's track pad as he drove.

At the same time, Gregory Graham was crossing Raeford Road on foot. Earlier that day, Mr. Graham was admitted to Roxie Care Center for suicidal ideations. At one point, he voiced thoughts of "throwing himself into traffic." Mr. Graham received medical treatment and was released later that same day. As he traversed Raeford Road that evening, Mr. Graham's blood alcohol content was 0.31.

There was no pedestrian crosswalk on that portion of the street, but camera footage showed that it was well lit by the floodlights of a car dealership. The same footage captured Mr. Graham crossing three eastbound lanes and stopping on the median. He looked both ways, and then started across the westbound lanes.

Raeford Road has a speed limit of 45 miles per hour. Officer Lambert, however, drove faster, at one point reaching 58 miles per hour. His cruiser's blue lights were off and its emergency siren quiet. As he drove, Officer Lambert periodically looked at and touched his laptop. And in the moments before the crash, his cruiser twice strayed outside of its lane. Three seconds before impact, Officer Lambert shifted positions and leaned towards his laptop.

At 11:53 PM, Officer Lambert struck Mr. Graham head-on. He was driving 53 miles per hour, and his body camera footage did not capture any obvious efforts to brake or swerve. There were no skid marks on the road. After colliding with Mr. Graham, Officer Lambert pulled over, activated his blue lights, and alerted dispatch. Mr. Graham died at the scene.

**B. The Lawsuit**

On 13 June 2019, almost a year after Mr. Graham's death, his Estate sued the Police Department, the City, and Officer Lambert in his individual and official capacities. The Estate alleged wrongful death, negligence, and gross negligence. On the latter claim, the Estate invoked N.C.G.S. § 20-145, arguing that Officer Lambert's driving was grossly negligent and above the posted speed limits.

On 19 August 2019, defendants answered the Estate's complaint. They moved to dismiss the Police Department as an improper party. They raised defenses of governmental and public officer immunity. And they moved to dismiss the Estate's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim. In defendants' view, the Estate did not specifically allege that the City waived governmental immunity by buying liability insurance.

In March 2020, defendants moved for summary judgment. Officer Lambert and the City reasserted their immunity defenses and argued that "no evidence" showed that the officer "acted in a . . . grossly negligent manner." The Police Department contended that, as a subunit of the City, it was not a proper party to the suit.

The trial court agreed with the Police Department and dismissed the Estate's claims against it with prejudice. But it denied summary judgment for Officer Lambert and the City, concluding that "genuine issues of material fact" remained. Officer Lambert and the City appealed the trial court's summary judgment ruling.

**C. The Appeal**

A divided panel of the Court of Appeals reversed the trial court's summary judgment ruling and granted summary judgment to the City and Officer Lambert. *Est. of Graham*, 282 N.C. App. at 278. The court first held that the Estate sufficiently plead a waiver of governmental immunity. *Id.* at 274. Under N.C.G.S. § 160A-485, cities may waive their immunity from tort claims by buying liability insurance. According to the Court of Appeals, the Estate's complaint was "sufficient to give notice to defendants that plaintiff is alleging a waiver of immunity because it states the action is brought and that defendants are liable

pursuant to § 160A-485." *Id.* Since the Estate adequately plead waiver, the court reasoned that "governmental immunity was waived." *Id.*

Next, the Court of Appeals examined the individual capacity suit against Officer Lambert. Though governmental immunity attaches to governments and their employees when sued in their official capacities, public officer immunity governs personal liability. *Id.* (citing *Smith v. State*, 289 N.C. 303, 331 (1976)). Under that doctrine, an officer is immune from suit for acts within the scope of his duties, so long as they are devoid of malice or corruption. *See id.* Applying that standard, the court determined that Officer Lambert "was responding to an incident within the scope of his duties at the time of the accident." *Id.* And in discharging his official responsibilities, the officer's "conduct was neither malicious nor corrupt." *Id.* For those reasons, the court concluded that public officer immunity protected Officer Lambert from the Estate's individual capacity suit. *Id.* at 275. It thus awarded summary judgment on that claim. *Id.*

Finally, the court considered whether Office Lambert was grossly negligent in violation of section 20-145. In the court's view, Officer Lambert's "acts of discretion . . . may have been negligent but were not grossly negligent." *Id.* at 277. Because he was responding to a domestic disturbance, the officer had a "valid and lawful" reason "for driving at a speed above the speed limit." *Id.* at 276. The court acknowledged that Officer Lambert "slightly deviated" from his lane twice before the collision, "look[ed] at his laptop" while driving, "touch[ed] the laptop's trackpad," and failed to activate his blue lights or emergency siren as required by Police Department policy. *Id.* at 277. But it emphasized that when courts have found a genuine dispute as to gross negligence, the officer's conduct was "more egregious" than Officer Lambert's. *See id.* (citing *Truhan v. Walston*, 235 N.C. App. 406, 413 (2014)). Relying on that precedent, the court discerned no "genuine issue of material fact as to gross negligence" and so granted summary judgment for Officer Lambert and the City. *Id.* at 278.

Judge Jackson dissented on the issue of gross negligence. In his view, the evidence—taken in the Estate's favor—"presents a genuine issue of material fact regarding whether Officer Lambert was grossly negligent when he struck and killed Mr. Graham." *Id.* at 280 (Jackson, J., concurring in part and dissenting in part). Judge Jackson noted that "the accident occurred on Officer Lambert's first night shift, and first day working alone." *Id.* at 282. Before the incident, Officer Lambert was "speeding, his blue lights and siren were not activated (in violation of Department policy), and the location of his collision with Mr. Graham

was well-lit despite the late hour." *Id.* In the seconds before the collision, Officer Lambert was "using his computer to find an address." *Id.* at 283. Further evidence suggested that his distraction seeped into his driving—he "committed two lane violations because he was looking at his computer instead of the road ahead of him" and "leaned distinctively towards his computer three seconds before" impact. *Id.* Officer Lambert "collided with Mr. Graham without attempting to avoid Mr. Graham by turning or applying the cruiser's brakes to slow his vehicle down." *Id.* Judge Jackson explained that the "evidence, if believed by a jury, tended to show a high probability of injury to the public despite the absence of significant countervailing law enforcement benefits." *Id.* at 282 (cleaned up). For that reason, Judge Jackson would let the Estate present its case for a jury "to determine whether Officer Lambert was grossly negligent on 24 July 2018—a task to which we are ill-suited as an appellate court." *Id.*

Before this Court, the Estate filed a notice of appeal based on Judge Jackson's dissent. The City and Officer Lambert also filed a petition for discretionary review, arguing that the Estate's complaint did not sufficiently allege waiver of governmental immunity. We allowed the petition for discretionary review.

## II. Standard of Review

We review summary judgment orders de novo. *See Builders Mut. Ins. Co. v. N. Main Constr.*, 361 N.C. 85, 88 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). Under that standard, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. Of Educ.*, 363 N.C. 334, 337 (2009) (cleaned up).

Summary judgment is proper only if (1) "there is no genuine issue as to any material fact," and (2) "any party is entitled to a judgment as a matter of law." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (cleaned up). The movant's "papers are carefully scrutinized" while the other party's "are indulgently regarded." *Caldwell v. Deese*, 288 N.C. 375, 378 (1975) (cleaned up); *accord Singleton v. Stewart*, 280 N.C. 460 (1972). Put differently, a court must credit "[a]ll facts asserted by the adverse party" and draw any inferences in its favor. *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (cleaned up).

Still, summary judgment is strong medicine and "should be used with caution." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402 (1979); *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). Courts must tread gingerly at summary judgment, reserving it for cases where "only questions of law are involved and a fatal weakness in the

claim of a party is exposed." *Bartley v. City of High Point*, 381 N.C. 287, 299 (2022) (cleaned up). In that vein, summary judgment is proper if an "affirmative defense" bars "an essential element of the opposing party's claim." *Craig*, 363 N.C. at 337 (cleaned up).

That principle applies to immunity. As this Court has explained, immunity is "more than a mere affirmative defense" to liability—it "shields a defendant entirely from having to answer for" its conduct "in a civil suit for damages." *See id.* (discussing governmental immunity); *see also Dawes v. Nash County*, 357 N.C. 442, 444–45 (2003) (sovereign immunity); *Bartley*, 381 N.C. at 294 (public officer immunity). Thus, a defendant entitled to immunity may seek summary judgment on a plaintiff's claims. *See Dobson*, 352 N.C. at 87 (awarding summary judgment to defendant and explaining that "plaintiff's claim against her for slander *per se* was barred" because the defendant's "compliance with the reporting statutes entitled her to immunity").

## III. Immunity Doctrines

This case initially involved three claims against three defendants—the City, the Police Department, and Officer Lambert. Adding another layer, the Estate sued Officer Lambert in separate legal capacities, seeking relief from him as an individual and within his official role. Because this case presents interlocking immunities and overlapping claims, we start by clarifying the legal frameworks at play.

### A. Suits Against Local Governments

The "common law doctrine of sovereign immunity" bars suits against the State unless it "has consented or waived its immunity." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 570 (2021) (cleaned up). Cities, counties, and other localities are "recognizable units that collectively make up" the State and enjoy a slice of its sovereign power. *Dawes*, 357 N.C. at 445 (cleaned up). For that reason, a "portion of the State's sovereign immunity" trickles down "to local governments." *Wray v. City of Greensboro*, 370 N.C. 41, 47 (2017). That "more limited" protection—termed governmental immunity—shields "units of local government from suit for acts committed in their governmental capacity." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 211–12 (2022) (cleaned up). By the same stroke, a local government is not liable "for the negligence of its employees in the exercise of governmental functions." *Meyer v. Walls*, 347 N.C. 97, 104 (1997).

Though conceptually similar, sovereign and governmental immunity differ importantly. For one, they attach to different entities. Sovereign

immunity embraces the State and its agencies—governmental immunity reaches local governments. *See id.* Likewise, the immunities "do not apply uniformly." *Evans v. Hous. Auth. of Raleigh*, 359 N.C. 50, 53 (2004). The State's sovereign immunity covers "both its governmental and proprietary functions." *Id.* But governmental immunity reaches "only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Id.* So when a local government reaches "beyond its governmental and police powers," it lacks "the full protections of sovereign immunity which the State and its agencies enjoy." *Kinston Charter*, 379 N.C. at 571 (cleaned up).

But sovereign and governmental immunity do share a key feature: Both are waivable by clear statutory language. *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38 (1983). The State Tort Claims Act, for instance, "partially waived [the State's] sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 45 (2022) (cleaned up). In the same vein, the legislature has allowed cities to waive "immunity from civil liability in tort" by buying liability insurance. N.C.G.S. § 160A-485(a) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."). A similar regime applies to counties. N.C.G.S. § 153A-435 (2023).

To surmount a defense of governmental immunity, a plaintiff must first "state a cause of action" by alleging a waiver of that immunity. *See Wray*, 370 N.C. at 47 (cleaned up). To do so, the plaintiff must plead "facts that, if taken as true, are sufficient to establish a waiver of immunity." *Id.* at 48 (cleaned up). If the government seeks summary judgment on immunity grounds, it bears the "burden of clearly establishing the lack of any triable issue of fact by the record properly before the court." *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 469–70 (1979); *see also Craig*, 363 N.C. at 337. To prevail, the government must present a "forecast of evidence" showing that "an essential element" of the plaintiff's claim "would be barred by [the] affirmative defense" of governmental immunity. *Dobson*, 352 N.C. at 83. If the government carries its burden, the plaintiff in turn must "show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982). To survive summary judgment, however, the plaintiff "need not *convince* the court that he would prevail on a triable issue of material fact but only that the issue *exists*." *Id.* at 370 (emphasis added); *accord Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 21 (1992) ("[I]t is not incumbent upon a plaintiff to present all

the evidence available in his favor, but only that necessary to rebut the defendant's showing." (cleaned up)).

**B. Suits Against Government Officers**

When a plaintiff sues a government employee, the "identity of the real party in interest dictates what immunities may be available." *Est. of Long v. Fowler*, 378 N.C. 138, 143 n.3 (2021) (quoting *Lewis v. Clarke*, 581 U.S. 155, 163 (2017)). In most cases, courts look to the pleadings and the "capacity in which a plaintiff intends to hold a defendant liable." *Mullis v. Sechrest*, 347 N.C. 548, 554 (1998). But when distinguishing official and individual capacity suits, a "crucial question" is "the nature of the relief sought, not the nature of the act or omission alleged." *Meyer*, 347 N.C. at 110 (cleaned up). If "the remedy sought is truly against the sovereign," the suit "in fact is against the official's office and thus the sovereign itself." *Lewis*, 581 U.S. at 162.

Thus, when a plaintiff sues a government employee in his official capacity, the "real party in interest" is "the governmental entity, not the named official." *Hafer v. Melo*, 502 U.S. 21, 26 (1991). That is because the suit seeks "recovery from the entity of which the public servant defendant is an agent." *Meyer*, 347 N.C. at 110. Because "the relief sought is only nominally against the official," official capacity suits "represent only another way of pleading an action against" the government. *Lewis*, 581 U.S. at 162 (cleaned up). On every meaningful metric, it "is basically a suit against the official office" rather than the person who holds it. *Corum v. Univ. of N.C.*, 330 N.C. 761, 772 (1992). For that reason, state officers sued in their official capacity "assume the identity of the government that employs them." *Hafer*, 502 U.S. at 27. And for the same reason, the "only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." *Moore v. City of Creedmor*, 345 N.C. 356, 367 (1996) (quoting *Hafer*, 502 U.S. at 25).

Thus in official capacity suits, a defendant acting within the scope of his duties and carrying out a government function enjoys "governmental immunity to the same extent as" his employer. *Mullis*, 347 N.C. at 551; *see also Harwood v. Johnson*, 326 N.C. 231, 238 (1990) ("A suit against defendants in their official capacities, as public officials or a public employee of the Parole Commission acting pursuant to its direction, is a suit against the State."). The same logic applies to waiver. Without its consent to suit, a government is immune, and so are its employees when sued in their official capacities for carrying out authorized, governmental functions. *See Harwood*, 326 N.C. at 238 (holding that plaintiff's "suit cannot be maintained against defendants in their official capacities"

because the government employer "has not consented to being sued in this forum" for defendants' actions). But when a government surrenders its immunity, so does an official capacity defendant—and to the same degree as the principal. *Mullis*, 347 N.C. at 555 (noting that school board's insurance coverage waived "governmental immunity from suit for the first $1,000,000 in damages which may be awarded," and thus concluding that "defendant[,] . . . in his official capacity, is entitled to governmental immunity to that same extent").

An individual capacity suit, by contrast, "seeks recovery from the defendant directly." *Meyer*, 347 N.C. at 110. In a personal capacity claim, officers are "sued as individuals," and held "personally liable for payment of any damages awarded." *Corum*, 330 N.C. at 772. For that reason, the "real party in interest is the individual, not the sovereign." *Lewis*, 581 U.S. at 163 (cleaned up). Thus, a defendant sued in his individual capacity does not enjoy sovereign or governmental immunity. *Est. of Long*, 376 N.C. at 139. That said, individual capacity defendants are not left unshielded—they may "assert personal immunity defenses." *Moore*, 345 N.C. at 368 (cleaned up).

Public officer immunity is one such personal defense. A "judicially created doctrine" steeped in prudential concerns, that immunity "shield[s] public officials from tort liability when those officials truly perform discretionary acts" within "the scope of their official duties." *Bartley*, 381 N.C. at 294. The doctrine has "two primary goals": promoting "fearless, vigorous, and effective administration of government policies," and dampening "trepidation about personal liability" that may deter competent people from taking office. *Id.* (cleaned up). And as the name suggests, public officer immunity is for public officers—i.e., people "charged with duties involving the exercise of some portion of the sovereign power." *Smith*, 289 N.C. at 333 (cleaned up). But the doctrine does not immunize conduct "at odds with the protections afforded by" it and that "underlie its utility." *Bartley*, 381 N.C. at 294. For that reason, an officer is immune only when he "lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption." *Smith*, 289 N.C. at 331.

## IV. Application

We apply those immunity principles to the claims remaining in this case at this point, starting with the Estate's suit against the City.

### A. The Estate's Suit Against the City

Governmental immunity shields the City "from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer*, 347 N.C. at 104. Everyone agrees that Officer Lambert was acting within his official duties and performing a government function at the time of the collision. So the City is immune for its officer's torts, unless it waived that immunity.

The Estate raises two theories of waiver. It first contends that the City surrendered immunity by buying insurance. According to the Estate, the City is indemnified—and thus liable—for the injuries caused by Officer Lambert. The Estate also invokes section 20-145. That provision exempts a police officer from speed limits when "chas[ing] or apprehen[ding] . . . violators of the law," so long as he drives with "due regard for safety." N.C.G.S. § 20-145. But under the statute, an officer must answer for "the consequence[s] of a reckless disregard of the safety of others"—in other words, his gross negligence. *Id.*; *see also Young*, 343 N.C. at 462. Because Officer Lambert was speeding and arguably distracted by technology at the time of the accident, the Estate contends that he was grossly negligent. And since the officer violated section 20-145, the Estate maintains that the City—as his employer—is vicariously liable. In so many words, then, the Estate reads section 20-145 to waive the City's governmental immunity for its officers' grossly negligent driving.

The Estate's first theory was improperly resolved by the Court of Appeals. Its second theory fails as a matter of law.

#### *1. Did the City waive governmental immunity by buying insurance?*

**[1]** By statute, cities may waive governmental immunity by securing liability insurance. *See* N.C.G.S. § 160A-485. And in the same statute, the legislature detailed the scope and mechanics of waiver-by-insurance. *See id.* If a city buys insurance, it surrenders immunity from a tort claim "to the extent that the city is insured against such claim pursuant to this section." N.C.G.S. § 160A-485(c).

In its complaint, the Estate explained that its suit was "brought against the Defendant City pursuant to N.C.G.S. § 160A-485" and that "Defendant City shall be held liable pursuant to . . . N.C.G.S. § 160A-485." *Est. of Graham v. Lambert*, 282 N.C. App. at 273 (alteration in original). The City, however, moved to dismiss the Estate's suit under Rule 12(b)(6). Invoking our precedent, the City attacked the complaint for failing to "state a claim upon which relief can be granted under *some* legal

theory." *See Bridges v. Parrish*, 366 N.C. 539, 541 (2013) (quoting *Coley v. State*, 360 N.C. 493, 494–95 (2006)). More specifically, the motion faulted the Estate because it did not specifically allege that the City waived immunity by securing insurance. From the record, we cannot locate any ruling on the City's 12(b)(6) motion. We do know, however, that the trial court denied Officer Lambert and the City's later motion for summary judgment.

The parties contested—and the Court of Appeals considered—only the summary judgment order, not the 12(b)(6) motion. But the court conflated the issues before it and commingled the applicable law. It first recited the 12(b)(6) standard: "[t]o state a claim against the municipality a plaintiff must allege waiver of immunity by the purchase of insurance." *Est. of Graham*, 282 N.C. App. at 273 (cleaned up). The court then applied that 12(b)(6) rubric to the pleadings. In its view, the Estate stated a claim against the City because its "complaint [wa]s sufficient to give notice to defendants that plaintiff [wa]s alleging a waiver of immunity." *Id.* at 274. On that basis, the court concluded that "governmental immunity was waived." *Id.* The problem with that analysis: The court resolved a summary judgment order using the Rule 12(b)(6) framework. That was error—the court did not consider the right question or apply the right standard.

In purpose and practice, Rule 12(b)(6) and summary judgment travel in discrete lanes. At the pleading stage, a 12(b)(6) motion tests the "the law of a claim, not the facts which support it." *Snyder v. Freeman*, 300 N.C. 204, 209 (1980) (quoting *White v. White*, 296 N.C. 661, 667 (1979)). At the dawn of the case, courts should not discard a complaint "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103 (1970) (cleaned up). But summary judgment is a different tool with a different scope. It furnishes a "device to bring litigation" to a head when it "can be readily demonstrated that no material facts are in issue." *Kessing*, 278 N.C. at 533. To that end, summary judgment "pierce[s] the pleadings," and gives courts "a preview or forecast of the proof of the parties in order to determine whether a jury trial is necessary." *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 149 (1976) (cleaned up). While a 12(b)(6) motion probes the "legal sufficiency" of the pleadings, *Blue v. Bhiro*, 381 N.C. 1, 5 (2022), summary judgment "eliminate[s] formal trials where *only* questions of law are involved," *Kessing*, 278 N.C. at 534 (emphasis added). And while a 12(b)(6) motion is "decided on the pleadings alone," *id.* at 533, summary judgment "embraces more than the pleadings," allowing courts to "consider affidavits, depositions,

and other information," *Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co.*, 42 N.C. App. 259, 262 (1979).

Because Rule 12(b)(6) and summary judgment pose different questions and draw from different sources, they require different standards. But here, the Court of Appeals misapprehend the issue before it and the framework at play. Because the parties only appealed the summary judgment order, the court should have asked whether the evidence raised a genuine factual dispute on the existence and extent of the City's waiver-by-insurance. But the court instead applied the Rule 12(b)(6) rubric, focusing on the sufficiency of the Estate's complaint. It held that the Estate adequately plead waiver, and so the City's "governmental immunity was waived." *Est. of Graham*, 282 N.C. App. at 274. But even if a complaint survives a 12(b)(6) motion, it is not guaranteed victory at summary judgment. After all, a plaintiff may state a claim for relief, but fail to show a "genuine factual controversy" for a jury to resolve. *See Nasco*, 291 N.C. at 149–50 (cleaned up). Significantly here, at summary judgment the City submitted affidavit testimony that it has not purchased liability insurance that covers this incident.

By asking whether the Estate sufficiently alleged waiver—the standard under Rule 12(b)(6)—the Court of Appeals improperly resolved the summary judgment order before it. We thus vacate its decision on the City's immunity and remand for the proper analysis. The court should ask whether—viewing the evidence in the light most favorable to the Estate and considering the City's offer of proof that no liability insurance exists—the Estate has offered sufficient evidence to raise a genuine factual dispute as to the City's waiver of immunity, including whether the terms of any existing insurance policy cover this incident.

### *2. Does section 20-145 waive the City's governmental immunity?*

**[2]** Though the General Assembly may waive a city's governmental immunity, it must do so clearly. *Guthrie*, 307 N.C. at 537–38. Put differently, the legislature must make plain its intent to withdraw the "sovereign attributes of immunity." *Orange County v. Heath*, 282 N.C. 292, 296 (1972). For that reason, immunity statutes are "strictly construed" and waiver is not "lightly inferred." *Guthrie*, 307 N.C. at 537–38.

Under that approach, section 20-145 does not plainly waive the City's governmental immunity. By its terms, the statute contemplates personal liability: It holds "the *driver*" of a listed car responsible for "the consequence of a reckless disregard of the safety of others." *See* N.C.G.S. § 20-145 (emphasis added). Because the statute focuses on

individual drivers and their individual actions, it lacks a key ingredient for waiver: Clear language withdrawing immunity from a discrete government body. Under our precedent, statutes waiving immunity have specified what they were doing, how they were doing it, and to whom they applied. *See*, *e.g.*, *Evans*, 359 N.C. at 56–57 (holding that "a Chapter 157 housing authority has statutory authority to accept liability for its governmental functions by the purchase of insurance" because the legislature authorized it "to sue and be sued" and "to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable" (cleaned up)); *N.C. Ins. Guar. Ass'n v. Bd. of Trs.*, 364 N.C. 102, 112 (2010) (concluding that the General Assembly clearly waived the State's sovereign immunity by applying the Workers' Compensation Act to claims brought by governmental employees); *see also* N.C.G.S. § 160A-485 (allowing cities to waive tort immunity by buying insurance); N.C.G.S. § 153A-435 (same for counties).

But section 20-145, by contrast, says nothing about governmental immunity and still less about waiver. Also telling, the statute reaches beyond government employees, extending coverage to private ambulances "when traveling in emergencies." *See* N.C.G.S. § 20-145. We think it implausible that section 20-145 was intended to waive governmental immunity without saying so and while applying to non-governmental actors. Because section 20-145 is not a "direct," "positive," or "clear waiver by the lawmaking body," it does not expose municipalities to liability when their agents breach its terms. *Orange County*, 282 N.C. at 296. For that reason, the City's governmental immunity remains intact against the Estate's gross negligence claims unless otherwise waived by the purchase of liability insurance.

Section 20-145 fastens responsibility to individual drivers for their individual acts and therefore applies to individual capacity suits. *See Young*, 343 N.C. at 462. For those claims, gross negligence is the standard. *See Parish v. Hill*, 350 N.C. 231, 238 (1999) ("[A]s the law stands currently, in *any* civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability."). In those narrow circumstances, personal liability attaches to "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *See Bullins v. Schmidt*, 322 N.C. 580, 583 (1988) (explaining that section 20-145 "establishes as the public policy of North Carolina that if an officer's conduct" is "determined to be grossly negligent, then the statute does not protect him and he may be liable for damages proximately resulting from such gross negligence").

But without the plain legislative mandate needed to withdraw governmental immunity, section 20-145 does not provide a vehicle for the Estate's claim against the City.

### B. The Estate's Official Capacity Suit Against Officer Lambert

**[3]** Sued in his official capacity, Officer Lambert is "entitled to governmental immunity to the same extent as" the City. *Mullis*, 347 N.C. at 551. Because the official capacity claim against Officer Lambert is "merely another way of bringing suit against the City," both claims entail the same analysis and the same result. *See Moore*, 345 N.C. at 367. Since the City's immunity hinges on its insurance coverage, the official capacity suit against Officer Lambert does as well. On remand, the court should treat the official capacity suit against Officer Lambert as merged with the claim against the City.

## V. Conclusion

As to the City, we reverse the Court of Appeals' ruling on whether the City waived governmental immunity and remand to that court for application of the proper summary judgment standard. Because the official capacity suit against Officer Lambert in this case is simply another way of suing the City, the immunity analysis is the same. As noted above, the Estate has abandoned its individual capacity suit against Officer Lambert. The case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HALIKIERRA COMMUNITY SERVICES LLC
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH BENEFITS; MEDICAL REVIEW OF NORTH CAROLINA, INC. D/B/A THE CAROLINAS CENTER FOR MEDICAL EXCELLENCE; KAY COX, IN HER INDIVIDUAL CAPACITY; PATRICK PIGGOTT, IN HIS INDIVIDUAL CAPACITY

No. 59A23

Filed 22 March 2024

**Administrative Law—Medicaid reimbursements—prepayment review—constitutional violations alleged—no genuine issue of material fact**

In a complex business case arising from the decision of the N.C. Department of Health and Human Services (DHHS) to place a medical services company on Medicaid reimbursement prepayment review for alleged overbilling practices, the trial court correctly granted summary judgment to DHHS where the company's evidentiary forecast did not demonstrate any genuine issue of material fact with regard to its substantive due process and equal protection violation claims. The agency's decision was not arbitrary and capricious where its reasons for placing the company on prepayment review were rationally related to a legitimate government interest of combating Medicaid fraud and where there was no evidence that DHHS treated the company differently from other personal care providers similarly situated.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 27 September 2022 by Special Superior Court Judge for Complex Business Cases Michael L. Robinson in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 13 February 2024.

*Ralph T. Bryant Jr.; and Q Byrd Law, by Quintin D. Byrd, for plaintiff-appellant.*

*Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, John H. Schaeffer, Assistant Attorney General, James W. Whalen, Solicitor General Fellow, and Mary Elizabeth D. Reed, Solicitor General Fellow, for defendant-appellee North Carolina Department of Health and Human Services, Division of Health Benefits.*

*No brief filed for defendant-appellees Medical Review of North Carolina, Inc. d/b/a The Carolinas Center for Medical Excellence, Kay Cox, and Patrick Piggott.*

RIGGS, Justice.

This appeal requires us to determine whether summary judgment was properly entered against plaintiff Halikierra Community Services LLC (Halikierra) on its substantive due process and equal protection violation claims against defendant North Carolina Department of Health and Human Services (DHHS)[1] after DHHS placed Halikierra on Medicaid reimbursement prepayment review. We hold that the trial court properly granted summary judgment for DHHS because Halikierra's evidentiary forecast failed to disclose any genuine issues of material fact in support of its claims.

## I. Factual and Procedural History

Beginning in 2009, Halikierra provided home personal care services to Medicaid beneficiaries through the North Carolina Medicaid Program. DHHS, which administers the Medicaid program, received reimbursement requests from Halikierra in connection with the provision of personal care services; once received, DHHS would ordinarily remit the Medicaid reimbursement to Halikierra.

DHHS received several Medicaid overbilling complaints relating to Halikierra's services between 2015 and 2017, leading DHHS to conduct several post-payment audits. In carrying out these audits, DHHS inspected Halikierra's supporting documentation, determined that Halikierra had erroneously received excess Medicaid reimbursement funds on at least three occasions, and recovered those excess sums from Halikierra. DHHS also compared Halikierra's billing patterns to comparable personal care providers, which showed an outsized volume of billing compared to its peers. Independent of these investigations into Halikierra's billing practices, DHHS received a complaint that Halikierra was operating out of unlicensed locations.

In October 2017, DHHS resolved to place Halikierra on prepayment review. Under this statutory auditing regime, DHHS held any reimbursements to Halikierra pending investigation. DHHS informed Halikierra of its decision by letter dated 4 June 2018, which stated that "[i]dentification

1. Halikierra's appeal only concerns claims against DHHS, and discussion of the other named defendants is therefore omitted from this opinion.

of aberrant billing practices as a result of investigations" and "[d]ata analysis performed by [DHHS]" merited prepayment review. These stated bases conformed with the statute governing prepayment claims review, N.C.G.S. § 108C-7(a) (2023), which authorizes such action on those precise grounds.

By August 2018, DHHS had referred Halikierra to the North Carolina Attorney General's Office for investigation into potential fraud. DHHS suspended Halikierra's Medicaid participation that same month on suspicion that it was billing for services not rendered, hiring and providing services through unauthorized personnel, and operating out of unlicensed facilities. DHHS's own audit through an independent investigator, completed in September 2018, revealed $530,579 in suspicious reimbursement claims; DHHS ultimately denied $982,789.50 of the $1,129,733.27 in Medicaid reimbursement claims submitted by Halikierra during the prepayment review period. Halikierra's participation in Medicaid was subsequently terminated on 2 October 2018.

Halikierra filed a petition with the Office of Administrative Hearings on 13 December 2018, challenging DHHS's denial of its Medicaid reimbursement claims. The Office of Administrative Hearings subsequently upheld DHHS's actions in its Final Decision.

Outside the administrative petition, Halikierra filed suit in the Superior Court, Wake County against DHHS alleging, *inter alia*, that DHHS's decision to place Halikierra on prepayment review violated its substantive due process and equal protection rights under the North Carolina Constitution. The matter was subsequently designated a mandatory complex business case. On 27 September 2022, the trial court granted summary judgment for DHHS on all pending claims. Halikierra subsequently filed timely notice of appeal, asserting error as to the dismissal of its substantive due process and equal protection claims against DHHS.

## II. Analysis

Halikierra's argument on appeal is straightforward: DHHS acted arbitrarily and capriciously in placing Halikierra on prepayment review because DHHS had no established policies or procedures for doing so. Moreover, Halikierra contends, the evidence reveals inconsistent and contradictory bases behind DHHS's prepayment review decision. We hold the trial court did not err in granting summary judgment to DHHS on these claims.

### A. Standard of Review

Summary judgment is proper where "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 the moving party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023). These materials are considered in the light most favorable to the nonmovant. *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). Material issues are those that "constitute a legal defense, or would affect the result of the action[,]" while genuine issues are those that "may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972). The movant "bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002) (citation omitted). We review a trial court's summary judgment ruling de novo. *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 285 (2020).

### B. Substantive Due Process

The Law of the Land Clause in Article 1, Section 19 of the North Carolina Constitution—like its federal analogue found in the Fourteenth Amendment to the United States Constitution—serves "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Gunter v. Sanford*, 186 N.C. 452, 456 (1923) (cleaned up). "When reviewing an alleged violation of [these] substantive due process rights, a court's first duty is to carefully describe the liberty interest the complainant seeks to have protected." *Standley v. Town of Woodfin*, 362 N.C. 328, 331 (2008). Restrictions on fundamental rights—those rights that are "a part of every individual's liberty," *State v. Dobbins*, 277 N.C. 484, 497 (1971)—are subject to strict scrutiny, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180 (2004). When the right involved is not fundamental, we apply the rational basis test and ask "whether the [government action] in question is rationally related to a legitimate government purpose." *Standley*, 362 N.C. at 332 (cleaned up). Under this test, "any conceivable legitimate purpose is sufficient," *id.* (cleaned up), and the act is not arbitrary so long as it bears a "rational . . . relation to the public health, morals, order, or safety, or the general welfare," *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 210 (1962) (cleaned up).

Neither party asserts that a fundamental right is implicated by DHHS's action in this case. And Halikierra does not argue that the prepayment review program violates substantive due process; instead, it argues only that the selection of Halikierra was unconstitutionally arbitrary under the Law of the Land Clause. Because any or all of the reasons for which Halikierra was placed on prepayment review are rationally related to a legitimate governmental interest, we hold that Halikierra has failed to establish a constitutional substantive due process violation.

The forecast of evidence produced below shows that Halikierra was selected for prepayment review on several grounds. One DHHS investigator, Kay Cox, testified that the adverse post-payment audits, consumer complaints, and data analysis showing comparatively outsized billing volumes were submitted to Patrick Piggott, the final decisionmaker at DHHS, for consideration of prepayment review. Mr. Piggott's testimony was largely consistent with Ms. Cox's,[2] as he identified both the prior investigation and DHHS's data analytics analysis as the bases for his decision. These unfavorable inquiries into Halikierra's billing practices provided a rational basis for placing Halikierra on prepayment review, which purpose is to combat Medicaid fraud and "ensure that claims presented by a provider for payment by [DHHS] meet the requirements of federal and State laws and regulations" through investigation of "credible allegations of fraud, identification of aberrant billing practices as a result of investigations, [and] data analysis performed by [DHHS]." N.C.G.S. § 108C-7(a) (2023).[3]

To be sure, an agency may act arbitrarily and capriciously for substantive due process purposes when it is granted unfettered discretion over a decision and fails to promulgate and adhere to policies governing that process. *See In re Ellis*, 277 N.C. 419, 425–26 (1970) (observing that government action violates the substantive due process clauses of the state and federal constitutions when decisionmakers, "in the absence of standards, . . . could [render their decision] for a good reason, for a bad reason, or for no reason" (cleaned up)). And agencies may insulate themselves from prospective substantive due process challenges

2. Mr. Piggott testified that Ms. Cox would have only been assigned to review Halikierra *after* it was placed on prepayment review. This contradiction in the testimony is ultimately immaterial to the question of *why* Halikierra was selected for prepayment review, as Mr. Piggott's stated bases for doing so were consistent with those offered by Ms. Cox. Moreover, rational basis review is satisfied "[a]s long as there could be *some* rational basis." *Lowe v. Tarble*, 313 N.C. 460, 462 (1985) (emphasis added).

3. Halikierra does not contend in its principal brief that this statute is ambiguous or that these statutory criteria were not met based on the evidence presented.

by creating and faithfully implementing such policies. While Halikierra may make sound policy arguments for why more detailed policies and procedures are desirable or even necessary, this Court cannot, on these facts, find error in the trial court's ruling. The prepayment review statute in this case identifies the public purposes for which prepayment review may be exercised, and the rationales presented by the evidence for placing Halikierra on prepayment review fall within those enumerated therein. Because this case does not implicate fundamental rights and the evidence shows that DHHS's prepayment review placement decision was rationally related to a legitimate governmental interest, Halikierra has failed to demonstrate a genuine issue of material fact in support of its substantive due process claim.[4]

### C. Equal Protection

Like substantive due process, equal protection claims under the North Carolina Constitution are subjected to either strict scrutiny or rational basis review, with the former standard applicable to restrictions of fundamental rights or members of a suspect class. *Rhyne*, 358 N.C. at 180. For example, government action treating persons differently or more harshly than a similarly situated person or entity on the basis of race mandates the exacting standards of strict scrutiny review. *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Other claims unrelated to disparate treatment of suspect classes or restrictions of fundamental rights, however, are subject to less stringent rational basis review. Under this standard, a claimant must establish that "he received treatment different from others similarly situated," *Maines v. City of Greensboro*, 300 N.C. 126, 132 (1980), and that such disparate treatment did not "bear some rational relationship to a conceivable legitimate governmental interest," *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11 (1980).

Here, Halikierra does not directly allege that it was treated differently or more harshly on any basis that would trigger strict scrutiny review. Nor has it introduced any evidence that would support such allegations. Without allegations or evidence disclosing that strict scrutiny applies, we proceed under rational basis review.

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4. Halikierra asserts that our ruling would permit an official to "make [prepayment review] decisions to benefit[ ] [a] criminally minded individual[,] . . . to feed [a] personal vice[,] . . . [or out of] personal ill will." We do not so hold, and nothing in the record remotely suggests that any of these events occurred here. There are limits to the deference of rational basis review, but we do not find the facts in this case require us to probe the contours of those limits.

The parties' evidentiary proffers do not demonstrate disparate treatment of Halikierra from those similarly situated; none of the evidence produced below demonstrates that other personal care providers with outsized billing volumes, prior adverse post-payment audits, and a record of consumer complaints were not placed on prepayment review like Halikierra was. Nor has Halikierra identified evidence showing that DHHS utilized a different decision-making process than that used to place other Medicaid providers on prepayment review. The burden fell to Halikierra to produce such evidence once DHHS made its initial showing that there were no genuine issues of material fact on this claim. *See Liberty Mut. Ins. Co.*, 356 N.C. at 579. Halikierra has not done so here, and on the record before us, we affirm the trial court's order granting summary judgment on this claim.

## III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment in favor of DHHS and dismissing Halikierra's claims.

AFFIRMED.

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IN THE MATTER OF A.H.

No. 194A23

Filed 22 March 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 501 (2023), reversing orders entered on 20 and 24 May 2022 by Judge Thomas B. Langan in District Court, Stokes County. Heard in the Supreme Court on 20 February 2024.

*Anné C. Wright for petitioner-appellant Stokes County Department of Social Services.*

*James N. Freeman Jr. for appellant Guardian ad Litem.*

*Mercedes O. Chut for respondent-appellee father.*

PER CURIAM.

Justice RIGGS did not participate in the consideration or decision of this case. As to the trial court's adjudication of neglect, the decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion.

As to the trial court's adjudication of dependency, the remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals as to dependency is left undisturbed and stands without precedential value. *See Batson v. Coastal Res. Comm'n*, 385 N.C. 328 (2023) (per curiam) (affirming by an equally divided vote a Court of Appeals decision without precedential value). This matter is remanded to the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice EARLS dissenting.

North Carolina's general statutes set out seven criteria for determining that a child is a neglected juvenile. N.C.G.S. § 7B-101(15) (2023). This Court's cases establish that there must be "clear, cogent, and convincing evidence" of neglect to support an adjudication that a child is neglected. *See In re K.N.*, 373 N.C. 274, 278 (2020). The criteria for determining neglect are intended by the General Assembly "[t]o provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. § 7B-100(4) (2023). But those criteria are not intended to empower trial courts to punish a parent they consider uncooperative or to remove a child from a home based on the court's own views of good parenting.

Several of the trial court's findings of fact in this case were not supported by clear, cogent, and convincing evidence. The remaining factual findings centered on a single incident and the interactions of the juvenile's parent and her caregiver with social workers. Those remaining findings do not support the adjudication that the child in this case was neglected by her father. I would affirm the decision of the Court of Appeals reversing the trial court's adjudication order and resulting disposition order.

## I. Factual Background

This is respondent-father's appeal from an adjudication order dated 20 May 2022 and a disposition order dated 24 May 2022 adjudicating his daughter A.H. (Aerin)[1] neglected and dependent and placing Aerin in the custody of petitioner, Stokes County Department of Social Services (DSS). Aerin was born on 12 April 2012 and was nine years old at the time of the 4 October 2021 incident that led to the orders appealed here. Aerin's biological mother relinquished her parental rights on 15 December 2021 and is not a party to this appeal.

The record indicates that on 27 May 2021, a temporary custody order giving custody of Aerin to respondent-father was entered by the Forsyth County District Court when Aerin was residing with her mother in Forsyth County. The findings supporting that order detail unfit living conditions that Aerin was subjected to in her mother's home. The trial court on that date found

> that with [respondent-father] the minor child has her own room, a quiet and safe living environment; that to provide the same for the minor child, [her father] rented and moved into a second apartment across the street from [his wife/Aerin's stepmother] and his six other children; that the minor child's home, hygiene, clothing are all suitable and safe and [DSS caseworker] has seen and has no concerns with the same; that the minor child is presently remote learning in third grade, has an IEP and is doing well; that [her father and stepmother] are aware of and taking care of the minor child's medical and dental care and the minor child does not have any significant health issues.

The Forsyth County order also provided that respondent-father, who was the plaintiff in that case, "shall have legal and primary physical custody of the minor child, pending review of this matter before the undersigned on December 15, 2021." At the time this order was entered, respondent-father was living in Mt. Airy, North Carolina. However, before the Forsyth County court could review the temporary custody order, DSS became involved with the family due to an incident on 4 October 2021.

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1. A pseudonym used to protect the privacy and identity of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

On 4 October 2021, Aerin was living with her father, stepmother, and her stepmother's four other children in Stokes County and attending King Elementary School. That day Aerin rode the school bus home with two of the other children in the home, and all three of them were met at the bus stop by respondent-father driving a truck with a work trailer attached. While still in the truck, respondent-father received a telephone call from Aerin's teacher, who mentioned that the family was now all living together in their new house.[2] When the call ended, respondent-father "told [Aerin] he was tired of her telling other people their business. He stated to [Aerin] that he was going to whoop her."

At this point Aerin got out of the truck and started walking away. Respondent-father told her to get back into the truck but she refused. He followed her in the truck but could not keep up with her because he could not maneuver the truck in the neighborhood's cul-de-sacs. Respondent-father then got out of his truck, again ordered Aerin to get in the truck, and started chasing her. Aerin began running and darted into the road, where she was nearly hit by a dump truck that honked at her. There was conflicting testimony about what respondent-father saw and why he turned around and got back into his truck. The trial court's uncontested finding was that "[t]he black man turned and walked away before the child was directly in front of the dump truck."

A neighbor, also returning home from picking up children from school, was directly behind the dump truck and saw Aerin run into the road. He followed Aerin walking down the road for approximately 200–300 feet until he pulled off the road into the parking lot of a business. He found that Aerin was "hysterical, crying and screaming" and initially too upset to speak. Eventually when he calmed her down, she said she was afraid of her father and that he would beat her. The neighbor called law enforcement and waited with Aerin until they arrived.

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2. This account is taken from the trial court's findings of fact based on Aerin's testimony. In Finding of Fact 38 the trial court states that it finds Aerin's testimony credible and "adopts the events and chronology set out" in her testimony as the court's findings. Respondent-father gave a different account of the telephone call and the conversation with his daughter in his testimony, but, as the majority in the Court of Appeals noted, the trial court's findings appeared to credit respondent-father's testimony at some points despite also making a finding that "[t]he court does not find [respondent-father] to be credible." The challenge this creates for appellate review is why, as we recently explained, "the better practice always will be to make specific, express findings in the written order about what the trial court determined the facts to be, rather than referencing evidence in the record and stating that the referenced evidence is credible" or, as in this case, not credible. *In re H.B.*, 384 N.C. 484, 490–91 (2023).

It appears that the trial court credited respondent-father's testimony in finding that he drove from the scene of the incident and took the other two children in the truck to a convenience store. The trial court found that

> there was a substantial risk to the juvenile of serious physical injury, when the father turned around, walked away, and left the child on a busy roadway on 10/4/2021. [Respondent-father] did not provide proper care of his child, when he left her running into a busy roadway . . . .

Aerin's stepmother admitted in her testimony that she did not cooperate with the DSS caseworker who came to the home the afternoon of 4 October 2021. The trial court found that "[n]o respondent was able to make a proper plan for [Aerin] on 10/4/2021. Her father . . . left and did not return to the scene. [Her stepmother] did not offer to make a plan for the child . . . ." Less than 24 hours after the incident, DSS filed a juvenile petition alleging that Aerin was an abused, neglected, and dependent juvenile.

## II. Proceedings Below

The DSS petition was heard at the 23 February 2022 session of Stokes County Juvenile Court at which time the trial court took evidence and heard arguments of counsel for all parties. The trial court ultimately concluded that Aerin was neglected and dependent and dismissed the allegation of abuse. Respondent-father appealed, challenging several of the trial court's findings as unsupported by the evidence and inadequate to support the conclusion that Aerin was neglected or dependent. *See In re A.H.*, 289 N.C. App. 501, 502, 505 (2023).

Both the majority and the dissenting judges in the Court of Appeals agreed that the trial court's Findings of Fact 33, 39 through 42, 44, and 45 are unsupported by the evidence. *Id.* at 505, 511. They further agreed that the remaining findings of fact are proper and supported by the evidence. *Id.* The dissenting judge disagreed with the majority on the question of whether the remaining findings of fact were sufficient to support the trial court's ultimate conclusions that Aerin was a neglected and dependent juvenile. *Id.* at 510, 524.

Because the decision of the Court of Appeals to reverse the finding of dependency is left undisturbed by this Court's decision, the only issue here is whether, disregarding the unsupported findings, the findings of fact by the trial court that were supported by competent evidence are adequate to support the finding of neglect. *See In re A.J.L.H.*, 384 N.C.

45, 53 (2023) (explaining that in an appeal from a neglect adjudication, a reviewing court examines "whether the trial court's conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence") (citing *In re E.H.P.*, 372 N.C. 388, 392 (2019)); *see also In re A.C.*, 378 N.C. 377, 394 (2021) (discussing that when a finding lacks sufficient evidentiary support, it must be disregarded and the court must determine whether the remaining findings support the trial court's adjudication).

## III. Findings of Fact Supporting the Conclusion of Neglect

The Court of Appeals majority applied the correct standard of review in this case. Findings supported by clear, cogent, and convincing evidence are conclusive and binding on appeal, even when there is contrary evidence in the record. *In re A.E.*, 379 N.C. 177, 184 (2021). Conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019). We therefore review de novo whether the trial court's legal conclusion that Aerin was a neglected juvenile is supported by the remaining findings of fact.

This is distinct from the contention in the Court of Appeals dissent that our task is to "consider the totality of the evidence to determine whether the trial court's findings sufficiently support its ultimate conclusion that [Aerin] is a neglected juvenile." *In re A.H.*, 289 N.C. App. at 519 (Flood, J., dissenting) (alteration in original) (*quoting In re F.S.*, 268 N.C. App. 34, 43 (2019)). This Court's precedents hold that appellate courts may not reweigh the underlying evidence to make factual assessments that are not made by the trial court. *See In re C.C.G.*, 380 N.C. 23, 33 (2022) (citing *In re J.A.M.*, 372 N.C. 1, 11 (2019)). The language in *In re F.S.* relied upon by the dissent below is not based on any applicable precedent from this Court and implies a "totality of the evidence" standard of review that we have not previously applied in these circumstances. *See, e.g.*, *In re H.B.*, 384 N.C. 484, 492–93 (2023) (stating that the trial court is "the sole judge of the credibility and weight to be given to the evidence" (quoting *In re N.P.*, 374 N.C. 61, 65 (2020))). We review the evidence to determine if the trial court's findings of fact are supported, but we do not make or rely on our own findings of fact.

Under the law of this state, a neglected juvenile is one:

> [W]hose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.

> b. Has abandoned the juvenile, except where that juvenile is a safely surrendered infant as defined in this Subchapter.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under G.S.14-321.2.
>
> g. Has placed the juvenile for care or adoption in violation of law.

N.C.G.S. § 7B-101(15).

Remembering that the purpose of this section is simultaneously to provide services to protect juveniles, to respect the right to family autonomy and to prevent the "unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(3), (4), it is axiomatic that neglect is something more than a single act of bad judgment by a parent or caregiver that results in no significant harm to a child. *See In re Stumbo*, 357 N.C. 279, 283 (2003). Under our cases interpreting this statute, a finding that a juvenile is neglected requires that the "conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *Id*. That precedent remains good law. And for good reason. As this Court explained, to hold that every act of negligence constitutes neglect

> would subject every misstep by a care giver to the full impact of subchapter I of chapter 7B of the North Carolina General Statutes, resulting in mandatory investigations, and the potential for petitions for removal of the child or children from their family for custodial purposes, and/or ultimate termination of parental rights.

*In re Stumbo*, 357 N.C. at 283 (cleaned up).

While a single act of negligence severe enough to cause significant harm to a child and indicative of the likelihood that future harm would result can constitute neglect, it is not the case that any "treatment of a child which falls below the normative standards imposed upon parents by our society" is sufficient to justify a finding that the child is neglected. *See In re V.M.*, 273 N.C. App. 294, 297 (2020).

Both *In re Stumbo* and *In re V.M.* involve children who arguably were subjected to negligent parenting, just as Aerin arguably was on 4 October 2021, but who were not neglected juveniles within the meaning of the statute. In *In re Stumbo*, a two-year-old child was reportedly playing naked and unsupervised in the driveway of his home. *In re Stumbo*, 357 N.C. at 280. When social workers came to the home to investigate the report, the parents were uncooperative. *Id.* In interpreting the statutory definition of neglect, this Court explained that

> It is obvious from this definition and the cases applying it that the circumstances constituting neglect involve serious and substantial allegations. 'Neglect' is further linked with 'abuse' and 'dependency,' thereby reinforcing the legislative conclusion that these are conditions that pose a serious threat to a juvenile's welfare.

*Id.* at 287.

In *In re V.M.*, cited by the dissent below, the Court of Appeals reversed a trial court's finding of neglect where a four-month-old child suffered acute alcohol intoxication after being fed formula prepared with liquor that had been poured into water bottles after a funeral. 273 N.C. App. at 295. Upon de novo review, the Court of Appeals concluded that the trial court's findings of fact did not support the legal conclusion that the child was a neglected juvenile. *Id.*

These and other cases make clear that isolated incidents of neglect, even if the potential for serious injury is present, do not meet the statutory threshold for a finding of neglect. *See, e.g.*, *In re H.P.*, 278 N.C. App. 195 (2021) (holding that findings that a three-year-old child was running naked between parents' homes and was walking alone did not constitute a neglected juvenile).

As the majority below correctly concluded after reviewing all the trial court's competent and supported findings of fact, this case presents a single incident in which a nine-year-old child walked away from her father, refused to follow his directions to return, and ran from him as

he followed her in his truck with two other children. When he could not effectively navigate the neighborhood streets, he got out of the truck and pursued her on foot. Before Aerin crossed the busy road, he had already turned around to return to the other two children. *See In re A.H.*, 289 N.C. App. at 507. At this point he had a Sophie's choice—he could expose the nine-year-old to danger by allowing her to continue unsupervised as she ran away from him, or he could expose the children in the truck to danger by leaving them alone to pursue the nine-year-old. Perhaps in hindsight he made the wrong choice, but there is no evidence that it was a neglectful one.

The dissent below found support for the conclusion that Aerin was neglected based on the finding that respondent-father "left the scene of the incident and did not return nor inquire about his child." As the majority explained, the trial court's finding here is simply devoid of sufficient information to establish neglect. *Id.* at 508–09. There was no finding of fact regarding whether respondent-father knew who to contact or how. As the majority below recounted:

> What evidence was introduced shows that [the DSS caseworker] received a report at 3:15 p.m., arrived at Newsome Road around 4:00 p.m., began her home inspection between 5:30 and 5:45 p.m., executed her verified petition before a magistrate later that evening, and filed the petition the following day. Again, the absence of evidence is not evidence, and DSS failed to meet its burden of introducing evidence proving Father's failure to contact DSS after business hours on the 4th and on the morning of the 5th before the filing of the petition amounted to neglect, particularly when the only evidence that was introduced—credible or not—shows Father knew that his wife had already met with DSS and that Aerin was safe in DSS custody.

*Id.* at 509 (cleaned up).

It is not our role to make findings of fact from the evidence. Just as we are bound by the competent findings of fact that the trial court did make, we are forbidden to infer factual findings that it did not.

At the end of the day, the issue here is not whether we approve of respondent-father's parenting decisions on 4 October 2021. The question is whether the trial court's findings of fact that were supported by clear, cogent, and convincing evidence in the case are sufficient to meet the

statutory criteria to find that a child is a neglected juvenile. The findings of fact in this case do not rise to that level. This Court's failure to enforce the statute as written, and to follow our precedents, frustrates the purposes of the General Assembly to protect family integrity, to provide children with safety, continuity, and permanence, and to prevent the unnecessary separation of children from their parents. The decision of the Court of Appeals should be affirmed.

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IN RE INQUIRY CONCERNING A JUDGE, NOS. 22-073 & 22-395

ANGELA C. FOSTER, RESPONDENT

No. 347A23

Filed 22 March 2024

**Judges—discipline—improper phone call to magistrate—to demand bond reduction for her son—closing down administrative courtroom without permission—suspension**

On the basis of two incidents, a district court judge was suspended without pay for 120 days for conduct in violation of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C.G.S. § 7A-376(b)). In the first incident, the judge called a magistrate's office, used her judicial title to ask if a particular criminal defendant had been placed into custody without disclosing that that defendant was her son, and then yelled at the magistrate while demanding a bond reduction for her son based on inaccurate information. In the second incident, the judge—while on notice of the disciplinary charges filed against her based on the first incident—demanded, without first notifying her chief district court judge, that an assistant district attorney and a presiding magistrate close their administrative courtroom for her own use despite an active administrative order mandating that the courtroom remain open; notably, the judge's conduct caused more than one hundred cases to be continued.

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 on 21 December 2023. The Commission recommends that

respondent Angela C. Foster, a Judge of the General Court of Justice, District Court Division, Judicial District 18, be suspended for conduct in violation of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C 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 15 February 2024 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 of Supreme Court Review of Recommendations of the Judicial Standards Commission.

*No counsel for Judicial Standards Commission or respondent.*

PER CURIAM.

The issue before the Court is whether District Court Judge Angela C. Foster, respondent, should be suspended for violations of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct—violations which amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Respondent entered a stipulation pursuant to Rule 18 of the Rules of the Judicial Standards Commission (Stipulation) in which respondent stipulated to the facts surrounding her conduct and the disciplinary recommendation that she be suspended for 120 days without compensation.

On 7 July 2022, Commission Counsel filed a Statement of Charges against respondent in Inquiry No. 22-073. The charges alleged that respondent had engaged in conduct inappropriate to her office when she called the Wake County Magistrate's Office on 3 March 2022. During the call, respondent utilized her judicial title to inquire about the custody status of her son without disclosing the familial relationship. Further, respondent yelled at the magistrate and demanded a bond reduction based upon inaccurate and incomplete information.

Before Inquiry No. 22-073 was resolved, Commission Counsel filed another Statement of Charges against respondent in Inquiry No. 22-395 on 23 February 2023. The charges alleged that respondent had demanded, without notifying her chief district court judge, that an assistant district attorney (ADA) and a presiding magistrate close their administrative courtroom for her own use, despite an active administrative order

mandating that it stay open. The conduct resulted in over one hundred cases being continued.

Respondent filed her answer to Inquiry No. 22-073 on 8 August 2022 and her answer to Inquiry No. 22-395 on 29 March 2023. On 27 July 2023, Commission Counsel and respondent entered into the Stipulation containing joint evidentiary, factual, and disciplinary stipulations as permitted by Rule 18 of the Rules of Judicial Standards Commission that tend to support the decision to suspend respondent. The Commission heard the matter on 11 August 2023, and the Stipulation was entered into the record without objection. The Commission initially rejected the Stipulation on 11 August 2023, but the Commission later accepted the Stipulation on 12 October 2023.

## I. Recommendation of the Judicial Standards Commission

### A. Findings of Fact

The recommendation of the Commission contains the following stipulated findings of fact:

> 1. In Inquiry Number 22-073, the parties stipulate to the following facts:
>
>    a. On 3 March 2022, at 10:48pm, the Wake County Magistrates' Office received a phone call from an individual listed as "Foster, Angela" on the caller identification. At the time, Magistrate Lauren May was on duty along with three other magistrates.
>
>    b. Magistrate May answered this phone call. The person on the other end of the line identified herself as Respondent, indicated that she was a Guilford County District Court Judge, and inquired if a defendant named Alexander Pinnix was in Wake County custody. Respondent appeared annoyed but did not seem to be directing it at Magistrate May at the time. At no point during this introduction did Respondent identify her relationship with Mr. Pinnix.
>
>    c. After looking in their system, Magistrate May was able to confirm for Respondent that Mr. Pinnix was in Wake County custody on a

$1000 secured bond. In response, Respondent began speaking loudly at Magistrate May and requested that she change Mr. Pinnix's bond to a written promise to appear.

d. Magistrate May was confused by Respondent's response given that Respondent was not a Wake County judge but did not want to come across as rude, so she requested to put Respondent on a brief hold to look at Mr. Pinnix's file. After reviewing the file, Magistrate May found that Mr. Pinnix was being held on Wake County charges of resisting a public officer and misdemeanor breaking or entering that had been sworn out before a Wake County magistrate with a bond set by a different Wake County magistrate.

e. Before returning to the call, Magistrate May enlisted the assistance of her three colleagues who had been nearby her cubicle for an unrelated reason. All four magistrates concluded that based on their training and experience that Respondent had no reason to be involved with the case as an out of county judge and that the situation sounded strange.

f. When Magistrate May returned to the call, she asked Respondent to explain her involvement with Mr. Pinnix's case and provide a basis for changing the bond. As a result of Respondent's response, Magistrate May explained that since she had not issued the charges or set the bond, she did not feel comfortable altering the bond of another magistrate.

g. Respondent then requested the telephone numbers of the magistrates who had been involved with Mr. Pinnix's case so that she could call them at home and ask them to change the bond. Magistrate May declined to provide this information but suggested

that Respondent could call Wake County Chief District Court Judge Ned Mangum to discuss the situation. Respondent became extremely angry at this suggestion, indicated that she would never dream of calling a district court judge at that time of night, and again demanded Magistrate May alter the bond. Magistrate May suggested that Respondent could wait until morning to call Judge Mangum, however this suggestion caused Respondent to become even more upset. By this point, Magistrate May's three co-workers could hear Respondent yelling through the phone receiver at her.

h. Respondent continued requesting Magistrate May to change Mr. Pinnix's bond by saying that Mr. Pinnix had court in Guilford County the following morning on 4 March 2022, for a child custody case and that he needed to be present because the court was going to take away his children if he was not. She explained that Mr. Pinnix could not miss this court appearance, that calling Judge Mangum in the morning would already be too late, and stressed that the bond need to be changed that evening.

i. Magistrate May then muted the phone and again requested the assistance of the other magistrates. At their suggestion, Magistrate May offered Respondent her Chief Magistrate's phone number. The phone call ended shortly thereafter. Respondent never contacted the Chief Magistrate regarding Mr. Pinnix's bond that evening.

j. Due to the strange nature of the phone call, the amount of personal information Respondent had about Mr. Pinnix, and how upset Respondent had become, Magistrate May and her colleagues decided to look up Respondent on the internet. After a brief search, they learned that Respondent was

Mr. Pinnix's mother. At no point during the phone conversation did Respondent identify her familial relationship with Mr. Pinnix, but instead led Magistrate May to believe that Mr. Pinnix was a litigant in her courtroom. After making this discovery, Magistrate May wrote down her recollection of the phone call with Respondent and reported the incident to her Chief Magistrate.

k. After investigating these claims, court documents showed that Mr. Pinnix did not have a history of failures to appear, nor did he have a Guilford County child custody case (or any other case) pending.

l. The next morning, [4] March 2022, Magistrate Jordan Fly received a call from Respondent inquiring whether Mr. Pinnix was in the Wake County Detention Center. Magistrate Fly confirmed Mr. Pinnix was in the detention center under a $1000 secured bond, to which Respondent expressed surprise, stated she arranged for the bond to be posted, wondered why it was taking so long, and asked whether it was possible he was already released. Magistrate Fly again stated he was sure Mr. Pinnix was still in the Detention Center. During this call, Respondent did not identify herself as a judge or disclose the nature of her relationship to Mr. Pinnix.

2. In Inquiry Number 22-395, the parties stipulate to the following facts:

a. Chief District Court Judge Teresa H. Vincent issued an Administrative Order on 22 July 2022, stating, "In High Point, administrative traffic court and 3B waiver court will be combined into courtroom 3B. The Courtroom 3B shall be open Mondays and Fridays from 8:30am until 12:30pm." This Administrative Order was distributed to all High Point Courthouse employees, including judges, when it went into effect.

b. On 1 November 2022, Respondent alerted Judge Vincent by text that her assigned courtroom for 7 November 2022, would not meet the needs of her Abuse, Neglect, and Dependency Court session. Respondent was scheduled to address a case on this date where both parents were charged with the murder of their child. The parents, both in custody, could not be in the courtroom at the same time, which in turn required extra security and staff to conduct this hearing. Additionally, recording capability was required, which only some of the courtrooms in High Point were equipped with.

c. In response to Respondent's request, Judge Vincent provided the option for her to take over Courtroom 3B once Administrative Court concluded as this courtroom could meet the needs of the hearing in question. Respondent replied expressing her concern that the courtroom would not be run "with the goal of finishing in an efficient manner." Judge Vincent replied, "I am sure they will finish court as soon as they can in order to handle other tasks." No other contingency plans were discussed.

d. Before court began on 7 November 2022, at approximately 8:30am, Respondent came to Courtroom 3B and informed the assigned ADA that she might need his courtroom. In response, the ADA informed her of the number of cases on his docket and reminded her of Judge Vincent's Administrative Order. During this conversation, the courtroom bailiff was nearby. Once Respondent left, the ADA made the magistrate presiding aware of the conversation then conducted the business of Administrative Court as usual.

e. After this conversation, Respondent returned to her assigned courtroom, 201, and informed everyone there that they would be moving to

Courtroom 4C, a superior court courtroom. This was done by Respondent without first getting approval from Judge Vincent and the Senior Resident Superior Court Judge.

f. While Respondent was holding her district court session in Courtroom 4C, the Superior Court Trial Court Administrator ("the TCA") walked past and heard voices. When the TCA entered and realized what Respondent was doing, she asked why Respondent was there, to which Respondent replied, "Oh they didn't tell you either. . . I needed to use this courtroom." The TCA informed Respondent that she was not aware that anyone would be using the superior court courtroom then went to her office to call her supervisor, who in turn, informed Judge Vincent.

g. At 9:37am, Judge Vincent confronted Respondent via text about her use of the superior court courtroom without permission, how that was not the plan they discussed, and ordered Respondent to vacate. Respondent responded claiming the bailiffs gave her permission to use this courtroom. When Judge Vincent asked the Sheriff's Office about this, they denied providing Respondent with such permission.

h. Respondent left Courtroom 4C and returned to Courtroom 3B at approximately 10:00am to inform the ADA she needed his courtroom. The ADA told Respondent that he still had a full courtroom, but she told him to vacate. The courtroom bailiff was nearby during this conversation. As a result, the ADA informed the presiding magistrate of his conversation with Respondent and they proceeded to close down Administrative Court. This consisted of handling any case the ADA had already begun addressing and informing the remaining citizens that their cases would be continued, which the ADA

notated on his docket. This resulted in more than one hundred cases being continued without being addressed which caused frustration to many members of the public.

i. After Administrative Court closed, the presiding magistrate went directly to speak with Judge Vincent to advise her of the incident because he did not want to get in trouble for closing court early in violation of the Administrative Order.

j. After speaking with the presiding magistrate, Judge Vincent confronted Respondent via text at 10:57am about her directing Administrative Court to shut down without Judge Vincent's permission and in violation of her Administrative Order. Respondent denied this via text and stated that she only spoke to the clerk regarding the possibility of Administrative Court moving to Courtroom 4C, the superior court courtroom she did not have the authority to use, because they did not need the recording equipment. This allegation by Respondent could not be confirmed.

3. In mitigation, the Commission found Respondent is remorseful for her actions in these matters and has accepted responsibility for her Code violations.

4. In aggravation, the Commission found Respondent (1) was previously issued a censure by the North Carolina Supreme Court, *In re Foster*, 373 N.C. 29 . . . (2019), and (2) while on notice for Inquiry Number 22-073, Respondent engaged in the conduct outlined in Inquiry Number 22-395.

**B. Conclusions of Law**

Based upon the foregoing findings of fact, the Commission made the following conclusions of law:

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 2A of the Code of Judicial Conduct generally mandates that "[a] judge should respect and comply with the law and should conduct [herself] at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

3. Canon 2B of the Code of Judicial Conduct instructs that "[a] judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others except as permitted by [the] Code; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge."

4. Canon 3 of the Code of Judicial Conduct governs a judge's discharge of his or her official duties.

5. Canon 3A relates to judges' adjudicative duties, with Canon 3A(3) requiring that a judge be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity. . ." and Canon 3A(5) requiring that a judge "dispose promptly of the business of the court."

6. Canon 3B pertains to judges' administrative duties, with Canon 3B(1) requiring a judge to "diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials."

7. Canon 3C concerns a judge's duty to "disqualify him or herself in a proceeding in which the judge's impartiality may reasonably be questioned. . ."

8. Upon the Commission's independent review of the stipulated facts in Inquiry Number 23-073 concerning Respondent's conduct towards Magistrate May relating to her son's bond, the Commission, by a unanimous 5-0 vote of the hearing panel concludes Respondent:

    a. failed [to] conduct herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canons 1 and 2A of the Code;

    b. allowed her family relationships to influence her judicial conduct or judgment in violation of Canon 2B of the Code;

    c. failed to remain patient, dignified, and courteous to all individuals she deals with in her judicial capacity in violation of Canon 3A(3) of the Code; and

    d. involved herself in a matter in which her impartiality could be reasonably questioned in violation of Canon 3C of the Code.

The Commission notes that Respondent conceded in the Stipulation these facts were sufficient to support the conclusions.

9. Upon the Commission's independent review of the stipulated facts in Inquiry Number 23-395 concerning Respondent's conduct towards the ADA and presiding magistrate in Administrative Court, forcing the continuances of over one-hundred cases before they were able to be addressed, the Commission, by a unanimous 5-0 vote of the hearing panel concludes Respondent:

    a. failed to conduct herself at all times in a manner that promotes public confidence in

the integrity of the judiciary and impartiality of the judiciary in violation of Canons 1 and 2A of the Code;

b. prevented another judicial official from disposing promptly of the business of the court in violation of Canon 3A(5) of the Code; and

c. failed to diligently discharge her administrative responsibilities, maintain her professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials in violation of Canon 3B(1) of the Code.

The Commission notes that Respondent conceded in the Stipulation these facts were sufficient to support the conclusions.

10. The Commission further concludes, and accepts Respondent's admission, that the facts establish Respondent engaged in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.[G.S.] § 7A-376(b). *See also* Code of Judicial Conduct, Preamble ("[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute.").

11. The North Carolina Supreme Court defined "willful misconduct in office" as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Edens*[,] 290 N.C. 299, 305 (1976). The Supreme Court further held in *In re Nowell*, 293 N.C. 235 (1977), while willful misconduct in office necessarily encompasses "conduct involving moral turpitude, dishonesty, or corruption," it can also be found based upon "any knowing misuse of the office, whatever the motive." *Id.* at 248. . . . "[T]hese

elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith." *Id.*

12. In reaching this conclusion, the Commission weighed Respondent's pattern of abusing her power, the guidance provided by precedent set by the North Carolina Supreme Court, and Respondent's willingness to accept responsibility for her actions.

13. The Commission stressed that Respondent was censured for abusing her power in the courtroom in *In re Foster*, 373 N.C. 29 . . . (2019), then proceeded to abuse her power again by misleading and bullying a magistrate in an attempt to have her son released from custody notwithstanding her previous public discipline. Then, after being put on notice and charged by the Commission in that matter, Respondent again abused her power by disregarding instructions from her chief district court judge and a valid administrative order, forcing more than one hundred cases to be continued without being addressed so that she could use a courtroom for her own purposes.

14. The Commission compared the facts at hand with those in *In re Hartsfield*, 365 N.C. 418, [431–32] (2012), where the respondent judge was issued the longest suspension (75-days) in the Commission's history for engaging in a pattern of transferring traffic tickets onto her dockets with the understanding that the tickets (issued to individuals including her friends, church members, law students, etc.) would be resolved by her with favorable outcomes. Similarly to Respondent, the respondent judge in that matter was also charged with engaging in a pattern of misconduct, entered a factual stipulation . . . . *Id.* [at 426.] . . . In conducting this weighing, the Commission determined that although the facts

addressed in *In re Hartsfield* were arguably more severe than any of those in Respondent's current or former matters to be addressed by the Court, Respondent's repeated course of conduct over time called for a more severe sanction.

15. However, similar to the comparative analysis the Court conducted in *In re Hartsfield*, the Commission also compared Respondent's conduct to that addressed by cases resulting in judges' removals from office and found that Respondent's conduct did not seem to rise to that level. *See In re Peoples*, 296 N.C. 109 . . . (1978) (where the respondent judge (1) engaged in a pattern of addressing criminal cases without calendaring them, noticing the district attorney, or entering judgment in open court and (2) on several occasions, accepted money from defendants to "take care of" traffic citations); *In re Martin*[,] 302 N.C. 299 . . . (1981) (where the respondent judge (1) initiated ex parte communications with two twenty-one year old female defendants and attempted to force himself on them and (2) heard his own failure to stop at a stop sign case[ ]); *In re Kivett*, 309 N.C. 635 . . . (1983) (where the respondent judge allowed his relationship with a bail bondsman, who provided the respondent judge with gifts and the use of his home for illicit sexual relations, to influence multiple court decisions); *In re Badgett*, 362 N.C. 482 . . . (2008) (where, after being censured and suspended in a prior case, the respondent judge made a defendant proceed pro se in a juvenile court hearing and ordered that defendant to pay spousal support despite the complaint not seeking it and turn over the keys of his truck to the Sheriff's Office, after which the respondent judge lied to investigators and tried to suggest to a Sheriff's deputy that they also lie); and *In re Belk*, 364 N.C. 114 . . . (2010) (where the respondent judge continued to serve on the board of directors for two companies despite receiving contrary ethics advice and, after his request to

be relieved of his judicial duties to attend a board meeting was denied, confronted and yelled at his chief district court judge[ ]).

16. The Commission also acknowledged that prior to legislative changes in 2006, the Court only had the authority to censure or remove a judge. N.C.[G. S.] § 7A-377(b). Further, the Court has made it clear that the discipline imposed in any given case "will be decided upon its own facts." *In re Hardy*, 294 N.C. 90, 98 . . . (1978).

17. As a result, the Commission concludes, and Respondent agrees that a suspension of 120 days without compensation is appropriate balancing the aforementioned factors.

18. The North Carolina Supreme Court in *In re Crutchfield*, 289 N.C. 597 (1975)[,] first addressed sanctions under the Judicial Standards Act and stated that the purpose of judicial discipline proceedings "is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and in the honor and integrity of is judges." *Id.* at 602.

19. The Commission and Respondent acknowledge the ultimate jurisdiction for the discipline of judges is vested in the North Carolina Supreme Court pursuant to Chapter 7A, Article 30 of the North Carolina General Statutes, which may either accept, reject, or modify any disciplinary recommendations from the Commission.

**C. Recommendation**

Based on the foregoing findings of fact and conclusions of law, the Commission, by unanimous vote of the five Commission members that comprised this matter's hearing panel, concurred in the recommendation to suspend respondent for a period of 120 days without compensation.

## II. Analysis

The Court, upon recommendation of the Judicial Standards Commission, has the authority and responsibility to discipline judges by

issuing a public reprimand, censure, suspension, or removal of a judge "for willful misconduct in office, willful and persistent failure to perform the judges' duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-376(b) (2023). The purpose of our judicial standards system is "to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of . . . judges." *In re Crutchfield*, 289 N.C. 597, 602 (1975).

To that end, conduct prejudicial to the administration of justice includes "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be, not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." *In re Edens*, 290 N.C. 299, 305 (1976) (quoting *Geiler v. Comm'n on Jud. Qualifications*, 10 Cal. 3d 270, 284 (1973)). Further, conduct is prejudicial and constitutes willful misconduct when a judge intentionally, improperly, or wrongfully uses the power of the office with gross unconcern for his or her conduct and in bad faith. *In re Martin*, 295 N.C. 291, 301–02 (1978).

In reviewing recommendations of the Commission, the Court "acts as a court of original jurisdiction" and exercises independent judgment as to the disciplinary measures imposed on a judge. *In re Badgett*, 362 N.C. 202, 207 (2008) (quoting *In re Daisy*, 359 N.C. 622, 623 (2005)). Each case is decided solely on its own facts, *In re Martin*, 302 N.C. 299, 315–16 (1981), and the recommendation of the Commission is not binding on this Court, *In re Hartsfield*, 365 N.C. 418, 428 (2012). This Court may adopt the Commission's findings of fact if they are supported by clear and convincing evidence or may make its own findings. *Id.* In the same vein, this Court may adopt the Commission's recommendation or exercise independent judgment as to the appropriate sanction. *In re Martin*, 295 N.C. at 301.

In this matter, we agree that the Commission's findings are supported by clear and convincing evidence, and we adopt them as our own. By extension, we agree with the Commission's conclusions that respondent's conduct violates Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct, and is prejudicial to the administration of justice and brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

Our guidepost in determining the appropriate sanctions is the impact of the conduct on public confidence in our judicial system and

ensuring the honor and integrity of judges who serve the people of this state. *In re Crutchfield*, 289 N.C. at 602. The stipulations in this matter establish judicial conduct troubling enough to warrant suspension, and this Court has suspended judges where a pattern of problematic conduct has been identified. *See*, *e.g.*, *In re Hartsfield*, 365 N.C. at 426–27, 431–32 (suspending a judge engaged in a pattern of transferring traffic tickets of friends and family to her docket with the understanding the tickets would be resolved with a favorable outcome). Here, respondent was also previously sanctioned for her conduct. *In re Foster*, 373 N.C. 29, 31-33, 40 (2019) (censuring respondent for holding a hearing without notice, placing a mother in jail without cause and then lecturing the mother's fifteen-year-old children in an effort to convince them to exercise visitation with their father). Further, while on notice of Inquiry No. 22-073, she engaged in the conduct described in Inquiry No. 22-395. The stipulated conduct justifies the recommended discipline.

We appreciate respondent's cooperation with the Commission during the pendency of these proceedings, her candor, her acknowledgment of responsibility for her conduct, and her completion of additional training on ethics and professionalism. Respondent recognizes that her conduct warrants disciplinary consequences and agreed to accept the recommended disciplinary action. Weighing the severity and extent of respondent's misconduct against her acknowledgement and cooperation, we conclude that the Commission's recommendation of a 120-day suspension is appropriate and supported by the Commission's findings of fact and conclusions of law.

It is hereby ordered by the Supreme Court of North Carolina in conference that respondent Angela C. Foster be SUSPENDED for a term of 120 days without compensation for conduct in violation of Canons 1, 2A, 2B, 3A(3), 3A(5), 3B(1), and 3C of the North Carolina Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

ROBIN KLUTTZ-ELLISON, EMPLOYEE
v.
NOAH'S PLAYLOFT PRESCHOOL, EMPLOYER, AND
ERIE INSURANCE GROUP, CARRIER

No. 173PA22

Filed 22 March 2024

**Workers' Compensation—compensability—causal connection to workplace injury—"directly related" test—three independent criteria**

In a workers' compensation case, the Supreme Court reversed the decision of the Full Commission awarding compensation to plaintiff for bariatric surgery—based on needing corrective knee surgery after two workplace accidents aggravated a preexisting knee condition, plaintiff was advised that she first needed to have bariatric surgery in order for the knee surgery to be safely performed—and remanded with instructions for the Industrial Commission to apply the proper legal standard regarding compensability for that treatment. The Supreme Court formally endorsed the "directly related" test, developed over the course of several Court of Appeals' cases, under which medical treatment is compensable only if it is directly related to the workplace injury. A sufficiently causal connection may be shown if (1) the workplace injury caused the condition for which treatment is sought, (2) the workplace injury aggravated the condition or caused new symptoms, or (3) the condition did not require treatment prior to the workplace injury but required treatment solely to remedy the workplace injury.

Justice RIGGS dissenting.

Justice EARLS 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, 283 N.C. App. 198 (2022), affirming an opinion and award entered on 11 March 2021 by the North Carolina Industrial Commission. Heard in the Supreme Court on 20 September 2023.

*Shelby, Pethel and Hudson, P.A., by David A. Shelby, for plaintiff-appellee.*

*Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Lindsay N. Wikle, for defendant-appellants.*

DIETZ, Justice.

Under our workers' compensation statutes, an employee who suffers a compensable injury in a workplace accident may receive compensation for any medical treatment that "may reasonably be required to effect a cure or give relief." N.C.G.S. § 97-2(19) (2023); *see also id.* § 97-25(c).

Despite this broad language, the Court of Appeals has long held (quite understandably) that this provision does not apply to *every* medical treatment; it applies only to those treatments that are "directly related" to the workplace injury. Were it otherwise, workers' compensation would too easily transform into general health insurance, forcing employers to cover treatments for medical conditions with no connection to the workplace injury.

To assess whether a treatment is directly related, the Court of Appeals examines the strength of the "causal relationship" between the condition that requires treatment and the workplace injury. *See*, *e.g.*, *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 133 (2005). This approach, which this Court has favorably recognized but never formally endorsed, protects the need for causality in assessing workers' compensation—a need that is "the very sheet anchor" of the system. *Duncan v. City of Charlotte*, 234 N.C. 86, 91 (1951).

As explained in more detail below, we endorse the test as it has developed in the Court of Appeals. Under the "directly related" test, treatment for a medical condition is directly related to a workplace injury, and therefore compensable, if there is a sufficiently strong causal relationship between the condition that requires treatment and the workplace injury. *Perez*, 174 N.C. App. at 133. This requires a showing that the condition for which treatment is sought (1) was caused by the workplace injury; (2) was aggravated by the workplace injury; or (3) did not require medical treatment or intervention of any kind before the workplace injury but now requires treatment solely to remedy the workplace injury.

If any of these criteria are met, the treatment is directly related to the workplace injury and is compensable. If not, the treatment is, at most, indirectly related to the workplace injury and is not compensable under the workers' compensation system.

Our holding today is largely a restatement of longstanding Court of Appeals precedent. Nevertheless, we find it necessary to reverse the Court of Appeals' decision and remand with instructions to further remand this case to the Industrial Commission. As explained in more detail below, neither the Commission nor the Court of Appeals properly applied the test set out in this existing line of Court of Appeals cases, which we have now formally endorsed. We therefore reverse and remand this matter so that the Commission can apply the test set out in this opinion.

## Facts and Procedural History

Plaintiff Robin Kluttz-Ellison worked at Noah's Playloft Preschool. Plaintiff brought two workers' compensation claims against defendants (her employer and workers' compensation carrier) for injuries sustained in two different workplace accidents. The first accident occurred when plaintiff fell several feet off a ladder while changing a lightbulb. The second incident occurred when plaintiff tripped on a child's sleeping cot and fell.

Defendants denied a number of plaintiff's claims, asserting that the alleged injuries were unrelated to the workplace accidents. The Commission ultimately consolidated plaintiff's claims for a single hearing.

Before these accidents, plaintiff had a medical procedure known as knee arthroplasty, which required a prosthetic secured with hardware to be placed in her right knee. In addition, plaintiff had struggled with body weight issues for many years. Her medical care providers previously diagnosed her with obesity and recommended treatments ranging from changes to her diet to prescription weight-loss medications.

After the workplace accidents, plaintiff's care providers determined that she needed additional knee surgery to address a loosening of the hardware in her right knee. They also recommended that plaintiff undergo a form of bariatric weight loss surgery known as gastric bypass. Plaintiff's care providers believed this weight loss surgery was necessary because they could not safely perform the required knee surgery until plaintiff's body mass index was lowered significantly. These care providers concluded that bariatric surgery was the only available treatment that would lead to a sufficiently rapid loss of body weight.

Following a hearing, the deputy commissioner denied plaintiff's claim with respect to the loosened hardware in her right knee. As a result, the deputy commissioner also denied the claim for bariatric

weight loss surgery, which was based on the compensability of plaintiff's knee surgery. Plaintiff then appealed the deputy commissioner's decision to the Full Commission.

In the interim, plaintiff successfully underwent bariatric surgery and lost a substantial amount of weight. Plaintiff then underwent the corrective surgery on her right knee. After the surgeries, plaintiff moved to submit additional evidence to the Full Commission to support her claim that her knee hardware loosened because of the workplace accidents. She also moved for permission to take additional depositions from her care providers. The Commission granted her motions.

The Commission later entered an opinion and award concluding that plaintiff's right knee surgery was related to her workplace injuries and was compensable. But the Commission concluded that plaintiff "failed to establish that weight loss treatment is medically necessary as a result of her compensable injuries" and denied compensation for plaintiff's bariatric surgery.

Two weeks later, plaintiff moved to reconsider the Commission's opinion and award and requested permission to introduce new evidence. The Commission denied plaintiff's request to introduce new evidence but entered an amended opinion and award that changed its decision with respect to the bariatric surgery.

The amended opinion and award found that the bariatric surgery "was medically necessary to achieve a BMI of less than 40, a prerequisite to allowing Plaintiff to undergo the revision right total knee arthroplasty." Based on this finding, the Commission concluded that the bariatric weight loss surgery was compensable.

Defendants appealed the Commission's opinion and award to the Court of Appeals, challenging a number of rulings, including the award of compensation for the bariatric surgery. *See Kluttz-Ellison v. Noah's Playloft Preschool*, 283 N.C. App. 198 (2022).

With respect to that surgery, the Court of Appeals examined whether the treatment was "directly related to the original compensable injury." *Id.* at 213. The court held that "while the existence of Plaintiff's weight problem was not directly related to the 5 August 2013 accident, the need for bariatric surgery is directly related" because plaintiff could not undergo her knee surgery until she lost sufficient body weight. *Id.* at 214.

We allowed defendants' petition for discretionary review with respect to this portion of the Court of Appeals' decision.

**Analysis**

In our workers' compensation system, an employee is entitled to compensation for injuries "by accident arising out of and in the course of the employment." N.C.G.S. § 97-2(6) (2023). For many decades, this Court has held that the phrase "arising out of employment" imposes a causal element on workers' compensation claims. *See*, *e.g.*, *Taylor v. Town of Wake Forest*, 228 N.C. 346, 350 (1947); *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557 (1960). Thus, to prove claims for workers' compensation benefits, employees must prove that the workplace accident caused their injuries. *Sprouse v. Mary B. Turner Trucking Co.*, 384 N.C. 635, 643 (2023).

We imposed this causal requirement because the Workers' Compensation Act "was never intended to be a general accident and health insurance policy." *Weaver v. Swedish Imps. Maint., Inc.*, 319 N.C. 243, 253 (1987). "This rule of causal relation is the very sheet anchor" of the Act. *Duncan*, 234 N.C. at 91. "It has kept the Act within the limits of its intended scope,—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." *Id.*

When employees meet this causal requirement, and all other elements of their claim, they are entitled to workers' compensation. This includes "medical compensation," which is defined as medical or rehabilitative treatment that "may reasonably be required to effect a cure or give relief." N.C.G.S. § 97-2(19); *see also id.* § 97-25(c).

But here, too, our appellate courts have imposed a causal requirement to safeguard the purpose of the workers' compensation system. This causal test originated in a Court of Appeals opinion several decades ago, which held it "[l]ogically implicit" that any compensable medical treatment "be directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130 (1996).

In *Pittman*, the employee suffered a compensable back injury at work that caused difficulty moving and walking. *Id.* at 126, 132. The employee underwent spinal surgery. *Id.* at 131. After the surgery, the employee continued to have trouble walking and sought additional treatment. *Id.* The Industrial Commission denied that treatment request after finding that the employee's symptoms stemmed from a congenital spine defect that was not "caused by" the workplace injury. *Id.* at 131–32.

Applying the "directly related" test, the Court of Appeals in *Pittman* affirmed the Industrial Commission's decision, holding that the

Commission's findings supported the "legal conclusion that *plaintiff's current condition* was not related to the original compensable injury." *Id.* at 133 (emphasis added). Importantly, it was "plaintiff's current condition," not the treatment plaintiff sought, that was the focus of the analysis. *Id.* In other words, the *Pittman* test examines causality between the workplace injury and the condition needing treatment.

Although *Pittman* did not expressly state *why* it was necessary to focus on the condition to be treated, it flows from the same "logically implicit" rationale that *Pittman* relied upon to create the test. Because the "rule of causal relation is the very sheet anchor" of workers' compensation, an award of medical compensation requires a showing that the condition being treated is causally tied to the workplace injury. *Duncan*, 234 N.C. at 91.

For example, suppose an employee who is being treated for a preexisting condition suffers an unrelated workplace injury. The employee's care providers might recommend changing the course of treatment because a new treatment would help the employee recover from the workplace injury more quickly or with less pain. That treatment would therefore "reasonably be required to effect a cure or give relief" from the workplace injury. N.C.G.S. § 97-2(19); *see also id.* § 97-25(c).

Although this new treatment concerns a *preexisting* condition, there are many scenarios where the condition nevertheless is causally related to the workplace injury. Perhaps that workplace injury aggravated the preexisting condition. Perhaps the injury triggered a need for medical treatment or intervention of the condition where none existed before. In these circumstances, awarding compensation for the treatment is consistent with the causal anchor that grounds our workers' compensation system.

By contrast, there are many scenarios where a preexisting condition has no causal connection to the workplace injury but that condition's treatment nevertheless is impacted by the workplace injury. Imagine an employee undergoing cancer treatment. After a workplace injury, the employee's care providers might recommend changes to that cancer treatment—for example, another round of chemotherapy rather than a surgery that would take place too soon after a surgery for the workplace injury.

In that circumstance, our workers' compensation system does not require the employer to take over the cancer treatment and pay for the chemotherapy. That cancer treatment is part of the employee's general health care and outside the scope of workers' compensation.

Simply put, if there is no causal connection between a workplace injury and a preexisting condition, forcing the employer to pay for treatment of that preexisting condition makes the employer responsible not for the consequences of a workplace accident but for an employee's general health and well-being. That is not workers' compensation; that is health insurance. *Weaver*, 319 N.C. at 253.

For this reason, the Court of Appeals has consistently applied the "directly related" test by examining whether there is "a causal relationship between the medical condition and the work-related injury." *Perez*, 174 N.C. App. at 133; *see also Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542 (1997); *Adams v. Frit Car, Inc.*, 185 N.C. App. 714, 720 (2007); *Brewer v. Rent-A-Ctr.*, 288 N.C. App. 491, 497 (2023), *vacated on other grounds*, No. 139PA23 (N.C. Feb. 2, 2024) (order). By focusing on that causal relationship between condition to be treated and workplace injury, the Court of Appeals ensured that medical compensation does not undermine the causal sheet anchor that grounds the workers' compensation system.

This Court has referenced the "directly related" test only once, in *Wilkes v. City of Greenville*, 369 N.C. 730 (2017). There, we favorably quoted the test established in *Pittman*, as well as *Pittman*'s conclusion that the test is "[l]ogically implicit" in the structure of the Workers' Compensation Act. *Id.* at 737. And, importantly, we also favorably discussed the focus on a causal connection between the condition for which treatment is sought and the workplace injury, citing *Parsons* and *Perez*. *Id.* at 740. We noted that, when assessing medical compensation, the analysis turns on whether the "injuries or symptoms," not the treatment, are "causally related to the admittedly compensable condition." *Id.* at 741.

Despite these references to the Court of Appeals test, the holding in *Wilkes* focused on separate issues, and the Court did not expressly adopt the *Pittman* line of cases. We therefore take this opportunity to formally endorse the test that developed in our lower appellate court and that we favorably recognized in *Wilkes*. This "directly related" test, with its focus on the causal connection between the condition to be treated and the workplace injury, safeguards the "rule of causal relation" that we have described as the anchor of the workers' compensation system. *Duncan*, 234 N.C. at 91.

Under this test, an employee may receive compensation for a medical treatment only if that treatment is directly related to the workplace injury, meaning there is a sufficiently strong causal relationship between

the condition that requires treatment and the workplace injury. *Wilkes*, 369 N.C. at 737; *Perez*, 174 N.C. App. at 133. Our case law examining causation in the workers' compensation context offers guidance on how this causal relationship can be established. When examining how one injury, condition, or symptom could be causally related to another, we consider whether the former "caused, aggravated, or accelerated" the latter. *Morrison v. Burlington Indus.*, 304 N.C. 1, 17 (1981).

In the context of a causal relationship between a condition to be treated and a workplace injury, these three factors can be articulated as three separate tests. First, a causal relationship exists when the workplace injury caused the condition for which treatment is sought. Second, a causal relationship exists when the workplace injury materially impacts the condition for which treatment is sought by aggravating that condition or causing new symptoms. Finally, a causal relationship exists if the condition was materially accelerated by the workplace injury—meaning the condition did not require medical treatment or intervention of any kind before the workplace injury but now requires treatment to aid in treatment of the workplace injury. *See id.* at 18.

If any of these criteria are met, the treatment is directly related to the workplace injury and is compensable. If not, the treatment is, at most, indirectly related to the workplace injury and is not compensable under the workers' compensation system. This causal standard ensures that, although the "employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses," medical compensation will be limited to conditions directly related to the workplace injury and will not "convert our compensation law into a system of compulsory general health insurance." *Id.*

In this case, neither the Industrial Commission nor the Court of Appeals applied the test set out above. The Commission's opinion and award examined only whether the bariatric surgery (the treatment) was "medically necessary" to achieve the requisite weight loss to undergo knee surgery. The Commission did not make any findings or conclusions concerning the causal relationship between plaintiff's body weight issues (the condition) and the workplace injury.

The same is true of the Court of Appeals. The court focused on the treatment, not the condition, holding that "there is a direct line connecting the dots between Plaintiff's original compensable injury and the Commission's award for bariatric surgery." *Kluttz-Ellison*, 283 N.C. App. at 214. Indeed, the Court of Appeals expressly held that plaintiff's body weight issues were *not* causally related to the workplace accident,

emphasizing that "while the existence of Plaintiff's weight problem was not directly related to the 5 August 2013 accident, the need for bariatric surgery is directly related." *Id.*

Because the lower courts did not apply the proper legal standard in this case, we reverse the decision of the Court of Appeals and remand with instructions to remand the matter to the Industrial Commission for further proceedings. *See Pine v. Wal-Mart Assocs.*, 371 N.C. 707, 716–17 (2018).

REVERSED AND REMANDED.

Justice RIGGS dissenting.

The Workers' Compensation Act (the Act) mandates that medical compensation include services that "may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the [Industrial] Commission, will tend to lessen the period of disability." N.C.G.S. § 97-2(19) (2023). As the majority recognizes, this paints a broad brush, and understandably so; the facts of workers' compensation claims are infinitely varied. No job is the same, no employee is the same, no accident is the same, no injury is the same, and no treatment is the same. And as the factfinders on the Industrial Commission can attest, even medical experts—to say nothing of judges—often disagree as to the cause, extent, and appropriate treatment of any given injury. While I understand the majority's desire to judicially craft a uniform tripartite test and impose a "directly related" condition on an otherwise silent statute out of a desire to "k[eep] the Act within the limits of its intended scope," *Duncan v. City of Charlotte*, 234 N.C. 86, 91 (1951), I am concerned that the means and end are at cross purposes. An unflinching and uniform test crafted by nonexpert appellate jurists seems all but guaranteed to end up excluding some unforeseen claims—whether due to lapses in our knowledge or imaginations—that fairly fall within the language and intent of the Act. Indeed, as discussed below, it will exclude some claims foreseen both in the majority and this dissent. A test that excludes claims that the legislature intended to cover based on the Act's text does not in any real sense "k[eep] the Act within the limits of its intended scope." *Id.* Because I do not believe the rigid test adopted by the majority is appropriate or necessary and because I believe the findings and conclusions of the Industrial Commission properly establish Ms. Kluttz-Ellison's bariatric surgery as a treatment

"reasonably . . . required to effect a cure or give relief" for a covered injury, N.C.G.S. § 97-2(19), I respectfully dissent.

The majority rightly notes that the Act is not, nor was it intended to be, a general health insurance policy. *Morrison v. Burlington Indus.*, 304 N.C. 1, 11 (1981). And the Act does require a causal relationship between the injury and the workplace accident; specifically, the injury must be "by accident aris[ing] out of and in the course of the employment." N.C.G.S. § 97-2(6) (2023); *see also Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402 (1977). It is this causal relationship between the *injury* and the workplace *accident* that is the "very sheet anchor" of the Act to which the majority refers. *Duncan*, 234 N.C. at 91.

As for compensable treatment, the relevant statute covers

> medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services *prescribed by a health care provider authorized by the employer or subsequently by the [Industrial] Commission*, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, *as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the [Industrial] Commission, will tend to lessen the period of disability*; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C.G.S. § 97-2(19) (emphases added). In other words, treatment is compensable under the Act if, in the view of a prescribing authorized healthcare provider, it is reasonably required to effect a cure or give relief to a covered injury or, in the judgment of the Industrial Commission, will lessen the period of a covered disability. Or, stated even more simply, if an authorized doctor believes the treatment is necessary to effect a cure or give relief of a workplace injury, then that treatment is compensable under the statutory text. To graft additional strictures into the Act, or to second-guess factfinders' reliance on medical professionals' expert judgments in unique circumstances, is not our province. *See Lunsford v. Mills*, 367 N.C. 618, 623 (2014) ("[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used."); *Sprouse v. Mary*

*B. Turner Trucking Co.*, 384 N.C. 635, 642 (2023) ("The North Carolina Industrial Commission is the fact-finding body under the [Act].").

I acknowledge that we have imposed a "directly related" test in the context of *future* medical treatment for continued or additional symptoms. *Wilkes v. City of Greenville*, 369 N.C. 730, 737 (2017) (holding an employee seeking coverage for psychological symptoms after the employer had admitted compensability for physical injuries was entitled to a presumption that the psychological symptoms were related to his admittedly compensable conditions); *see also Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130 (1996) (holding an employee was not entitled to additional compensation for a new condition when the evidence supported the Industrial Commission's finding that the new condition was not related to a previously-covered injury); *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542 (1997) (holding an employee was entitled to a presumption that treatment of continuing headaches was causally related to prior covered headaches caused by a workplace injury); *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135 (2005) (holding a herniated disc discovered two years after last medical compensation for a covered workplace back injury was paid and four years since the covered accident occurred was causally related to that accident and injury). But that is not the circumstance we have here, this case involves a *preexisting* condition that must be treated in order to cure or relieve the covered workplace injury. Importantly, at least in the context of disability, this Court has acknowledged that if "pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated." *Little v. Anson Cnty. Schs. Food Serv.*, 295 N.C. 527, 532 (1978). Not every employee that suffers a knee injury will require a total knee arthroplasty, and fewer still will require bariatric surgery prior to the arthroplasty. But the appropriate medical treatment for an injury is often unique to the employee, and if an authorized medical professional prescribes bariatric surgery as "required to effect [the] cure" of arthroplasty for that employee's covered workplace injury, then the bariatric surgery is compensable under N.C.G.S. § 97-2(19).

Though the majority's uniform test has an inherent attraction, I cannot say it will avoid results inconsistent with the coverage contemplated by N.C.G.S. § 97-2(19). The majority's own examples illustrate my concerns; in one abstract hypothetical, it suggests that an employee who changes treatment of a preexisting condition to help address pain from a new workplace injury would have those treatment changes for

the preexisting condition covered. But it is hard to square that example with the majority's distillation of its test into three circumstances: in the abstract hypothetical, (1) the workplace injury did not "cause[ ] the [pre-existing] condition for which treatment is sought"; (2) the workplace injury did not—at least at the level of abstraction offered by the majority—"aggravat[e] that [pre-existing] condition or caus[e] new symptoms"; and (3) it is not true that "the [pre-existing] condition did not require medical treatment or intervention of any kind before the workplace injury but now requires treatment to aid in treatment of the workplace injury." While there are some specific instances where I might agree that the change in treatment for the preexisting condition is not covered because the new treatment itself does not further the aid "reasonably . . . required to effect a cure or give relief" from the covered injury, there are others—including those where the preexisting condition is neither aggravated or altered by the workplace injury itself—that would be covered under the statutory text consistent with the overall intent of the Act. A holding focused more on crafting a uniform test rather than ensuring the purposes of the Act are carried out cannot—and the majority's test does not—account for these circumstances.

Imagine a scenario that is slightly different from this case. A worker falls on the job, injuring her knee and requiring surgery to repair the injury. As part of the pre-operative workup, the medical team may order an echocardiogram to ensure that the patient does not have decreased blood flow to the heart prior to attempting the surgery. Roscoe N. Gray & Louise J. Gordy, *Attorneys' Textbook of Medicine*, § 30.42(1) (3d ed. 2010). If the test indicates a preexisting heart condition, previously diagnosed and controlled or mitigated in daily life by a low-dose aspirin regimen or similar noninvasive treatment, but which is too severe to allow for knee surgery without immediate invasive intervention, the health care provider may determine that it is medically necessary to immediately address the preexisting heart condition through more invasive means as a prerequisite to the required knee surgery. And if the factfinders on the Industrial Commission credited adequate expert testimony consistent with that medical determination to find and conclude the heart condition treatment was compensable, that treatment would not be covered under the Act because of its mere existence—the hallmark of general health insurance—but because it *had* to be addressed *in order to* "effect a cure or give relief" for the covered injury, as demanded by statute. And yet, the majority's three-part test would not cover that treatment because: (1) the heart condition had not been caused by the workplace injury; (2) the injury itself did not aggravate the heart condition or create

new symptoms; and (3) the heart condition had previously required some form of treatment.[1]

Stated differently, I would hold that whether a treatment is covered should turn on whether the particular facts of a case, as found by the Industrial Commission based on adequate competent evidence, demonstrate that the treatment was "reasonably . . . required to effect a cure or give relief and for such additional time as, in the judgment of the [Industrial] Commission, will tend to lessen the period of disability," N.C.G.S. § 97-2(19), not on an extra-textual test that, in a noble effort for uniformity and predictability, may still not—and perhaps cannot—account for all circumstances intended to be covered by the legislature.

In these scenarios, the patient may require treatment for the preexisting condition, itself unrelated to the workplace injury in isolation, prior to and as a prerequisite for treatment of the workplace injury. Treatment of these preexisting conditions for the purpose of effecting a cure, giving relief, or lessening the period of disability of a covered workplace injury would not convert the Act into a general health insurance policy. It simply ensures that, pursuant to the stated goals of the statute, a treatment that cures, effects relief, or reduces the period of disability of a covered injury is compensable. And compensability under N.C.G.S. § 97-2(19) in these circumstances would accord with our caselaw establishing that the Act should be liberally construed to effectuate its purpose to provide compensation for injured employees and avoid denying benefits under technical, narrow, or strict construction of its provisions. *See Hollman v. City of Raleigh, Pub. Util. Dep't*, 273 N.C. 240, 252 (1968); *Wilkes*, 369 N.C. at 736–37.

As for the majority's remand, Ms. Kluttz-Ellison sustained a compensable injury to her right knee due to a fall at work. The Industrial Commission found that the injury arose out of and during the course of employment. Both the health care provider and Industrial Commission agreed that Ms. Kluttz-Ellison required a "right total knee arthroplasty" to effect a cure, provide relief, and/or lessen the period of disability" for

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1. Similarly, imagine an employee who suffers from allergies that are safely controlled in daily life by a regular over-the-counter antihistamine regimen and allergen avoidance. Then imagine that the employee requires a medication containing those allergens to treat or diagnose a workplace injury, *e.g.*, intravenous contrast media for x-ray imaging; muscle relaxants; or aspirin. Roscoe N. Gray & Louise J. Gordy, *Attorneys' Textbook of Medicine*, § 65.42 (3d ed. 2010). The majority's three-part test would not cover prophylactic epinephrine, steroids, or other treatments required to address those preexisting allergies' response to the workplace-injury related treatments or medications—allergies that must be safely controlled in order to effectuate a cure of the workplace injury.

this knee injury. After considering the testimony of several medical professionals as to the necessity of the prerequisite surgery to ensure the success of the arthroplasty, the Industrial Commission found that bariatric surgery was "medically necessary" as "a prerequisite to allowing [Ms. Kluttz-Ellison] to undergo the revision right total knee arthroplasty."

In sum, I cannot sign on to a uniform test that is not compelled by the statutory text and may result in the denial of intended coverage given workers' compensation claims' infinite permutations. The statute states that treatment prescribed by a medical provider as necessary to effectuate a cure of or relieve a workplace injury is compensable, and the Industrial Commission found that Ms. Kluttz-Ellison's bariatric surgery was medically necessary to effect a cure, provide relief and/or lessen the period of disability of the covered knee injury. I would therefore affirm the decision of the Industrial Commission without remanding the case.

Justice EARLS joins in this dissenting opinion.

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NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
MATTHEW BRYAN HEBERT

No. 281A22

Filed 22 March 2024

**Motor Vehicles—insurance—underinsured motorist coverage—qualification as underinsured highway vehicle—interpolicy stacking—not permitted**

In a declaratory judgment action to determine the underinsured motorist (UIM) coverage available to defendant, who owned the at-fault vehicle in a fatal car crash but was not the tortfeasor (his friend was driving the car while defendant rode as a passenger), the trial court erred in granting judgment on the pleadings for defendant and thereby allowing him to recover under both his own policy and his parents' policy. Under the plain language of the Motor Vehicle Safety and Financial Responsibility Act, defendant could not "stack" the UIM coverage limits from his own policy and his parents' policy (which named defendant as an insured but did not cover his car) in order to qualify his car as an "underinsured highway vehicle" for purposes of activating his own policy's UIM coverage and bringing a

UIM claim under that policy. Further, because defendant could not "stack" multiple UIM limits, his car did not meet the alternate definition of "underinsured highway vehicle" under the "multiple claimant exception" of the Act (N.C.G.S. § 20-279.21(b)(4)).

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 285 N.C. App. 159, 877 S.E.2d 400 (2022), affirming an order denying plaintiff's motion for judgment on the pleadings and granting judgment on the pleadings for defendant entered on 21 December 2021 by Judge Vince M. Rozier, Jr., in Superior Court, Wake County. On 1 March 2023, the Supreme Court allowed plaintiff's petition for discretionary review as to additional issues pursuant to N.C.G.S. § 7A-31. Heard in the Supreme Court on 21 February 2024.

*Lipscomb Law Firm, by William F. Lipscomb, for plaintiff-appellant.*

*Law Offices of James Scott Farrin, by Preston W. Lesley, for defendant-appellee.*

*Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Paul D. Coates, and Law Offices of C. Douglas Maynard, Jr., PLLC, by C. Douglas Maynard, Jr., for North Carolina Advocates for Justice, amicus curiae.*

NEWBY, Chief Justice.

Pursuant to subdivision 20-279.21(b)(4) of the Motor Vehicle Safety and Financial Responsibility Act of 1953 (FRA), a claimant's underinsured motorist (UIM) coverage must be "activated" for his UIM claim to proceed. At the "activation stage," the claimant must show that the tortfeasor's car satisfies one of the statutory definitions of an "underinsured highway vehicle." Generally, a tortfeasor's vehicle is an underinsured highway vehicle if the tortfeasor's liability limits are less than the claimant's "applicable limits of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy." N.C.G.S. § 20 -279.21(b)(4) (2019). If an accident results in more than one

injured person, the tortfeasor's vehicle may also qualify as an underinsured highway vehicle if "the total amount [of liability coverage] actually paid to" a single claimant is less than that claimant's "applicable limits of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy." *Id.*[1]

In this case we must determine whether defendant, who owned the at-fault vehicle but was not the tortfeasor, may stack multiple UIM coverage limits inter-policy—including those that do not insure the vehicle involved in the accident—to qualify his vehicle as an underinsured highway vehicle for his UIM claim brought under his policy insuring his vehicle. Although the FRA is to be "liberally construed" to accomplish its remedial purpose, this Court may only employ that canon of construction if the FRA's plain language is ambiguous or susceptible to multiple reasonable interpretations. Here we conclude that subdivision 20-279.21(b)(4)'s plain language is clear and unambiguous: the only UIM limits that may be considered at the activation stage are those "for the vehicle involved in the accident and insured under the owner's policy." *Id.* Accordingly, we conclude that the Court of Appeals erred when it permitted defendant to "stack and compare" at the activation stage—that is, when it allowed defendant to aggregate inter-policy all of the UIM policies available to defendant, regardless of their connection to the car involved in the accident, before comparing his UIM limits to the at-fault vehicle's liability limits.

Without inter-policy stacking, defendant's vehicle, which was the at-fault vehicle, does not qualify as an underinsured highway vehicle for purposes of defendant's UIM claim brought under his own policy. Accordingly, we reverse the decision of the Court of Appeals and remand this case with instructions to remand the matter to the trial court for entry of judgment on the pleadings in plaintiff's favor.

In 2020, defendant owned a 2004 Chevrolet Malibu.[2] Plaintiff issued defendant a personal automobile policy covering defendant's car.

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1. In 2023, the General Assembly amended the definitions of "underinsured highway vehicle," which will take effect on 1 January 2025. An Act to Make Various Changes to the Insurance Laws of North Carolina, to Amend the Insurance Rate-Making Laws, and to Revise High School Interscholastic Athletics, S.L. 2023-133, § 12(d), (i), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-133.pdf. This opinion takes no position on the interpretation of the statute as amended.

2. This case comes to this Court following plaintiff's motion for judgment on the pleadings. Accordingly, "[a]ll well pleaded factual allegations in the nonmoving party's pleadings [i.e., defendant's answer] are taken as true[,] and all contravening assertions in the movant's pleadings [i.e., plaintiff's complaint] are taken as false." *Ragsdale v. Kennedy*,

Defendant's policy provided liability coverage with limits of $50,000.00 per person and $100,000.00 per accident. It also provided UIM coverage with limits of $50,000.00 per person and $100,000.00 per accident. Additionally, defendant was named as an insured on his parents' personal automobile policy, which was also issued by plaintiff. Defendant qualified for UIM coverage under his parents' personal auto policy, which provided UIM coverage with limits of $100,000.00 per person and $300,000.00 per accident. Defendant's parents' policy, however, did not insure defendant's car.[3]

On 21 October 2020, Sincere Terrell Corbett was driving defendant's car, and defendant, Chase Everette Hawley, and Jamar Direll Hicks, Jr., were passengers. Defendant's car collided with another vehicle, which was owned and operated by William Rayvoin Coats.[4] As a result of that collision, Corbett and Hicks died, and defendant and Hawley sustained significant injuries.[5] Coats was also injured. Neither party disputes that defendant's car was the at-fault vehicle and that Corbett, not defendant, was the tortfeasor.

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286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Review is "limited to the facts properly pleaded in the pleadings . . . , inferences reasonably to be drawn from such facts[,] and matters of which the court may take judicial notice. An exhibit, attached to and made a part of the pleading, is so considered." *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 878–79 (1970) (citations omitted). To the extent that defendant's answer admitted or did not deny the complaint's factual allegations, however, those facts are deemed established. *See* N.C.G.S. § 1A-1, Rule 8(d) (2021) ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."). The facts and permissible inferences therefrom are viewed in the light most favorable to the nonmoving party. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

3. Defendant denied plaintiff's allegation that defendant's car was not insured by his parents' policy. Defendant's parents' policy, however, was attached as an exhibit to plaintiff's complaint, and defendant admitted that the exhibit was a true and certified copy of his parents' policy. The declarations page of defendant's parents' policy does not list defendant's car as a covered vehicle. To the extent that defendant's characterization of his parents' policy conflicts with the terms of the policy, the policy controls. *See Wilson*, 276 N.C. at 206, 171 S.E.2d at 879 ("The terms of [an attached] exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as these are inconsistent with its terms.").

4. Defendant denied that Coats was the owner and operator of the other car "due to lack of knowledge." He admitted in his answer, however, that plaintiff paid Coats as part of its payout of defendant's liability coverage. Thus, it is reasonable to infer from the admitted facts that Coats was the owner and operator of the other car.

5. Defendant also denied that Coats was injured "due to lack of knowledge." Because defendant admitted that plaintiff paid Coats as part of the liability payout, however, it is reasonable to infer from the admitted facts that Coats was injured.

After the accident, plaintiff tendered the $100,000.00 per accident limit of liability coverage under defendant's policy, and the four claimants agreed to divide the payout as follows: $49,500.00 to Hicks's estate, $49,500.00 to Hawley, $900.00 to Coats, and $100.00 to defendant. Plaintiff also paid defendant $99,900.00 in UIM coverage under defendant's parents' policy.[6]

On 29 July 2021, plaintiff filed a complaint seeking a judgment declaring that defendant's UIM coverage under his policy is unavailable because defendant's car, as the at-fault vehicle, does not qualify as an underinsured highway vehicle for his UIM claim brought under his own policy. On 15 September 2021, defendant filed his answer, requesting that he be paid the UIM coverage under his policy insuring his car. On 30 September 2021, plaintiff moved for judgment on the pleadings pursuant to North Carolina Rule of Civil Procedure 12(c). On 20 December 2021, the trial court denied plaintiff's motion for judgment on the pleadings, and it granted judgment on the pleadings for defendant. Plaintiff appealed.

The Court of Appeals affirmed in a divided decision. *N.C. Farm Bureau Mut. Ins. Co. v. Hebert*, 285 N.C. App. 159, 165, 877 S.E.2d 400, 404 (2022). "[G]uided by the 'avowed purpose' of the Financial Responsibility Act," the majority declined to construe subdivision 20-279.21(b)(4) "in a manner that would . . . limit the recovery of innocent occupants of a tortfeasor's vehicle." *Id.* at 163–64, 877 S.E.2d at 403–04. Applying the stack and compare rule, the majority permitted defendant to "stack" his own policy's UIM limits with his parents' policy's UIM limits before comparison to defendant's policy's liability limits. *Id.* at 163–65, 877 S.E.2d at 403–04 (first citing *N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 50–51, 483 S.E.2d 452, 458 (1997), and then citing *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, 259 N.C. App. 626, 630, 816 S.E.2d 251, 254 (2018)). After doing so, the majority concluded

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6. In its complaint, plaintiff conceded that defendant's car qualified as an underinsured motor vehicle for defendant's UIM claim brought under defendant's parents' policy. It further conceded that it "offered, and is in the process of paying, the $99,900[.00] UIM coverage from the parents' policy." Plaintiff calculated the $99,900.00 UIM payment by deducting the $100.00 payment from defendant's liability coverage from the $100,000.00 per person UIM limit under defendant's parents' policy.

Before this Court, the parties only dispute whether defendant activated his UIM coverage under his own policy such that he could bring a UIM claim under his own policy. Accordingly, we consider this case as it was presented, and the only question before us is whether defendant's car qualified as an underinsured highway vehicle for purposes of a UIM claim brought under defendant's own policy. *See* N.C. R. App. P. 28(a), (b)(6), (c).

that defendant's car satisfied subdivision 20-279.21(b)(4)'s general definition of an underinsured highway vehicle,[7] thus activating his policy's UIM coverage. *See id.* at 164–65, 877 S.E.2d at 403–04. Furthermore, the majority reasoned that subdivision 20-279.21(b)(4)'s "multiple claimant exception" did not apply to defendant's UIM claim simply because there were multiple injuries in the accident.[8] *Id.* at 164, 877 S.E.2d at 404 (citing *Integon Nat'l Ins. Co. v. Maurizzio*, 240 N.C. App. 38, 44, 769 S.E.2d 415, 420 (2015)). Because it concluded that the multiple claimant exception did not apply, the majority further stated that the multiple claimant exception's caveat sentence[9] did not prevent defendant's vehicle from qualifying as an underinsured motor vehicle for his claim under his policy insuring that car. *Id.* Accordingly, the majority affirmed the judgment on the pleadings in defendant's favor. *Id.* at 165, 877 S.E.2d at 404.

Conversely, the dissent first concluded that defendant's car did not qualify as an underinsured highway vehicle under subdivision 20-279.21(b)(4)'s general definition because the liability limits of defendant's policy covering his car were equal to its UIM limits. *Id.* at 165, 877 S.E.2d at 404–05 (Arrowood, J., dissenting). The dissent then considered the multiple claimant exception and similarly concluded that defendant's car did not qualify as an underinsured highway vehicle for purposes of his UIM claim brought under his own policy insuring his car because his policy's liability limits were the same as the UIM limits. *Id.* at 165–66, 877 S.E.2d at 405. Although the dissent recognized that "inter-policy stacking is generally permitted," *id.* at 167, 877 S.E.2d at 405, it believed that "in this particular type of claim"—namely, UIM

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7. Under the general definition, a vehicle is an underinsured highway vehicle if (1) it is "a highway vehicle with respect to [its] ownership, maintenance, or use," and (2) "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy." N.C.G.S. § 20-279.21(b)(4) (2019).

8. Under the multiple claimant exception, a vehicle is also an underinsured highway vehicle if (1) a "[UIM] claim [is] asserted by a person injured in an accident where more than one person is injured," and (2) "the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." N.C.G.S. § 20-279.21(b)(4) (2019).

9. The caveat sentence to the multiple claimant exception provides that when a UIM claimant proceeding under the multiple claimant exception brings a UIM claim under an owner's policy insuring the at-fault and allegedly underinsured vehicle, the vehicle is not considered underinsured "unless the owner's policy insuring that vehicle provides [UIM] coverage with limits that are greater than that policy's bodily injury liability limits." N.C.G.S. § 20-279.21(b)(4) (2019).

claims under the owner's policy insuring the at-fault vehicle involved in the accident—"[t]he General Assembly . . . specifically confined the limit coverage comparison to the owner's policy," *id.* at 166–67, 877 S.E.2d at 405. Therefore, reasoning that "consider[ation of] multiple insurance policies in this particular type of claim is impermissible pursuant to [subdivision 20-279.21(b)(4)]," *id.* at 167, 877 S.E.2d at 405, the dissent would have reversed the trial court's order, *id.* at 167, 877 S.E.2d at 406.

Plaintiff appealed based on the dissent.[10] This Court also allowed plaintiff's petition for discretionary review, wherein plaintiff sought review of the application of the stack and compare rule.

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C.G.S. § 1A-1, Rule 12(c) (2021). "A Rule 12(c) movant must show that 'the [pleading] . . . fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar' to a cause of action." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (ellipsis in original) (quoting *Jones v. Warren*, 274 N.C. 166, 169, 161 S.E.2d 467, 470 (1968)). A trial court's grant of judgment on the pleadings is reviewed de novo. *Id.* Questions of statutory construction are also reviewed de novo. *City of Asheville v. Frost*, 370 N.C. 590, 591, 811 S.E.2d 560, 561 (2018).

The primary goal of statutory interpretation is to accomplish legislative intent, which, in the first instance, is discerned from the plain language of the enactment. *N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 378 N.C. 181, 188, 861 S.E.2d 705, 712 (2021). If the statute's plain language is clear and unambiguous, this Court applies the statute as written and does not engage in further statutory construction. *See id.* at 189, 861 S.E.2d at 712. This Court may turn to other sources to determine legislative intent, including "the spirit of the act," only if the statute is ambiguous or susceptible to multiple interpretations. *Id.* at 188–89, 861 S.E.2d at 712.

"The avowed purpose of the [FRA], of which N.C.G.S. § 20-279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that

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10. *See* N.C.G.S. § 7A-30(2) (2021), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-134.pdf. The repeal of N.C.G.S. § 7A-30(2) only applies to cases filed with the Court of Appeals on or after 3 October 2023. *See* Current Operations Appropriations Act § 16.21(e).

the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (citations omitted), *superseded on other grounds by statute*, An Act to Prohibit the Stacking of Uninsured and Underinsured Motorist Coverage, ch. 646, §§ 1–4, 1991 N.C. Sess. Laws 1550, 1550–59. "[T]h[is] fact," however, "does not inevitably require that one interpret the relevant statutory language to produce the maximum possible recovery for persons injured as a result of motor vehicle negligence regardless of any other consideration." *N.C. Farm Bureau Mut. Ins. Co. v. Dana*, 379 N.C. 502, 512, 866 S.E.2d 710, 717 (2021). Indeed, "*the usual rules of statutory construction govern* . . . subject to the caveat that the relevant statutory language should be construed to produce the greatest possible protection for the innocent victims of negligent conduct *permitted by a reasonable interpretation of the relevant statutory language*." *Id.* at 512, 866 S.E.2d at 717–18 (emphases added). Accordingly, the threshold question for this Court when interpreting the FRA is whether the Act's plain language is clear and unambiguous. If it is, we must dispassionately give effect to the plain language. If it is not, only then may this Court "liberally construe" its terms in favor of recovery.

Insurance companies doing business in North Carolina are required to offer UIM coverage. N.C.G.S. § 20-279.21(b)(4) (2019) ("[An] owner's policy of liability insurance . . . [s]hall . . . provide underinsured motorist coverage . . . ."). UIM coverage, which was developed out of uninsured motorist insurance, "provides a secondary source of recovery for an insured when the tortfeasor has insurance, but the tortfeasor's liability limits are insufficient to compensate the injured party." *Lunsford v. Mills*, 367 N.C. 618, 633, 766 S.E.2d 297, 307 (2014) (Newby, J., concurring in part and dissenting in part). In this way, UIM coverage acts "as a safeguard when [a] tortfeasor['s] liability polic[y] do[es] not provide sufficient recovery—that is, when the tortfeasor[ ] [is] 'under insured.' " *Id.* at 632, 766 S.E.2d at 306. Practically speaking, "[f]ollowing an automobile accident, a tortfeasor's liability coverage is called upon to compensate the injured [party], who then turns to *his own UIM coverage* when the tortfeasor's liability coverage is exhausted." *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 188, 420 S.E.2d 124, 127 (1992) (emphasis added), *superseded by statute*, An Act to Prohibit the Stacking of Uninsured and Underinsured Motorist Coverage, §§ 1–2, 1991 N.C. Sess. Laws at 1550–59, *as recognized in Mills*, 367 N.C. at 626, 766 S.E.2d at 303. Under our General Statutes, UIM coverage "augment[s] [the] inadequate recover[y] obtained from [an] underinsured tortfeasor[ ]" by "put[ting] the insured claimant . . . in the position he would have occupied had the tortfeasor been insured at limits equal to the claimant's UIM limits." *Mills*, 367 N.C.

at 633–34, 766 S.E.2d at 307 (Newby, J., concurring in part and dissenting in part). As a result, "[t]he insured's UIM limits, not the insured's total damages, provide the ceiling for recovery." *Id.* at 635, 766 S.E.2d at 308.

The FRA's UIM provision, subdivision 20-279.21(b)(4), is logically organized. In the first paragraph, it mandates that insurance companies provide UIM coverage and expounds upon the specific limits they must provide. N.C.G.S. § 20-279.21(b)(4) (2019). Then, subdivision 20-279.21(b)(4) moves to the "activation provision," which encompasses the definitions of underinsured highway vehicle at issue in this case. *Id.* As more fully explained below, for a claimant to "activate" his UIM coverage, he must show that the tortfeasor's vehicle meets one of the statute's definitions of underinsured highway vehicle. *Id.*; *cf. N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 285, 851 S.E.2d 891, 895 (2020) ("The party seeking coverage under an insurance policy bears the burden 'to allege and prove coverage.' " (quoting *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461, 137 S.E.2d 837, 839 (1964))). After activation, however, an insurer is not necessarily obligated to pay on the UIM policy. Rather, subdivision 20-279.21(b)(4)'s "triggering provision" explains that the activated UIM coverage must be "triggered" for a claimant to collect his UIM coverage. *See* N.C.G.S. § 20-279.21(b)(4) (2019). A claimant's UIM protection is triggered "when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted." *Id.*

In summary, "[a] UIM carrier pays on its policy to an injured claimant when (1) the auto accident involves a tortfeasor [vehicle that] meets the statute's definition of an underinsured highway vehicle (the activation provision); and (2) the underinsured highway vehicle's liability coverage has been exhausted (triggering provision)." *Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part). Then, assuming the claimant's UIM coverage is both activated and triggered, subdivision 20-279.21(b)(4)'s second paragraph explains how to calculate the amount of UIM benefits to be paid to the claimant.[11] N.C.G.S. § 20-279.21(b)(4) (2019).

As noted above, the threshold question in a UIM analysis is whether the tortfeasor's vehicle is an underinsured highway vehicle as defined by the activation provision in subdivision 20-279.21(b)(4). *Lunsford*, 378 N.C. at 186, 861 S.E.2d at 710. "[I]f no vehicle meets the definition[s]

11. Subdivision 20-279.21(b)(4)'s remaining paragraphs are irrelevant to the current dispute. *See* N.C.G.S. § 20-279.21(b)(4) (2019).

of an underinsured [highway] vehicle under [subdivision 20-279.21(b)(4)'s] activation provision, then consideration of the subsequent . . . provision[s] is unnecessary." *Mills*, 367 N.C. at 636, 766 S.E.2d at 308 (Newby, J., concurring in part and dissenting in part).

The activation provision has two definitions of underinsured highway vehicle. First, it announces the general definition:

> "[U]nderinsured highway vehicle[ ]" . . . means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is *less than* the applicable limits of underinsured motorist coverage *for the vehicle involved in the accident and insured under the owner's policy.*

N.C.G.S. § 20-279.21(b)(4) (2019) (emphases added). Stated differently, "UIM coverage is activated when the insured's UIM policy limits are greater than the liability limits of policies connected with the tortfeasor's ownership, maintenance, or use of a highway vehicle." *Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part); *see also* 3 Alan I. Widiss & Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Insurance* § 35.2 n.1 (3d ed. rev. 2005) (observing that subdivision 20-279.21(b)(4) "provide[s] that underinsured motorist insurance applies when the [claimant insured's UIM] coverage limit exceeds the tortfeasor's liability insurance coverage limit").

Subdivision 20-279.21(b)(4) then furnishes a second definition of underinsured highway vehicle, which is commonly known as the "multiple claimant exception" or the "2004 Amendment." *See Hebert*, 285 N.C. App. at 162, 877 S.E.2d at 403. The first sentence of the multiple claimant exception provides the second definition of underinsured highway vehicle:

> For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is *less than* the applicable limits of underinsured motorist coverage *for the vehicle involved in the accident and insured under the owner's policy.*

N.C.G.S. § 20-279(b)(4) (2019) (emphases added). In other words, if an accident results in multiple innocent parties sustaining injuries, the at-fault vehicle qualifies as an underinsured highway vehicle if the total amount of liability coverage paid to an injured claimant is less than that injured claimant's UIM limits for the vehicle involved in the accident and insured under the owner's policy.

The second sentence of the multiple claimant exception is a caveat to the second definition:

> *Notwithstanding the immediately preceding sentence*, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle *unless* the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits.

*Id.* (emphases added). Put differently, for a claimant pursuing a UIM claim under the multiple claimant exception and proceeding under an owner's policy insuring the allegedly underinsured vehicle (i.e., the at-fault vehicle), that owner's policy's liability limits must be less than its UIM limits.

Since the 1990s, the Court of Appeals has permitted UIM claimants to "stack"—that is, add together—"all of the UIM limits available to" them "for purposes of determining whether [a] vehicle [is] an underinsured motor vehicle as defined under [N.C.]G.S. § 20-279.21(b)(4)." *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458; *see also*, *e.g.*, *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 689, 456 S.E.2d 882, 884 (1995); *Benton v. Hanford*, 195 N.C. App. 88, 92–94, 671 S.E.2d 31, 34–35 (2009). Although this Court has considered cases relating to the stack and compare rule in the past,[12] in this case we must determine whether

12. In *North Carolina Farm Bureau Mutual Insurance Co. v. Lunsford*, this Court "affirm[ed] prior decisions of the Court of Appeals allowing inter[-]policy stacking when calculating the 'applicable' policy limits as required under . . . N.C.G.S. § 20-279.21(b)(4)." 378 N.C. at 183, 861 S.E.2d at 708. In that case, however, this Court repeatedly emphasized that the plaintiff "d[id] not challenge" the Court of Appeals' caselaw allowing inter-policy stacking when qualifying a vehicle as an underinsured highway vehicle. *Id.* at 187–89, 861 S.E.2d at 710–12. Rather, "[t]he crux of the parties' dispute [was] whether [the tortfeasor's policy's] UIM coverage limit [was] also an 'applicable limit of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy.' " *Id.* at 186–87, 861 S.E.2d at 710. This Court's opinion essentially presumed the validity of inter-policy stacking and approved of the practice without thoroughly considering whether it aligns with

defendant may stack and compare in order to activate his UIM coverage under his policy insuring the at-fault vehicle. Cognizant of our duty to dispassionately give effect to subdivision 20-279.21(b)(4)'s plain language, we conclude that defendant is not permitted to stack his parents' policy's UIM limits with his own policy's UIM limits in order to qualify his vehicle as an underinsured highway vehicle.

Looking first to the plain language of subdivision 20-279.21(b)(4), the statutory definitions of underinsured highway vehicle "appl[y] a comparison of limits approach." *Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part); *see also* 3 Widiss & Thomas § 35.2 n.1 (observing that subdivision 20-279.21(b)(4)'s approach to the definition of underinsured highway vehicle is a "comparison[ ] between the tortfeasor's liability insurance and the claimant's underinsured motorist coverage limits" (emphasis omitted)). On one side of the scale, the definitions consider the liability limits applicable to *the tortfeasor's vehicle*. *See Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part). Depending on which definition is applied, subdivision 20-279.21(b)(4) focuses on either "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident" or "the total amount actually paid to [a claimant] under all bodily injury liability bonds and insurance policies applicable at the time of the accident." N.C.G.S. § 20-279.21(b)(4) (2019). On the other side of the scale, and relevant here, the definitions consider "*the insured's* UIM policy limits." *Mills*, 367 N.C. at 636, 766 S.E.2d at 309 (Newby, J., concurring in part and dissenting in part) (emphasis added). More specifically, the scope of the inquiry is "the applicable limits of [the insured's] underinsured motorist coverage *for the vehicle involved in the accident and insured under the owner's policy*." N.C.G.S. § 20-279.21(b)(4) (2019) (emphasis added).

This language clearly and unambiguously means that subdivision 20-279.21(b)(4)'s activation provision is concerned with the claimant's UIM coverages that pertain to the vehicle involved in the accident, not all UIM policies for which the UIM claimant is personally eligible. In other words, if an insured's UIM policy is not "for" the vehicle involved in the accident and insured under the owner's policy, it is outside the scope of consideration when determining whether the at-fault vehicle

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subdivision 20-279.21(b)(4)'s plain language. To the extent that this Court did engage in statutory construction in *Lunsford*, it only did so to determine whether "applicable limits" also included "the UIM coverage limits contained within the insurance policy covering the tortfeasor's vehicle." *Id*. at 188–90, 861 S.E.2d at 711–13.

is an underinsured highway vehicle. Conversely, the stack and compare rule permits consideration of "all of the UIM limits available to [the claimant]" regardless of their connection to the vehicle involved in the accident, *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458 (disavowing an interpretation that "confines [a claimant's] UIM coverage only to [the vehicle he or she occupied at the time of the accident]"), which contravenes the statute's plain language.

For thirty years, however, the Court of Appeals anchored its adherence to the stack and compare rule on the statute's use of the word "limits." *Id.* In the court's view, "the 'limits' referred to . . . [were] all of the UIM limits available to [the claimant]." *Id.* This interpretation, however, ignores the remainder of subdivision 20-279.21(b)(4)'s first paragraph. In the sentences immediately surrounding subdivision 20-279.21(b)(4)'s definitions of underinsured highway vehicle, "limits" appears thirteen times. In each of those instances, the statute refers to the per-person and per-accident limits under a singular policy, not limits from multiple policies. *See* N.C.G.S. § 20-279.21(b)(4) (2019); *cf. Dana*, 379 N.C. at 511, 866 S.E.2d at 717 ("[In N.C.G.S. § 20-279.21(b)(4),] references to 'limit,' stated in the singular, occur in instances in which the General Assembly is referring to a single limit rather than to a collection of limits, such as the per-person and per-accident limits of liability that appear to be standard in most automobile liability insurance policies."). Moreover, elsewhere in the statute, the General Assembly clearly indicated when it authorized the inter-policy stacking of multiple automobile insurance policies. *See* N.C.G.S. § 20-279.21(b)(4) (2019) ("the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident"); *id.* (permitting, under subdivision 20-279.21(b)(4)'s second paragraph, claimants to stack "separate or additional policies" when calculating the amount of UIM payments to be made). Without a clearer expression of intent from the General Assembly, the language it used does not support the broad interpretation of "limits" adopted by the Court of Appeals.

The Court of Appeals, however, defended its interpretation of "limits" by pointing to the second paragraph of subdivision 20-279.21(b)(4), which it called the "stacking subsection." *Bost*, 126 N.C. App. at 49–51, 483 S.E.2d at 457–58. That paragraph provides:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage

> applicable to the motor vehicle involved in the accident. *Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy* . . . . The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

N.C.G.S. § 20-279.21(b)(4) (2019) (emphasis added). In our view, the Court of Appeals' approach placed more reliance on the stacking language than it can reasonably bear.

Indeed, although the second paragraph does permit inter-policy stacking of UIM limits, it only does so at the calculation stage of the UIM process. As explained above, subdivision 20-279.21(b)(4), although concededly "lengthy and complicated," *Dana*, 379 N.C. at 508, 866 S.E.2d at 715, is logically organized. Initially, it explains how to "activate" the UIM coverage, which is the relevant issue in this case. Assuming the UIM coverage is activated, subdivision 20-279.21(b)(4) next explains how to "trigger" UIM coverage. Then, subdivision 20-0279.21(b)(4)'s second paragraph explains how to calculate the amount of UIM payments to be paid to the claimant. It is at this stage—and this stage only—that subdivision 20-279.21(b)(4) permits a claimant to stack "separate or additional" UIM policies. N.C.G.S. § 20-279.21(b)(4) (2019). The second paragraph does not reach back and modify the definitions of underinsured highway vehicle. To hold otherwise is to "inevitably require . . . [an] interpret[ation of] the relevant statutory language to produce the maximum possible recovery for persons injured . . . regardless of any other consideration." *Dana*, 379 N.C. at 512, 866 S.E.2d at 717. This we are not permitted to do.

For all these reasons, we conclude that subdivision 20-279.21(b)(4)'s plain language does not allow for defendant to stack his policy's UIM limits with his parents' policy's UIM limits to determine if his car was an underinsured highway vehicle for his claim under his policy insuring his car. Accordingly, the Court of Appeals erred when it allowed defendant to do so. Properly interpreted, subdivision 20-279.21(b)(4) only permits

comparison of "the limits of liability" of the at-fault vehicle in this case—defendant's car—with "the applicable limits of [UIM] coverage for the vehicle involved in the accident and insured under the owner's policy"—also defendant's car. N.C.G.S. § 20-279.21(b)(4) (2019).

In his answer, defendant admitted that the UIM limits for his car were identical to its liability limits. Defendant further admitted that his parents' policy did not insure defendant's vehicle. Thus, his parents' policy does not provide UIM coverage "for the vehicle involved in the accident." *Id.* Defendant's admissions bar defendant's claim for UIM payments under his own policy.

Indeed, on these facts, defendant's car does not qualify as an underinsured highway vehicle under the general definition. Unlike most UIM scenarios, defendant's car is both the at-fault vehicle and the vehicle through which defendant, as an innocent, injured party, seeks UIM recovery. Nevertheless, the sum of defendant's liability limits for his car is not "less than" its applicable UIM limits. Thus, defendant's car does not satisfy subdivision 20-279.21(b)(4)'s general definition of an underinsured highway vehicle.

Moreover, although defendant's car otherwise would qualify under the multiple claimant exception's definition because "the total amount actually paid to [defendant] under all bodily injury liability bonds and insurance policies . . . is less than the applicable [UIM] limits" for his car, *id.*, defendant's UIM claim is still barred. Defendant's claim also fails under the multiple claimant exception because it is a UIM claim brought under the owner's policy insuring the at-fault vehicle that is allegedly underinsured. Accordingly, the caveat sentence of the multiple claimant exception operates to bar defendant's claim because his policy insuring his car does not "provide[ ] [UIM] coverage with limits that are greater than that policy's bodily injury liability limits." *Id.* Therefore, defendant's car does not satisfy either definition of underinsured highway vehicle, meaning he is unable to activate his policy's UIM coverage.

The decision of the Court of Appeals is therefore reversed, and this case is remanded to that court with instructions to remand this matter to the trial court for entry of judgment on the pleadings in favor of plaintiff.

REVERSED AND REMANDED.

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

Justice EARLS dissenting.

The Court's decision in this case has limited applicability because, as the majority notes, the North Carolina General Assembly has again amended the Motor Vehicle Safety and Financial Responsibility Act of 1953 (FRA) on this very point, to clarify that:

> If a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the total amount of underinsured motorist coverage applicable to the claimant is the sum of the limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy, and shall not be reduced by a setoff against any coverage, including liability insurance, except for workers' compensation coverage to the extent provided for in subsection (e) of this section.

An Act to Make Various Changes to the Insurance Laws of North Carolina, to Amend the Insurance Rate-Making Laws, and to Revise High School Interscholastic Athletics, S.L. 2023-133, § 12(d), (i), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-133.pdf (codified at N.C.G.S. § 20-279.21(b)(4) (effective Jan. 1, 2025)).

This case asks us to determine, under the statute in effect at the time of the accident and our applicable precedents, whether Mr. Hebert may stack his vehicle's UIM coverage along with the coverage under his parents' insurance policy on which he is an insured driver in order to determine whether his vehicle was an underinsured highway vehicle. This is an issue we resolved definitively in *North Carolina Farm Bureau Mutual Insurance Co. Inc. v. Lunsford*, 378 N.C. 181 (2021) (*Lunsford*). Blithely mischaracterizing the holding in *Lunsford* as a presumption rather than binding precedent, the new majority reverses course and adopts a position flatly inconsistent with that prior case. When overturning precedent, the Court should at a minimum acknowledge it, and, if the rule of law has any meaning, should justify doing so. *See State v. Elder*, 383 N.C. 578, 603 (2022) (factors to be considered when deciding to overturn precedent include "the quality of the prior decision's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.") (quoting *Janus v. Am. Fed'n of State, Cnty, and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479-80

(2018)); *McGill v. Town of Lumberton*, 218 N.C. 586, 591 (1940) ("It is, then, an established rule to abide by former precedents . . . as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion . . .").

There is no dispute that on 21 October 2020, Matthew Hebert was a passenger in his 2004 Chevrolet car being driven by Sincere Terrell Corbett on Highway N.C. 42 in Johnston County, North Carolina, when they collided with another vehicle owned and driven by William Coats. Jamal Direll Hicks, Jr. and Chase Everette Hawley were passengers in Mr. Hebert's car. Mr. Corbett and Mr. Hicks were killed in the collision. Mr. Hebert, Mr. Hawley, and Mr. Coats sustained significant injuries. Mr. Hebert's vehicle was covered by a personal auto insurance policy issued by North Carolina Farm Bureau Mutual Insurance Co. Inc. (Farm Bureau) to Mr. Hebert (Mr. Hebert's policy). On 21 October 2020, Mr. Hebert qualified as an insured of the UIM coverage of a personal auto policy issued by Farm Bureau to Mr. Hebert's parents, which provides UIM coverage of $100,000 per person / $300,000 per accident and medical payments coverage of $2,000.

## I. Governing Law

Most recently, in *Lunsford*, this Court held that the very statute as issue here, N.C.G.S. § 20-279.21(b)(4) (2019), provides for interpolicy stacking. *See Lunsford*, 378 N.C. at 188, 190 n.2, 191. This opinion was in no sense an "outlier" but instead affirmed multiple earlier rulings on this point by the Court of Appeals. Citing *Benton v. Hanford*, 195 N.C. App. 88 (2009), this Court explained that:

> Interpreting the ambiguous language contained in N.C.G.S. § 20-279.21(b)(4) to permit interpolicy stacking in this circumstance is "[i]n keeping with the purpose of the [FRA]" because it allows injured North Carolina insureds to access the UIM coverage they paid for in a greater number of circumstances, reducing the likelihood that the costs of the damage caused by an underinsured tortfeasor will be borne by the insured alone.

*Lunsford*, 378 N.C. at 191; *see also Tutterow v. Hall*, 283 N.C. App. 314, 319 (2022) ("[T]he statute provides an unambiguous method to calculate the applicable limit of combined UIM coverage: it is the difference between the total amount paid under all exhausted liability policies and the total limits of all applicable UIM policies."). This Court also noted in *Lunsford* that the North Carolina General Assembly "has not acted in a

way that evinces disagreement with *Benton* in the years since that case was decided" and that in any case, failure to allow interpolicy stacking would frustrate the bargain that the parties struck because *Benton* was the governing law at the time the insurance policy contract was entered into. *Lunsford*, 378 N.C. at 190 n.2. Both of those considerations apply with equal force in this case. At the time Mr. Hebert and his parents purchased their insurance policies, allowing interpolicy stacking to determine UIM coverage was the law in this State.

The unavoidable consequence of the majority's decision today is that the injured parties in *Lunsford* are able to stack UIM liability coverage from an out-of-state policy with the Farm Bureau policy covering the accident, while in this case, the injured parties cannot stack the coverages in two Farm Bureau policies purchased in North Carolina and will not be compensated to the full extent of the coverages they purchased. This not only contravenes the purpose of the North Carolina General Assembly in enacting the statute, it also frustrates the principle of equal justice under the law. The majority creates illogical distinctions in otherwise clear statutory language and ties itself in jurisprudential knots to arrive at the outcome-determined conclusion to favor insurers at the expense of their insured, contrary to the purpose of the FRA. *See*, *e.g.*, *Burgess v. Your House of Raleigh*, *Inc.*, 326 N.C. 205, 209 (1990) ("The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature."); *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573–74 (2002) (cleaned up) ("The avowed purpose of the Financial Responsibility Act . . . is to compensate the innocent victims of financially irresponsible motorists.").

## II. The FRA's Plain Language

The majority quotes the FRA's definitions of an underinsured vehicle and the provisions explaining what happens when more than one person is injured in an accident. *See* N.C.G.S. § 20-279.21(b)(4). Importantly, these definitions are then followed in the same subdivision with this explanation, which plainly establishes that if a person is an insured under another policy with UIM coverage, those limits also apply to determine the upper limit of coverage. The statute in effect at the time says:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage

> applicable to the motor vehicle involved in the accident. **Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy;** provided that this sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-15(9) and (10). The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

*Id.* (emphasis added). The plain language of the statute does allow Mr. Hebert to combine the underinsured motorist liability coverage on his own policy with that of the separate policy covering him that was issued to his parents. The majority's analysis that this section is applicable only at the "calculation" stage and not at the "activation" stage makes no sense. How could it be possible that underinsured motorist liability coverage would be "activated" or "triggered" by one lower set of coverage limits while the amount of coverage itself would be determined by a separate set of stacked coverage limits? This is especially illogical when the statute itself says nothing about activation, triggering, or calculation as being governed by separate standards.

The statute defines how an underinsured motorist claim is determined, and where a claimant, like Mr. Hebert, is an insured under another policy, "the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimants underinsured motorist coverages as determined by combining the highest limit available under each policy." *Id.* Nothing in the structure or language of the statute indicates that this sentence, in a paragraph which starts with "[i]n any event," is anything other than a clear intent to allow interpolicy stacking. Thirty years of Court of Appeals precedent on this question is not in error. *See*, *e.g.*, *N.C. Farm Bureau, Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 51 (1997) (citing *Onley v. Nationwide Mut. Inc. Co.*, 118 N.C. App. 686 (1995) ("The

1991 amendment expressly states that a claimant is not entitled to stack UIM coverage within policies, . . . but states that a claimant is entitled to stack between policies, upholding *Onley* . . . and therefore, defendant Carrie Bost is allowed to stack the UIM coverages of Farm Bureau and Allstate for purposes of determining whether Ezzelle's vehicle was an underinsured motor vehicle as defined under G.S. § 20-279.21(b)(4).").

## III. Conclusion

Interpreting the statutory language of N.C.G.S. § 20-279.21(b)(4) to permit interpolicy stacking in this circumstance, as we held in *Lunsford*, is what the statute requires and also is consistent with the FRA's purpose "because it allows injured North Carolina insureds to access the UIM coverage they paid for in a greater number of circumstances, reducing the likelihood that the costs of the damage caused by an underinsured tortfeasor will be borne by the insured alone." *Lunsford*, 378 N.C. at 191 (first quoting *Benton*, 195 N.C. App. at 92; and then quoting *Proctor v. North Carolina Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225 (1989) ("[T]he statute's general purpose, which has not been changed, is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection.").

Mr. Hebert owned the car that was involved in the collision, which his policy insures. He also was a named insured on his parents' policy. Both policies were purchased when *Benton* was the controlling precedent on this question. The statutes and our precedents provide that Mr. Hebert may combine the coverages under both his and his parents' policies to determine the amount of underinsured motorist coverage he is entitled to. The majority's ruling to the contrary is a perversion of the intent of the General Assembly and contrary to basic principles of the rule of law. Therefore, I dissent.

Justice RIGGS joins in this dissenting opinion.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
LANIER LAW GROUP, P.A., AND LISA LANIER

No. 235PA21

Filed 22 March 2024

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 605 (2021), affirming an order granting summary judgment on 28 June 2019 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 21 February 2024.

*Goldberg Segalla LLP, by David L. Brown and Martha P. Brown, for plaintiff-appellee.*

*Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Matthew J. Millisor, for defendant-appellants.*

PER CURIAM.

Justice DIETZ did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g.*, *Batson v. Coastal Res. Comm'n*, 385 N.C. 328, 892 S.E.2d 589 (2023) (per curiam) (affirming by an equally divided vote a Court of Appeals decision leaving it as law of the case without further precedential value); *Templeton Props. LP v. Town of Boone*, 368 N.C. 82, 772 S.E.2d 239 (2015) (same); *Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999) (same).

AFFIRMED.

JOHN SLATTERY
v.
APPY CITY, LLC; TIMOTHY S. FIELDS; MELISSA CRETE;
AND DAISY MAE FOWLER

No. 218A22

Filed 22 March 2024

**Jurisdiction—personal—service of process—waiver—post-judgment motion to exempt property—general appearance**

In a complex business case, in which defendant did not appear until after the trial court had already entered its judgment, at which point she filed a motion to claim exempt property pursuant to N.C.G.S. § 1C-1603, the Business Court properly denied defendant's subsequent motion to set aside both the entries of default against her and the order of summary judgment for plaintiff—pursuant to Civil Procedure Rule 60(b)—where defendant argued that the Business Court lacked personal jurisdiction over her because she had not been served with process. By moving to claim exempt property after judgment without also raising her objections to personal jurisdiction and the sufficiency of service of process, defendant made a general appearance in the action and therefore waived those objections.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on a post -trial motion entered on 16 February 2022 by Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 19 September 2023.

*Hamilton Stephens Steele Martin, PLLC, by M. Aaron Lay, for plaintiff-appellee/cross-appellant, John Slattery.*

*Wilson Ratledge, PLLC, by Reginald B. Gillespie, Jr., for defendant-appellant/cross-appellee, Daisy Mae Barber.*

NEWBY, Chief Justice.

In this case we consider whether a person who files a motion to claim exempt property after a judgment is entered makes a general appearance in the action and thereby waives objections to the sufficiency of service of process and personal jurisdiction. When a defendant makes a general appearance in an action without contesting personal jurisdiction or the sufficiency of service of process, she waives those objections. We conclude that defendant made a general appearance in the action when she moved to claim exempt property. In so doing, she waived her objections to the sufficiency of service of process and lack of personal jurisdiction. Accordingly, the Business Court's order is affirmed.

On 11 September 2019, plaintiff commenced this action against Timothy Fields and Melissa Crete, and it was designated as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a). Plaintiff's complaint alleged that Fields and Crete induced him to invest $500,000 in a sham technology company called "Appy City." On 7 February 2020, plaintiff filed an amended complaint naming Daisy Mae Barber[1] and Pamela Bowman[2] as additional defendants, alleging they conspired with Fields and Crete to hide the invested funds by converting them into cryptocurrency.

On 10 February 2020, the Business Court issued a civil summons for defendant. Plaintiff's counsel submitted an affidavit stating he deposited the summons and amended complaint (i.e., the process) with Federal Express (FedEx) on 17 February 2020 to be delivered to defendant at "618 Mills Road" in Aberdeen, North Carolina.[3] Plaintiff provided a proof-of-delivery form from FedEx showing that the process was delivered on 19 February 2020 to a FedEx location at a Walgreens Pharmacy located at 1706 North Sandhills Boulevard in Aberdeen, North Carolina, which was near defendant's home. The proof of delivery showed the process was signed for by a "D. Barber" and that the signatory signed for the package using the initials "D.B." Defendant, however, did not file an answer or otherwise respond to the complaint.

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1. Although this case's caption refers to defendant as "Daisy Mae Fowler," she is referred to by several surnames throughout the record, including "Fowler," "Barber," "Johnson," "Linn," and "Fields." Throughout the opinion, we simply refer to her as "defendant."

2. Plaintiff voluntarily dismissed without prejudice his claims against Bowman on 20 November 2020.

3. According to an affidavit provided by defendant, her address during February of 2020 was "618 Rays Mill Road."

Based on the evidence presented by plaintiff, the Business Court concluded that plaintiff sufficiently served process on defendant. Because defendant neither answered nor otherwise responded, the Business Court entered default against her pursuant to Rule 55(a) of the North Carolina Rules of Civil Procedure on 28 July 2020.[4]

On 24 September 2020, plaintiff moved for summary judgment on all claims, including those levied against defendant. Defendants did not respond to plaintiff's motion for summary judgment, nor did they appear, personally or through counsel, at the summary judgment hearing on 17 November 2020. On 24 March 2021, the Business Court awarded plaintiff summary judgment against all defendants on all but three claims.

On 4 June 2021, to enforce the judgment, plaintiff served a notice of right to claim exemptions on defendant at a new address.[5] On 23 June 2021, defendant appeared for the first time and moved to claim exempt property pursuant to N.C.G.S. § 1C-1603. Her motion did not contest personal jurisdiction or the sufficiency of service of process.

More than three months later, on 4 October 2021, defendant moved the Business Court to set aside the entries of default and summary judgment pursuant to Rules 55 and 60 of the North Carolina Rules of Civil Procedure. She argued the Business Court's judgment was void for lack of personal jurisdiction because she had not been served with process nor appeared in the action before the entry of summary judgment. She also argued that good cause existed to set aside the judgment and that she had a meritorious defense.

On 9 February 2022, the Business Court held a hearing on defendant's motion to set aside the entries of default and summary judgment. After consideration of all the parties' filings, the Business Court entered an order denying defendant's motion on 16 February 2022. The Business Court first found "that [plaintiff] . . . failed to adequately demonstrate that [d]efendant . . . was served with the [s]ummons and [a]mended [c]omplaint in this action." Relying on the Court of Appeals' decision in *Faucette v. Dickerson*, 103 N.C. App. 620, 406 S.E.2d 602 (1991), and its progeny, however, the Business Court determined that defendant made a general appearance in the action when she moved to claim exempt property. It therefore concluded that defendant waived her objections

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4. Similarly, none of the other defendants responded, and default was entered against them as well.

5. According to defendant's affidavit, by the early spring of 2021, defendant's residence was 260 Stephanie Street in Southern Pines, North Carolina.

to personal jurisdiction and the sufficiency of service of process. To the extent that defendant relied on the insufficiency of service of process for her Rule 60(b)(4) and Rule 60(b)(6) arguments, the Business Court denied defendant's motion. The Business Court then, in its discretion, declined to "reach the substance" of any of defendant's remaining Rule 60(b) arguments. Defendant appealed directly to this Court. N.C.G.S. § 7A-27(a)(2) (2021). Plaintiff filed a notice of cross-appeal.

The question before us is whether making a general appearance after the entry of a judgment is a general appearance in the underlying action that waives objections to personal jurisdiction and the sufficiency of service of process. This question presents a matter of law, which we review de novo. *Da Silva v. WakeMed*, 375 N.C. 1, 5, 846 S.E.2d 634, 638 (2020). Regarding the Business Court's denial of defendant's Rule 60(b) motions, we review for abuse of discretion.[6] *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). An error of law constitutes an abuse of discretion. *Da Silva*, 375 N.C. at 5 n.2, 846 S.E.2d at 638 n.2.

Rule 60(b)(4) of the North Carolina Rules of Civil Procedure permits a court to set aside a judgment upon a party's motion if the judgment is void. N.C.G.S. § 1A-1, Rule 60(b)(4) (2021) ("On motion and upon such terms as are just, the court *may* relieve a party . . . from a final judgment . . . [if] [t]he judgment is void . . . .") (emphasis added)). To render a valid judgment, a court must have jurisdiction over the subject matter of the case (subject matter jurisdiction) and jurisdiction over the parties to the case (personal jurisdiction).[7] N.C.G.S. § 1-75.3(b) (2021).

Subject matter jurisdiction is the "power to pass on the merits of [a] case." *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983). Without it, a court's actions are absolutely void. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (characterizing subject matter jurisdiction as "the indispensable foundation upon which valid judicial decisions rest"). Subject matter jurisdiction is conferred upon courts by law and operates as a structural limitation on the power of courts. *See* N.C. Const. art. IV, §§ 1, 12. We have consequently held that "[t]he existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *In re K.J.L.*, 363 N.C. 343, 345–46, 677 S.E.2d 835, 837 (2009) (internal quotation marks omitted) (quoting *In re T.R.P.*,

6. Although defendant's briefs mention Rule 55(d) in passing, her arguments focus exclusively on Rule 60(b). As such, we conduct our analysis under that rule.

7. Defendant does not contend the Business Court lacked subject matter jurisdiction. Instead, her appeal turns on the sufficiency of service of process, which implicates personal jurisdiction. *See In re K.J.L.*, 363 N.C. 343, 346–47, 677 S.E.2d 835, 837–38 (2009).

360 N.C. at 595, 636 S.E.2d at 793). For this reason, "a court's lack of subject matter jurisdiction is not waivable and can be raised at *any* time." *Id.* at 346, 677 S.E.2d at 837 (emphasis added). And "[*w*]*henever* it appears . . . that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." N.C.G.S. § 1A-1, Rule 12(h)(3) (2021) (emphases added)).

Conversely, personal jurisdiction is "a court's authority to require an individual to appear in the forum and defend an action brought against the individual in that forum." *In re F.S.T.Y.*, 374 N.C. 532, 534, 843 S.E.2d 160, 162 (2020). Generally, a court asserts personal jurisdiction over a defendant through "service of process"—that is, the defendant being served with the summons and complaint. *In re K.J.L.*, 363 N.C. at 346–47, 677 S.E.2d at 837–38; s*ee also* N.C.G.S. § 1-75.6 (2021) ("A court of this State . . . may exercise personal jurisdiction over a defendant by service of process in accordance with . . . the Rules of Civil Procedure."). A court may also exercise personal jurisdiction through a defendant's general (or "voluntary") appearance or consent. *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996). Our General Statutes specifically permit a court to assert personal jurisdiction over a defendant "[w]ho makes a general appearance in an action" even "without serving a summons upon [her]." N.C.G.S. § 1-75.7(1) (2021).

A defendant makes a general appearance when she appears before a court and submits to its adjudicatory power without objecting to its jurisdiction over her. *See Lynch v. Lynch*, 302 N.C. 189, 197, 274 S.E.2d 212, 219 (1981). Stated differently, a general appearance is an appearance whereby the defendant "invokes the judgment of the court in any manner on any question other than that of [personal] jurisdiction," *id.* (quoting *In re Blalock*, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951)), and "requests [the court's] affirmative intervention [o]n [her] behalf," *Simms v. Mason's Stores, Inc. (NC-1)*, 285 N.C. 145, 157, 203 S.E.2d 769, 777 (1974), *superseded on other grounds by statute*, An Act to Amend G.S. 1-75.7 and G.S. 1A-1, Rule 12, to Provide That Obtaining an Extension of Time Within Which to Answer or Otherwise Plead Shall Not Be Considered a General Appearance and Shall Not Constitute a Waiver of Any Defense Set Forth in Rule 12(b), ch. 76, 1975 N.C. Sess. Laws 48, 48–49 (codified as amended at N.C.G.S. § 1A-1, Rule 12(b)); *see also Faucette*, 103 N.C. App. at 623–24, 406 S.E.2d at 605 ("The concept of a general appearance should be given a liberal interpretation. Virtually any action other than a motion to dismiss for lack of jurisdiction constitutes a general appearance in a court having subject matter jurisdiction." (internal punctuation and alterations omitted) (citations omitted)).

Unlike subject matter jurisdiction, personal jurisdiction is a personal protection for a defendant. *In re K.J.L.*, 363 N.C. at 346–47, 677 S.E.2d at 837–38. Therefore, "[d]eficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner." *Id.* at 346, 677 S.E.2d at 837. Specifically, Rule 12 explains that "[a] defense of lack of jurisdiction over the person . . . or insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof . . . ." N.C.G.S. § 1A-1, Rule 12(h)(1). In summary, to timely assert a claim of insufficient service of process or lack of personal jurisdiction under the North Carolina Rules of Civil Procedure, a defendant must assert those defenses at her first filing with the court, or she waives them. *See Simms*, 285 N.C. at 153, 203 S.E.2d at 775 (construing Rules 12(b)(2)–(5), (g), and (h)(1) together); *Lynch*, 302 N.C. at 197–98, 274 S.E.2d at 219.

Thus, if a defendant makes a general appearance without objecting to personal jurisdiction or the sufficiency of service of process, those defenses are waived, and the court may properly exercise personal jurisdiction. *Simms*, 285 N.C. at 157, 203 S.E.2d at 777 (harmonizing Rule 12 and N.C.G.S. § 1-75.7); *Lynch*, 302 N.C. at 197, 274 S.E.2d at 219 ("[A]ny act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance."); *see also In re A.L.I.*, 380 N.C. 697, 701, 869 S.E.2d 704, 707 (2022) ("[P]articipat[ion] in . . . proceedings without raising an objection to the trial court exercising personal jurisdiction . . . waives any argument of insufficient service of process.").

In this way, lack of personal jurisdiction renders a court's actions voidable rather than void, and it is incumbent upon the defendant to preserve her objections by raising them at the first available opportunity. *See Voidable*, *Black's Law Dictionary* (11th ed. 2019) (defining "voidable" as "[v]alid until annulled" and "capable of being affirmed or rejected at the option of one of the parties"). Thus, if a defendant moves to invalidate the court's judgment for lack of personal jurisdiction at her first appearance in the action, the issue is preserved for review. And if the defendant's challenge prevails, the trial court may, in its discretion, set aside the void judgment. N.C.G.S. § 1A-1, Rule 60(b)(4).

In this case, however, we are confronted with a defendant whose first appearance was a motion to claim exempt property wherein she did not object to personal jurisdiction or the sufficiency of service of process. We must determine whether that appearance waived her

objections to personal jurisdiction and the sufficiency of service of process although it occurred *after* entry of the judgment. For our review, we assume, without deciding, that the Business Court correctly determined that plaintiff did not sufficiently serve process on defendant. Accordingly, we assume that, at the time it entered the judgment, the Business Court lacked personal jurisdiction over defendant and that, therefore, the defense was available to her.

The precise question we must answer is, by filing a motion to claim exempt property, did defendant make a general appearance in the underlying action? In other words, if defendant made a general appearance during the proceeding to enforce the judgment, is the general appearance "in [the] action"? N.C.G.S. § 1-75.7(1). Plaintiff argues that defendant made a general appearance in the action when she became aware of the judgment and appeared for the first time by moving to claim exempt property pursuant to N.C.G.S. § 1C-1603. We agree. By asking the Business Court to designate certain property as exempt from the judgment, defendant "invoke[d] the jurisdiction of the court and request[ed] its affirmative intervention [on her] behalf," submitting herself to the Business Court's adjudicatory power. *Simms*, 285 N.C. at 157, 203 S.E.2d at 777. She did not simultaneously object, however, to the Business Court's personal jurisdiction. She therefore made a general appearance. *See Lynch*, 302 N.C. at 197, 274 S.E.2d at 219; *see also Faucette*, 103 N.C. App. at 624, 406 S.E.2d at 605 (concluding a motion to claim exempt property was a general appearance). Moreover, defendant's general appearance was "in the action" because the judgment collection process is simply a continuation of the underlying action. *See* N.C.G.S. §§ 1-302 to -324.7, -352 (2021) (governing execution of judgments). Therefore, defendant made a general appearance in the action.

Our decision that defendant made a general appearance in the underlying action is informed by the Court of Appeals' thirty-three-year-old decision in *Faucette v. Dickerson*, which presented facts similar to the current case.[8] There the Court of Appeals held a general appearance made after the entry of a judgment waives objections to personal jurisdiction and the sufficiency of service of process such that the judgment may be enforced. *Faucette*, 103 N.C. App. at 624, 406 S.E.2d at 605. We agree.

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8. Notably, the Court of Appeals panel in *Faucette* included two future associate justices of this Court: Robert Orr and James Wynn. *Faucette*, 103 N.C. App. at 622, 624, 406 S.E.2d at 604–05.

In *Faucette*, the trial court entered default judgment against the defendant and issued her a notice of right to claim exemptions. 103 N.C. App. at 621, 406 S.E.2d at 603. The defendant submitted a motion to claim exempt property. *Id.* Sometime thereafter, she filed a motion to set aside the default judgment for insufficient service of process, which the trial court dismissed. *Id.* at 621, 623, 406 S.E.2d at 603–04. The Court of Appeals unanimously affirmed, reasoning that when "the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, [s]he has made a general appearance and has submitted [her]self to the jurisdiction of the court whether [s]he intended to or not." *Id.* at 624, 406 S.E.2d at 605 (quoting *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978)). Relying on N.C.G.S. § 1-75.7, the Court of Appeals held that the defendant's motion to claim exempt property was a general appearance that waived her objections to personal jurisdiction and the sufficiency of service of process. *Id.* at 623–24, 406 S.E.2d at 605 (stating the defendant's "motion to claim exempt property . . . was inconsistent with her later motion for relief from judgment on the grounds of the invalidity of service of process").[9]

We adopt *Faucette*'s reasoning and hold that when a defendant makes a general appearance in an action after the entry of a judgment, she waives any objections to the lack of personal jurisdiction or the sufficiency of service of process if she does not raise those objections at that time. Under such circumstances, the judgment may be enforced notwithstanding subsequent attempts to invalidate the judgment for lack of personal jurisdiction.[10] When a defendant's first appearance is

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9. The *Faucette* decision has been relied upon by subsequent Court of Appeals opinions. *See MedStaff Carolinas, LLC v. Northwood Nursing Ctr., Inc.*, No. 04-1281, slip op. at 7 (N.C. Ct. App. Aug. 16, 2008) (unpublished) (observing that the defendant "appropriate[ly]" abandoned his personal jurisdiction defense when he had moved to claim exempt property before moving to vacate the judgment because *Faucette* had "conclusively answered the issue [of whether the trial court had personal jurisdiction] against [him]"); *State v. Williams*, No. 13-47, slip op. at 7–8 (N.C. Ct. App. Oct. 15, 2013) (unpublished) ("[A]lthough the filing of a proper complaint is required to vest the trial court with subject matter jurisdiction under the Rules of Civil Procedure, the defenses of insufficiency of process and insufficiency of service of process may be waived, and, therefore, do not impact subject matter jurisdiction." (first citing *Estate of Livesay v. Livesay*, 219 N.C. App. 183, 185–86, 723 S.E.2d 772, 774 (2019); then citing *City of Charlotte v. Noles*, 143 N.C. App. 181, 183, 544 S.E.2d 585, 586 (2001); and then citing *Faucette*, 103 N.C. App. at 623, 406 S.E.2d at 605)).

10. We pause to observe that, although the dissent cites several decisions of this Court and the Supreme Court of the United States to arrive at its conclusion that a post-judgment general appearance does not validate a judgment rendered when the court was without personal jurisdiction, *none* of the cases cited by the dissent confronted the

to move to claim exempt property, it is fair and not unduly burdensome to require a defendant to raise any objections to the judgment that she may have at that time.

Here, as we have said, defendant made a general appearance in the action when she moved to claim exempt property. She did not, however, object to personal jurisdiction or the sufficiency of service of process until over three months later. Because defendant did not raise her objections when she moved to claim exempt property, she waived them, and the Business Court's judgment may be enforced.

Defendant relies on a contrary line of Court of Appeals cases, specifically *Dowd v. Johnson*, 235 N.C. App. 6, 12, 760 S.E.2d 79, 84 (2014). She maintains that a general appearance made after the entry of a judgment by a court that lacked personal jurisdiction cannot retroactively

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procedural posture presented in this case. Rather, in the cases cited by the dissent, this Court (or the Supreme Court of the United States) faced either special appearances before the judgment, *Vick v. Flournoy*, 147 N.C. 209, 212, 60 S.E. 978, 979 (1908); collateral attacks on the validity of a judgment, *see Pennoyer v. Neff*, 95 U.S. 714, 719–20 (1877), *overruled on other grounds by Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569 (1977); *Card v. Finch*, 142 N.C. 140, 140–43, 54 S.E. 1009, 1009–10 (1906); *Stafford v. Gallops*, 123 N.C. 19, 20–21, 31 S.E. 265, 266 (1898); *Doyle v. Brown*, 72 N.C. 393, 393 (1875); *Burke v. Elliott*, 26 N.C. (4 Ired.) 355, 355–58 (1844); or cases where the defendant's *very first action* was to attack the validity of the judgment, *see Harris v. Hardeman*, 55 U.S. (14 How.) 334, 335–36 (1852); *Guthrie v. Ray*, 293 N.C. 67, 68, 235 S.E.2d 146, 147 (1977); *N. State Fin. Co. v. Leonard*, 263 N.C. 167, 168, 139 S.E.2d 356, 357 (1964); *Harrington v. Rice*, 245 N.C. 640, 641, 97 S.E.2d 239, 240 (1957); *Bd. of Comm'rs v. Bumpass*, 233 N.C. 190, 192, 63 S.E.2d 144, 145–46 (1951); *City of Monroe v. Niven*, 221 N.C. 362, 363, 20 S.E.2d 311, 311–12 (1942); *Guerin v. Guerin*, 208 N.C. 457, 458–59, 181 S.E. 274, 275 (1935); *Harrell v. Welstead*, 206 N.C. 817, 818, 175 S.E 283, 283 (1934); *Simmons v. Defiance Box Co.*, 148 N.C. 344, 344–45, 62 S.E. 435, 435 (1908); *Harrison v. Harrison*, 106 N.C. 282, 283, 11 S.E. 356, 357 (1890); *Stancill v. Gay*, 92 N.C. 455, 455–57, 463 (1885); *Armstrong v. Harshaw*, 12 N.C. (1 Dev.) 187, 187–88 (1827); *Macher v. Macher*, 188 N.C. App. 537, 539, 656 S.E.2d 282, 283 (2008), *aff'd*, 362 N.C. 505, 666 S.E.2d 750 (2008) (per curiam); *cf. In re K.J.L.*, 363 N.C. at 344–45, 677 S.E.2d at 836–37 (challenging subject matter jurisdiction in appeal from judgment). In the circumstances presented in these prior cases, a judgment obtained without service of process may be rightfully declared void, and as a result, the affected party can assert that the judgment has no force and effect. This case, by contrast, did not involve a collateral attack, and defendant's first action was not to attack the validity of the judgment. Rather, defendant first appeared in the same proceeding to claim exempt property, availing herself of our state's laws to resist enforcement of the judgment. As such, the defect to the judgment was waived.

Moreover, we note that nearly all of the cases cited by the dissent on this point predated the adoption of our modern North Carolina Rules of Civil Procedure, *see* An Act to Amend the Laws Relating to Civil Procedure, ch. 954, 1967 N.C. Sess. Laws 1274–1354 (codified at N.C.G.S. §§ 1-75.1 to -75.12; 1A-1, Rules 1–44, 45–65, 68–68.1, 70, 84), which we have explained recognizes the nuances of void versus voidable judgments.

render the judgment enforceable. Her argument is unavailing for several reasons.

At the outset, her reliance on *Dowd* is misplaced. In *Dowd*, the Court of Appeals stated that to waive objections to personal jurisdiction and the sufficiency of service of process, a general appearance must occur before the entry of a judgment. *Id.* For this proposition, the court in *Dowd* relied on an earlier decision of the Court of Appeals: *Barnes v. Wells*, 165 N.C. App. 575, 579–80, 599 S.E.2d 585, 589–90 (2004) (finding that the general-appearance cases cited by the petitioner were "inapplicable because [the] respondent never made a general appearance before entry of the final order"). Although decided after *Faucette*, both *Barnes* and *Dowd* failed to account for *Faucette*'s explicit holding that a general appearance after entry of a judgment waives objections to personal jurisdiction and the sufficiency of service of process. Therefore, the *Barnes-Dowd* line of cases misapplied the Court of Appeals' own precedent in contravention of *In re Appeal from Civil Penalty Assessed for Violations of the Sedimentary Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Insofar as *Barnes* and *Dowd* suggest that a general appearance must be made before the entry of the judgment to waive objections to personal jurisdiction and the sufficiency of service of process, they are hereby expressly overruled.

Additionally, our decision more appropriately adheres to the modern distinction between subject matter jurisdiction and personal jurisdiction. As we have explained, when a court lacks subject matter jurisdiction, its actions are void, and objections thereto cannot be waived. When the court lacks personal jurisdiction, however, its actions are merely voidable. The defendant must therefore attack the action's validity at the first available opportunity; otherwise, the objection is waived. *Compare In re K.J.L.*, 363 N.C. at 345–46, 677 S.E.2d at 837 ("The existence of subject matter jurisdiction is a matter of law[,] and . . . . a court's lack of subject matter jurisdiction is not waivable and can be raised at *any* time." (emphasis added) (citations omitted)), *with id.* at 346–47, 677 S.E.2d at 837–38 ("Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. *Generally, such deficiencies can be cured.*" (emphasis added) (citation omitted)). Therefore, the power to contest the personal jurisdiction of the court and the sufficiency of service of process lies with the defendant, and

the defendant fails to exercise that power at her own peril. It would be incongruous for us to allow a defendant to waive those objections before the judgment but not afterward.[11] Therefore, whether pre- or post-judgment, a defendant must assert defenses concerning personal jurisdiction or the sufficiency of service of process at the first available opportunity, or they are waived.[12]

Moreover, our holding aligns with the practical considerations of post-judgment procedure. If we were to adopt a contrary rule, a defendant could appear before a court without contesting personal jurisdiction or the sufficiency of service of process and go through months—or even years—of post-judgment proceedings. All the while, the defendant would hold a trump card in her back pocket: if she received an unfavorable ruling, she could undo years of litigation by moving to vacate the judgment as void. A final judgment cannot rest upon such a flimsy foundation.

Because defendant moved to claim exempt property after judgment without raising her objection to the sufficiency of service of process, she made a general appearance in the action and waived her objections to the sufficiency of service of process and personal jurisdiction. We also

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11. *Cf. Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir. 1996) ("A defense of lack of jurisdiction is forfeited if not asserted in a timely motion to dismiss under Rule 12 or a responsive pleading or amendment of such . . . [, and a] motion to vacate under Rule 60(b) for lack of jurisdiction is essentially equivalent to a Rule 12(b)(2) motion to dismiss for lack of jurisdiction.").

12. Consistent with our analysis, several Federal Circuit Courts of Appeals interpreting Rule 60(b) of the Federal Rules of Civil Procedure have held that a defendant waives objections to the validity of the judgment based on personal jurisdiction or the sufficiency of service of process if she fails to raise them at her first available opportunity after the judgment. *See*, *e.g.*, *Swaim*, 73 F.3d at 716–18; *In re Worldwide Web Sys., Inc.*, 328 F.2d 1291, 1298–1302 (11th Cir. 2003); *cf. State St. Bank & Tr. Co. v. Inversiones Errazuiz Limitada*, 374 F.3d 158, 178–79 (2d Cir. 2004); *Feldman Inv. Co. v. Conn. Gen. Life Ins. Co.*, 78 F.2d 838, 841 (10th Cir. 1935). As we have previously observed, "[t]he North Carolina Rules [of Civil Procedure] are modeled after the [F]ederal [R]ules [of Civil Procedure]," and "[i]n most instances, they are verbatim copies with the same enumerations." *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970). Indeed, except for a few minor differences in phraseology, Rule 60(b) of the North Carolina Rules of Civil Procedure is identical to Rule 60(b) of the Federal Rules of Civil Procedure. *Compare* N.C.G.S. § 1A-1, Rule 60(b), *with* Fed. R. Civ. P. 60(b). Accordingly, although we emphasize that federal cases construing the Federal Rules of Civil Procedure are not binding on this Court, *see Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015) ("As the court of last resort in this state, we answer with finality 'issues concerning the proper construction and application of North Carolina laws . . . .' " (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989)), we consider the aforementioned cases as "pertinent for guidance and enlightenment as we develop the philosophy of" our Rules of Civil Procedure, *Johnson v. Johnson*, 14 N.C. App. 40, 42, 187 S.E.2d 420, 421 (1972).

hold that with respect to the Business Court's decision to deny defendant's Rule 60(b)(6) motion, it did not abuse its discretion. *See State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (stating that a trial court abuses its discretion if its decision is manifestly unsupported by reason and could not have been the result of a reasoned decision). The decision of the Business Court is affirmed.

AFFIRMED.

Justice RIGGS dissenting.

Two centuries ago, this Court recognized "a principle never to be lost sight of, that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the [state] Constitution. . . . A judgment entered up otherwise would be a mere nullity." *Hamilton v. Adams*, 6 N.C. (1 Mur.) 161, 162 (1812). The same is true under our federal constitution. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that a judgment rendered against a person by a court without personal jurisdiction is void as violating federal due process). In vindication of this right, we have previously held that "[a] default judgment rendered against a defendant in an action where he has never been served with process returnable to the proper county, nor appeared in person or by attorney, *is not simply voidable, but void.*" *Harrell v. Welstead*, 206 N.C. 817, 819 (1934) (emphasis added). This is irrespective of any post-judgment appearance, as "[e]very court, *before it can enter a lawful judgment*, must have jurisdiction, (1) of the subject-matter, *and (2) of the person*." *Stafford v. Gallops*, 123 N.C. 19, 22 (1898) (emphasis added); *see also Harrell*, 206 N.C. at 820 ("The one fatal circumstance [to the validity of the judgment], which is not to be overlooked, is that no appearance of any kind was made by the corporate defendant *before judgment* cutting off its right to be heard on the merits."). Because the majority's holding is contrary to these precedents and erodes the due process rights enshrined in our state and federal constitutions, I respectfully dissent.

## I. Personal Jurisdiction as Fundamental Constitutional Protection

My objection to the majority's holding in this case stems in no small part from a solemn respect for and desire to fully vindicate the rights enshrined in our state and federal constitutions. A discussion of personal jurisdiction's constitutional character, missing from the majority, is warranted.

The requirement of personal jurisdiction is not merely a procedural safeguard—just as with subject-matter jurisdiction, the necessity of personal jurisdiction is "a basic, fundamental principle" of constitutional provenance. *Bryson v. McCoy*, 194 N.C. 91, 93 (1927). Early decisions of this Court recognize that "[t]he Constitution and laws of the country guarantee the principle that no freeman shall be divested of a right by the judgment of a court, unless he shall have been made party to the proceedings in which it shall have been obtained." *Armstrong v. Harshaw*, 12 N.C. (1 Dev.) 187, 188 (1827). The United States Supreme Court has likewise remarked that:

> it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfil.

*Harris v. Hardeman*, 55 U.S. 334, 339 (1852).

Thus, entry of a judgment without personal jurisdiction over an affected party contravenes "the Bill of Rights, as well as . . . every conceivable principle of natural justice." *Harrison v. Harrison*, 106 N.C. 282, 283 (1890). Both subject-matter and personal jurisdiction have long been understood to be essential to the validity of a judgment. *Stafford*, 123 N.C. at 22. And our state and federal constitutions thus demand that a trial court have both subject-matter jurisdiction over the action *and* personal jurisdiction over the parties *before* judgment is entered. *Id.*; *Harrell*, 206 N.C. at 820; *see also Burke v. Elliott*, 26 N.C. (1 Ired.) 355, 358 (1844) ("[T]he court is forbidden to enter judgment until notice is served."); *Vick v. Flournoy*, 147 N.C. 209, 215 (1908) ("There is no doubt of the correctness of the position . . . that a valid judgment strictly *in personam cannot be had* unless there *has been* a voluntary appearance by defendant or there *has been* service of process upon him within the jurisdiction of the court . . . ." (emphases added)). In short, as a predicate constitutional concern, "[j]urisdiction of the party, obtained by the court in some way allowed by law, is essential to *enable* the court to give a valid judgment against him." *Stancill v. Gay*, 92 N.C. 462, 463 (1885) (emphasis added). No statute can diminish this constitutional guaranty. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787).

The majority uniformly holds that entry of a judgment without personal jurisdiction renders the judgment voidable, not void. This is plainly contrary to the longstanding constitutional principles outlined

above and the overwhelming weight of authority enforcing them. *See Harris*, 55 U.S. at 339 ("[A] judgment depending upon proceedings *in personam* can have no force as to one on whom there has been no service of process . . . . That with respect to such a person, such a judgment is absolutely void . . . ."); *Doyle v. Brown*, 72 N.C. 393, 395 (1875) ("Where a defendant has never been served with process, nor appeared in person, or by attorney, a judgment against him is not simply voidable, but void . . . ."); *Card v. Finch*, 142 N.C. 140, 144 (1906) ("It is axiomatic, at least in American jurisprudence, that a judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the Court.").

Nor can I agree that, in all cases, the judgment debtor must assert a personal jurisdiction argument at the earliest opportunity. *See Doyle*, 72 N.C. at 395 ("Where a defendant has never been served with process, nor appeared in person, or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated *whenever* and wherever offered . . . ." (emphasis added)); *Harrison*, 106 N.C. at 285 ("Something more than bare notice is necessary to estop one from setting aside a void proceeding. Neither can a delay in making this motion preclude them.").

**II. Voidable Procedural Irregularities vs. Void Judgments**

To be sure, this Court has held that when the face of the record suggests that service is valid but no such service actually occurred, the judgment may be enforced until challenged and vacated in the underlying action. *Doyle*, 72 N.C. at 395. And the majority is certainly correct to note that *some* defects in service are curable. *See In re K.J.L.*, 363 N.C. 343, 346 (2009) ("Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. *Generally*, such deficiencies can be cured." (emphasis added) (citation omitted)). But, contrary to the holding of the majority in this case, we have previously distinguished void and voidable judgments in the context of service of process by explaining that "[d]efective service has given rise to many irregularities in the course of the courts, but it will be found that they do not render the final judgment void, but only irregular, *unless the defect is such as to amount to no service*." *Stafford*, 123 N.C. at 22–23 (emphasis added); *see also Guerin v. Guerin*, 208 N.C. 457, 458 (1935) ("Since the defendant, the movant, has never been given notice of any action pending against her in Alamance County, she has never been served with process, and for that reason the judgment entered against her was void and her motion to set the same aside was properly allowed."). *Defects*

in process or service of process may render a judgment voidable, but a lack of service of process renders it void. *Stafford*, 123 N.C. at 22–23.

Here, the trial court determined that no service was ever accomplished in this case *prior* to judgment—a ruling the majority sees fit to assume without disturbing, and with which I agree. The lack of personal jurisdiction pre-judgment is fatal to the judgment's validity, as "[n]otice and an opportunity to be heard are *prerequisites* of jurisdiction, and jurisdiction is a *prerequisite* of a valid judgment." *Bd. of Comm'rs of Roxboro v. Bumpass*, 233 N.C. 190, 195 (1951) (citations omitted) (emphasis added). In such circumstances, a judgment is void and not merely voidable. *See*, *e.g.*, *Simmons v. Defiance Box Co.*, 148 N.C. 344, 345 (1908) (noting a judgment procured through fraud on a party is voidable, but a facially regular judgment entered when "in fact there was no service of summons nor appearance by the defendant . . . is void").

The proposition that a lack of service in fact and related absence of personal jurisdiction renders a judgment void has been reaffirmed many times by our Court. For example, in *City of Monroe v. Niven*, the plaintiff obtained a judgment and, while a summons was returned showing service on all defendants, only one defendant had been served. 221 N.C. 362, 363 (1942). The lower court held that this lack of service rendered the judgment voidable rather than void and denied the unserved defendants' motion to vacate. *Id.* at 364. We reversed, holding that the judgment was "void in fact" for lack of personal jurisdiction and that the defendant's post-judgment appearance did not serve to validate the void judgment, as "[a] nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exception." *Id.* at 364–65 (quoting *Harrell*, 206 N.C. at 819).

This position is further reinforced in cases dealing directly with judgments entered following default. *See Simmons*, 148 N.C. at 345–46 ("Where the summons was not served on defendant and he did not enter an appearance nor have any knowledge of the action until *after* default judgment, the judgment is void . . . ." (quoting *Doyle*, 72 N.C. at 393 (emphasis added)). Decades after *Doyle*, we explicitly held in *Harrell* that such judgments entered without service are "not simply voidable, but void, and will be set aside on motion." 206 N.C. at 819. Subsequently, in *North State Finance Co. v. Leonard*, we held a default judgment—entered against a defendant the trial court later found was never served—was likewise entirely void as a nullity. 263 N.C. 167, 170–71 (1964). Even more plainly, we stated in *Harrington v. Rice* that "[i]f in fact the summons and complaint were not served on the . . . defendant

. . . , the default judgment . . . is void." 245 N.C. 640, 642 (1957). This legal maxim has survived the adoption of and remains in force under our Rules of Civil Procedure. *See*, *e.g.*, *Guthrie v. Ray*, 293 N.C. 67, 71 (1977) ("If, in fact, the summons and complaint were not served upon defendant as prescribed by G.S. 1A-1, Rule 4(j)(1)(a), the default judgment . . . and the judgment . . . assessing damages against him are void and must be set aside."). In short, I would adhere to precedents establishing that "[a] judgment against a defendant is void where the court *was* without personal jurisdiction." *Macher v. Macher*, 188 N.C. App. 537, 539 (emphasis added), *aff'd per curiam*, 362 N.C. 505 (2008).

## III. General Appearance

Even if a judgment entered without personal jurisdiction is merely voidable, and thus waivable by a post-judgment general appearance, I would not hold that Ms. Barber's motion to claim exemptions was such an appearance, because the mere filing of her motion did not "invoke[ ] the *judgment* of the court in any manner on any question other than that of . . . jurisdiction." *Lynch v. Lynch*, 302 N.C. 189, 197 (1981) (emphasis added) (quoting *In re Blalock*, 233 N.C. 493, 504 (1951).

The filing of a motion to claim exemptions does not, in and of itself, call upon the trial court to exercise its judgment or adjudicate a dispute in any meaningful sense; unless opposed by objection and motion from the judgment creditor, "the clerk *must* enter an order designating the property allowed by law and scheduled by the judgment debtor as exempt property." N.C.G.S. § 1C-1603(e)(6) (2021) (emphasis added). It is only when "the judgment creditor objects to the schedule filed or claimed by the judgment debtor [that] the clerk must place the motion for hearing by the district court judge, without a jury, at the next civil session." N.C.G.S. § 1C-1603(e)(7) (2021). The trial court therefore does not exercise any judgment unless and until it holds a hearing to resolve the judgment creditor's objections. Here, while Mr. Slattery did file an objection triggering such a hearing, Ms. Barber filed her motion to set aside the default and judgment prior to said hearing, and thus raised her personal jurisdiction objection prior to appearing in any adjudicatory proceeding.

## IV. Remaining Arguments

In its remaining arguments, the majority reevaluates our state and federal constitutions' precondition of personal jurisdiction under a "modern" lens. I am not convinced by that approach. Many of our sister courts have not adopted the view espoused by the majority. *See*, *e.g.*, *McCulley v. Brooks & Co. General Contractors*, 816 S.E.2d 270, 273–74 n.4 (Va. 2018) (collecting cases holding a post-judgment appearance

cannot retroactively validate a judgment void for want of personal jurisdiction when entered). This Court's own "modern" jurisprudence confirms that judgments entered without personal jurisdiction are void and not merely voidable. *See Hazelwood v. Bailey*, 339 N.C. 578, 586 (1995) ("[W]e believe that this Court today would reach the same result[ ] as th[at] reached by this Court in *Harrell* in 1934 . . . .").

As for the practical considerations raised by the majority concerning finality and gamesmanship, other jurisdictions held decades ago that a judgment void for lack of personal jurisdiction cannot be saved by a post-judgment appearance, and those states do not appear to have suffered any of the ill-effects theorized by the majority. *Doyle v. Wilcockson*, 169 N.W. 241, 244 (Iowa 1918); *Gallagher v. Nat'l Nonpartisan League*, 205 N.W. 674, 675–76 (N.D. 1925); *Perry v. Edmonds*, 84 P.2d 711, 713 (Nev. 1938); *Irving Tr. Co. v. Seltzer*, 40 N.Y.S.2d 451, 456 (1943); *Jones v. Colescott*, 307 P.2d 464, 465 (Colo. 1957); *Bulik v. Arrow Realty, Inc. of Racine*, 434 N.W.2d 853, 855 (Wis. Ct. App. 1988). And regardless of the majority's holding today, civil judgments void for lack of personal jurisdiction generally remain subject to challenge years after entry under Rule 60(b). *See, e.g.*, *Freeman v. Freeman*, 155 N.C. App. 603, 608 (2002) (holding a divorce judgment was void and must be set aside under Rule 60(b) seventeen years after entry when the trial court's findings established the defendant had never been served despite her purported signature on an acceptance of service), *disc. rev. denied*, 357 N.C. 250 (2003).

The majority's invocation of a hypothetical bad actor is similarly unpersuasive. It is unclear what favorable ruling a judgment debtor might seek to receive while knowingly allowing a void civil judgment—in this case, in the enormous sum of $2,000,000—to hang over their affairs like a judicial Sword of Damocles.[1] The same risk of gamesmanship already exists where subject matter jurisdiction is concerned. Any attorney who purposefully counsels their client and knowingly assists in such a scheme would run the risk of violating our Rules of Professional Conduct in their obligations to the client, the court, and opposing parties. N.C. R. Pro. Conduct 3.1 ("Meritorious claims and contentions"), 3.3 ("Candor toward the tribunal"), 4.1 ("Truthfulness in statements to others"), and 8.4 ("Misconduct"). I do not believe the protections of our state and federal constitutions are subject to erosion because of remote hypotheticals involving imagined parties purposefully proceeding in bad faith.

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1. The negative impacts of an outstanding civil judgment extend beyond the legal realm. In addition to subjecting future real and personal property to ongoing claims in execution of the judgment, N.C.G.S. § 1-313, a civil judgment—viewable by anyone as a public record—may affect a person's ability to afford or obtain insurance, credit, or rental housing.

## V. Conclusion

" 'Due process of law' requires that service of process shall always be made." *Bernhardt v. Brown*, 118 N.C. 700, 705 (1896). Here, the judgment was entered after default and without personal jurisdiction over the defendant, and thus was null and void on entry. *Stafford*, 123 N.C. at 22; *Guthrie*, 293 N.C. at 71; *Roxboro*, 233 N.C. at 195. Notwithstanding the constitutional command that no judgment is validly entered under such circumstances, the majority nonetheless holds that lack of personal jurisdiction renders a judgment merely voidable, and Ms. Barber retroactively supplied personal jurisdiction through a general appearance. At a minimum, our precedents and the facts of this case do not demand such a holding and, as detailed above, I believe they—along with our State and federal constitutions—compel the opposite result. As other courts have observed, "ruling otherwise . . . 'defies logic and common sense.' " *McCulley*, 816 S.E.2d at 274 (quoting *Abarca v. Henry L. Hanson, Inc.*, 738 P.2d 519, 520 (N.M. Ct. App. 1987)). Or, put more colorfully, "[j]ust as medicine may cure a sick man of a fatal disease but not revive him after his burial, a litigant can 'cure' the absence of personal jurisdiction by making a general appearance prior to final judgment but cannot resurrect a void judgment thereafter." *McCulley*, 816 S.E.2d at 273. I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

**SOC'Y FOR THE HIST. PRES. OF THE TWENTY-SIXTH N.C. TROOPS, INC. v. CITY OF ASHEVILLE**

[385 N.C. 744 (2024)]

THE SOCIETY FOR THE HISTORICAL PRESERVATION OF THE TWENTY-SIXTH NORTH CAROLINA TROOPS, INC.
v.
CITY OF ASHEVILLE, NORTH CAROLINA, AND BUNCOMBE COUNTY, NORTH CAROLINA

No. 123PA22

Filed 22 March 2024

**Jurisdiction—standing—challenge to monument removal—breach of contract alleged—legal injury**

In a dispute over a city's decision to remove a monument from public property, although the Court of Appeals properly upheld the trial court's order dismissing plaintiff historical society's claims (for breach of contract, a temporary restraining order, a preliminary injunction, and a declaratory judgment), its decision was modified and affirmed. The Court of Appeals erroneously concluded that plaintiff lacked standing under Rule 12(b)(1) to bring its breach of contract claim—which was a different basis for dismissal than that found by the trial court (failure to state a claim under Rule 12(b)(6)) —where plaintiff sufficiently alleged a legal injury to give rise to standing for that claim by alleging that a valid contract existed and that the contract had been breached. The Court of Appeals properly upheld the dismissal of plaintiff's remaining claims for lack of standing, and plaintiff abandoned any argument regarding the merits of its breach of contract claim.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 282 N.C. App. 700 (2022), affirming an order entered 30 April 2021 by Judge Alan Z. Thornburg in Superior Court, Buncombe County, holding that plaintiff lacked standing to bring claims and failed to state a claim of breach of contract upon which relief could be granted. Heard in the Supreme Court on 1 November 2023.

*H. Edward Phillips III for plaintiff-appellant.*

*City of Asheville City Attorney's Office, by Eric P. Edgerton, Senior Assistant City Attorney, for defendant-appellee City of Asheville.*

*No brief for defendant-appellee Buncombe County.*

*Noel E. Nickle, pro se, amicus curiae.*

BERGER, Justice.

More than a century ago, a monument was erected in Asheville dedicated to Zebulon Vance—former North Carolina Governor, United States Senator, and Confederate Colonel of the 26th North Carolina State Troops. This case arises from defendants' decision to remove the monument.[1]

The Court of Appeals determined that plaintiff lacked standing to pursue this action. We modify and affirm.

## I. Factual and Procedural Background

In December 1897, the cornerstone was laid for the monument dedicated to Vance in Asheville's Pack Square Park. By 2008, the monument was in disrepair and at risk of structural instability due to mortar loss and water incursion. Plaintiff is a nonprofit historical preservation organization focused on preserving the history of the 26th North Carolina State Troops and is opposed to removal of the monument.

Plaintiff raised $138,447.38 for the purpose of restoring the monument, and on 30 March 2015, plaintiff executed an agreement with the City of Asheville (defendant City) pursuant to N.C.G.S. § 160A-353 whereby plaintiff agreed to "purchase and conduct the restoration of the Vance Monument . . . and donate said Restoration to [defendant City] upon completion of the work." Section 160A-353 provides that a municipality may "[a]ccept any gift, grant, lease, loan, or devise of real or personal property for parks and recreation programs." N.C.G.S. § 160A-353(6) (2023).

The agreement between plaintiff and defendant City included various logistical details governing the restoration and reconstruction of the monument, including a warranty provision for the work performed and materials utilized in the preservation effort. Plaintiff completed the restoration and donated the monument to defendant City in accordance with the donation agreement.

In December 2020, the Buncombe County Board of Commissioners and the Asheville City Council voted to remove the monument. According

1. As defendant Buncombe County has not filed a brief in this case, we will refer to the City of Asheville as a singular defendant.

to Asheville's City Council, the "Vance Monument ha[d] become a public safety threat in [the] community" because "the monument ha[d] been vandalized and the City ha[d] received significant threats that members of the public w[ould] attempt to topple the structure."

On 23 March 2021, plaintiff filed a complaint against Asheville and Buncombe County seeking to prevent removal of the monument. Specifically, plaintiff alleged that defendant City breached the 2015 agreement, and plaintiff was entitled to entry of a temporary restraining order, preliminary injunction, and a declaratory judgment that N.C.G.S. § 100-2.1, which governs the removal of State-owned monuments, memorials, or other works of art, applied to the monument.

Plaintiff alleged in its complaint that it and the City had entered into a contract because both had a "desire to restore and preserve the Vance Monument in perpetuity." Plaintiff asserted that it did not intend to raise money and expend significant amounts of time over the restoration period only for the monument to be torn down soon after completion. According to plaintiff's complaint, the agreement was the foundation of "a partnership with the City . . . to carry out this crucial and necessary work." Plaintiff also asserted in the complaint that both parties intended to preserve the monument so that it "is not only part of [our] past, but our future as well."[2]

On 29 March 2021, defendant City filed a motion to dismiss plaintiff's complaint. Defendant City moved to dismiss plaintiff's breach of contract claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and moved to dismiss the remainder of plaintiff's claims for relief under both Rules 12(b)(1) and 12(b)(6). Defendant City also moved for an award of attorney's fees under N.C.G.S. § 6-21.5.

On 31 March 2021, plaintiff filed a motion to stay proceedings in the trial court pending this Court's resolution of *United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem*, 383 N.C. 612 (2022). According to plaintiff's motion to stay, "[t]he issues raised in the present case related to standing and whether N.C.[G.S.] § 100-2.1 applies to objects of remembrance . . . owned by the political subdivisions of the state of North Carolina are identical to those presented in [*United Daughters*]."

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2. Plaintiff asserts that this language was used in the agreement which was attached to the complaint. However, we have scrutinized the text of the donation agreement and have been unable to locate the quoted language.

On 30 April 2021, the trial court entered an order denying plaintiff's motion to stay proceedings, denying defendant City's motion for attorney's fees, and granting defendant City's motion to dismiss. Regarding defendant City's motion to dismiss under Rule 12(b)(6), the trial court concluded that "in the event that [p]laintiff has properly alleged the existence of a valid contract, the obligations of any potential agreement have been fulfilled; therefore, [p]laintiff has failed to sufficiently allege a breach of contract claim." As to defendant City's motion to dismiss under Rule 12(b)(1), the trial court concluded that plaintiff "lacks standing to bring its remaining claims" because plaintiff "and its individual members are not injuriously affected in their persons, property or constitutional rights in a manner to create an actual controversy and standing in this matter." Plaintiff appealed.

At the Court of Appeals, plaintiff failed to meet procedural deadlines governing the filing of the record on appeal and the filing of its appellant brief. On 23 August 2021—more than three months after the appeal was docketed—plaintiff filed a "motion for stay of appellate proceedings," reiterating its argument that the matter should be stayed pending this Court's resolution of *United Daughters* because "[t]he issues raised in the present case are identical." Defendant City opposed the motion and moved to dismiss plaintiff's appeal based upon plaintiff's repeated violations of the Rules of Appellate Procedure. The Court of Appeals denied plaintiff's motion for stay and defendant City's motion to dismiss the appeal.

On 5 April 2022, the Court of Appeals issued an opinion affirming the trial court's order. However, in addition to determining that dismissal of plaintiff's breach of contract claim pursuant to Rule 12(b)(6) was proper, the Court of Appeals also concluded that plaintiff had no standing to bring its breach of contract claim—a conclusion the trial court never made. *Soc'y for the Hist. Pres. of the Twenty-sixth N.C. Troops, Inc. v. City of Asheville*, 282 N.C. App. 707, 708 (2022). In addition, the Court of Appeals determined that dismissal of plaintiff's claims for a temporary restraining order, preliminary injunction, and declaratory judgment under Rule 12(b)(1) was appropriate because plaintiff failed to sufficiently allege an ownership interest or other legal interest in the monument. *Id.* at 707. Plaintiff was, thus, "unable to establish a legal injury" and "therefore unable to establish standing for its claims." *Id.*

On 13 December 2022, this Court allowed plaintiff's petition for discretionary review to consider whether the Court of Appeals erred in affirming the trial court's dismissal of plaintiff's complaint.

## II. Analysis

We review a lower court's decision on a motion to dismiss for lack of standing de novo. *United Daughters*, 383 N.C. at 624. In undertaking this review, the allegations contained in the complaint are presumed to be true, and these assertions along with

> the supporting record [are viewed] in the light most favorable to the non-moving party, with this being the applicable standard of review regardless of whether the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6).

*Id.* (cleaned up).

This Court has "consistently recognized that standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction," *United Daughters*, 383 N.C. at 649 (cleaned up), and a motion to dismiss for lack of standing is properly made under Rule 12(b)(1). A party seeking to enjoin the removal of a monument owned by a political subdivision of this State through a private suit must, at minimum, allege a legal interest for their claims to survive a motion to dismiss under Rule 12(b)(1). *Id.*

As the parties have acknowledged, many of the issues addressed by this Court in *United Daughters* are "identical" to the issues presented here. There, the organizational plaintiff challenged a municipality's decision to remove a monument from the grounds of a Forsyth County courthouse. *Id.* at 614. The plaintiff alleged that it had funded the erection of the monument in 1905 but did not "claim to own the monument or to have any sort of contractual or property interest in it." *Id.* at 615.

After the defendants removed the monument in that case, the plaintiff filed a complaint seeking a temporary restraining order, a preliminary injunction, and a declaratory judgment. *Id.* at 619. The defendants moved to dismiss for lack of standing pursuant to Rule 12(b)(1) and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). *Id.* The trial court allowed the defendants' motion and dismissed the complaint with prejudice, and a divided panel of the Court of Appeals affirmed. *Id.* at 620–21. The plaintiff appealed to this Court based upon a dissent in the Court of Appeals. *Id.* at 624.

This Court affirmed in part, reversed in part, and remanded the case to the trial court to dismiss plaintiff's complaint without prejudice. *Id.* at 651. We held, in relevant part, that because the plaintiff did not allege any ownership or contractual interest in the monument, the plaintiff had "failed to identify any legal right conferred by the common law, state or federal statute, or the state or federal constitutions of which they have been deprived by [the] defendants' conduct." *Id.* at 629. Notably, the plaintiff in *United Daughters* alleged neither the existence of a valid contract between the parties nor the breach of any such contract. *Id.* at 630.

In addition, we reiterated in *United Daughters* that "[w]hen a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Id.* at 626 (alterations in original) (quoting *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608 (2021)). This is so because our Constitution provides that "every person for an injury done to him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2.

It should be self-evident that our holding in *United Daughters* was limited to the facts of that case, rather than a blanket holding that individuals or organizations can never challenge the removal of historical monuments. If such parties, like the plaintiff in *United Daughters*, fail to allege the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, dismissal is appropriate. *See United Daughters*, 383 N.C. at 633. Conversely, if such parties establish standing by alleging an ownership, contractual, or other cognizable interest as described in our precedent, dismissal under Rule 12(b)(1) is error. *See id.* at 626.

This Court has "long held that a plaintiff can maintain an action for infringement of a common law interest irrespective of any 'actual' injury that may occur." *Comm. to Elect Dan Forest*, 376 N.C. at 596.

> For instance, we have not dismissed trespass actions where there is no allegation of harm beyond the infringement of the legal right. *See Keziah v. Seaboard Air Line R. Co.*, 272 N.C. 299, 311 (1968) ("Any unauthorized entry on land in the actual or constructive possession of another constitutes a trespass, *irrespective of degree of force used or whether actual damage is done*." (emphasis added)); *see also*

> *Hildebrand v. Southern Bell*, 219 N.C. 402, 408 (1941) (holding landowner "is entitled to be protected as to that which is his without regard to its monetary value"). Indeed, "[s]uch entry entitle[s] the aggrieved party to at least nominal damages." *Keziah*, 272 N.C. at 311. Actions for breach of contract can, in some circumstances, proceed on a theory of nominal damages. *See, e.g.*, *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 271 (1968) (explaining that in a contract action proof of breach alone is enough to avoid judgment of nonsuit). Even in a common law action where actual injury is a necessary element of the claim, such as negligence, the proper disposition for failure to allege actual injury or damages is not dismissal for lack of standing, but dismissal for failure to state a claim upon which relief can be granted. *See, e.g.*, *Hansley v. Jamesville & W.R. Co.*, 115 N.C. 602, 613 (1894) ("Neither negligence without damage nor damage without negligence will constitute any cause of action.").

*Id.* (alterations in original).

Here, the Court of Appeals held that plaintiff lacked standing to bring its claims for breach of contract, a temporary restraining order, a preliminary injunction, and a declaratory judgment. *See Soc'y for the Hist. Pres.*, 282 N.C. App. at 705–707. In so doing, the Court of Appeals purported to affirm the trial court's order granting defendant City's motion to dismiss these claims for lack of standing under Rule 12(b)(1). *Id.* at 706. However, contrary to the Court of Appeals' analysis, the trial court did not dismiss plaintiff's breach of contract claim for lack of standing under Rule 12(b)(1). Instead, the trial court ruled that because the donation agreement had been completed, plaintiff had "failed to sufficiently allege a breach of contract claim." Plaintiff's breach of contract claim was therefore dismissed under Rule 12(b)(6).

Thereafter, the trial court concluded that plaintiff "lack[ed] standing to bring its remaining claims," i.e., its claims for a temporary restraining order, a preliminary injunction, and a declaratory judgment. The trial court's proper distinction of dismissal under Rule 12(b)(1) and dismissal under Rule 12(b)(6) aligns with defendant City's motion to dismiss, which sought dismissal of plaintiff's breach of contract claim

*only* "pursuant to 12(b)(6)" and dismissal of the remaining claims "pursuant to Rule 12(b)(1) and 12(b)(6)."

The Court of Appeals' misapprehension of these issues would alone warrant reversal of its conclusion that plaintiff lacked standing to bring its breach of contract claim. Nevertheless, we take this opportunity to reiterate that "[w]hen a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Comm. to Elect Dan Forest*, 376 N.C. at 608.

Where a party alleges the existence of a valid contract and that such contract has been breached, that party has alleged a legal injury that gives rise to standing. Here, the Court of Appeals reasoned that plaintiff lacked standing because it failed to "sufficiently allege a breach of contract claim." *Soc'y for the Hist. Pres.*, 282 N.C. App. at 706. This failure goes to dismissal under Rule 12(b)(6) for failure to state a claim, not dismissal under Rule 12(b)(1) for lack of standing. *See Comm. to Elect Dan Forest*, 376 N.C. at 596 ("Even in a common law action where actual injury is a necessary element of the claim, such as negligence, the proper disposition for failure to allege actual injury or damages is not dismissal for lack of standing, but dismissal for failure to state a claim upon which relief can be granted.").

However, the end result is the same. The Court of Appeals alternatively affirmed the trial court's dismissal of plaintiff's breach of contract claim pursuant to Rule 12(b)(6), and plaintiff failed to argue the merits of its breach of contract claim in its brief to this Court. Our Rules of Appellate Procedure provide that "review in the Supreme Court is limited to consideration of the issues . . . properly presented in the new briefs." N.C. R. App. P. 16(a). As such, this issue has been abandoned by plaintiff, and we express no opinion as to this portion of the Court of Appeals' decision.

As to plaintiff's remaining claims, we agree that "[i]t is somewhat unclear what legal injury plaintiff asserts, in both the complaint and the present appeal, in seeking the [temporary restraining order], preliminary injunction, and declaratory judgment." *Soc'y for the Hist. Pres.*, 282 N.C. App. at 706. Although plaintiff's breach of contract claim prevents this Court from agreeing that this case is "identical" to *United Daughters*, plaintiff's failure to argue the merits of that claim requires us to hold that plaintiff's remaining claims suffer the same defect that was present in *United Daughters*.

Accordingly, we affirm the portion of the Court of Appeals' decision affirming the trial court's dismissal of plaintiff's claims for a temporary restraining order, a preliminary injunction, and a declaratory judgment for lack of standing under Rule 12(b)(1).

## III. Conclusion

For the reasons stated herein, we reverse the Court of Appeals' determination that plaintiff's breach of contract claim should be dismissed for lack of standing. However, plaintiff abandoned the merits of its breach of contract claim in its appeal to this Court. Therefore, plaintiff has failed to assert any ground for which it has standing to contest removal of the monument, and we affirm the portion of the Court of Appeals' decision affirming the trial court's dismissal of plaintiff's claims for a temporary restraining order, a preliminary injunction, and a declaratory judgment.

MODIFIED AND AFFIRMED.

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STATE OF NORTH CAROLINA
v.
GLENN SPENCER BOYETTE JR.

No. 43PA23

Filed 22 March 2024

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous opinion of the Court of Appeals, 287 N.C. App. 270 (2022), finding no error in a judgment entered 24 May 2021 by Judge Daniel A. Kuehnert in Superior Court, Caldwell County and holding the trial court did not abuse its discretion by admitting evidence obtained during a search of defendant's truck at a probation revocation hearing. Heard in the Supreme Court on 22 February 2024.

*Joshua H. Stein, Attorney General, by Kayla D. Britt, Assistant Attorney General, for the State-appellee.*

*Glenn Gerding, Appellate Defender, by Jillian C. Franke, Assistant Appellate Defender, for defendant-appellant.*

PER CURIAM.

Having considered the opinion of the Court of Appeals, the record and briefs, and the oral arguments before us, we conclude that defendant's petition for discretionary review was improvidently allowed by order on 14 June 2023.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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STATE OF NORTH CAROLINA
v.
RICHARD HENRY JORDAN, JR.

No. 124PA22

Filed 22 March 2024

**Search and Seizure—warrantless search—standing to challenge—reasonable expectation of privacy—material fact questions—findings required**

In a prosecution for multiple drug offenses, where the trial court denied defendant's pretrial motion to suppress evidence that was found during a warrantless entry into defendant's uncle's house, but where the ruling was made orally and was never memorialized in a written order with findings of fact, the matter was remanded for the trial court to make the necessary findings of fact regarding the central question of whether defendant had standing to challenge the search of the home. There were material conflicts in the evidence requiring resolution by the trial court, although the record contained evidence that could support a determination that defendant had a reasonable expectation of privacy in the home, despite defendant's statements to law enforcement that he did not live in the home and had no possessions there. Depending on the facts found, the court could either deny the motion to suppress again or grant a new trial.

Justice RIGGS dissenting.

Justice EARLS 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, 282 N.C. App. 651 (2022), reversing an order entered on 22 January 2020 by Judge Daniel Kuehnert in

Superior Court, Mecklenburg County, and remanding the case. Heard in the Supreme Court on 7 November 2023.

*Joshua H. Stein, Attorney General, by Michael T. Henry, Special Deputy Attorney General, for the State-appellant.*

*Christopher A. Brook for defendant-appellee.*

DIETZ, Justice.

While investigating reports of a stolen car, law enforcement officers observed a suspect retreat to a nearby home. The officers followed the suspect into the home and saw evidence of an illegal drug operation.

The issue presented in this case is whether defendant—one of the participants in that drug operation—has standing to challenge the officers' warrantless entry into the home. Defendant told the police he did not live there. Defendant's uncle, who was also present, told the officers that he lived there and consented to a search. The uncle also told the officers that one of the other men present—the original suspect that led officers to the home—was temporarily staying there and had some personal belongings in the home. The uncle did not indicate that defendant lived in the home or frequently visited.

After a suppression hearing, the trial court orally denied defendant's motion to suppress, referencing defendant's lack of any reasonable expectation of privacy in the home. The court's oral ruling did not include clearly identified findings of fact, with much of the court's discussion being mere recitation of the evidence. The court instructed the State to prepare a draft order, which the court would then enter to memorialize its ruling.

That never happened, and the case went to trial without the trial court memorializing its oral ruling in a written order with express fact findings. After the jury convicted defendant of a number of drug-related offenses, defendant appealed. The Court of Appeals reversed the trial court's denial of the motion to suppress, reasoning that the trial record would not support any finding that defendant lacked a reasonable expectation of privacy in the home.

As explained below, we reverse the decision of the Court of Appeals. The evidence presented at the suppression hearing *could* support findings that defendant lacked standing to challenge the search. But the

trial court never made those findings, despite being compelled to do so because the trial record contains materially conflicting evidence. *See State v. Bartlett*, 368 N.C. 309, 312 (2015).

We therefore reverse the decision of the Court of Appeals and remand with instructions to further remand this matter to the trial court to make findings of fact based on the trial record. The trial court, based on those new findings, may again deny the motion to suppress, leaving defendant's convictions intact, or it may grant the motion to suppress in whole or in part and order a new trial. *See State v. Hammonds*, 370 N.C. 158, 160–62 (2017).

## Facts and Procedural History

In 2017, law enforcement officers arrived in a residential neighborhood to investigate reports of a stolen car. The officers located the stolen car in a parking lot. While observing the car, officers saw Marcel Thompson leave a nearby house and approach the car as if he planned to enter it. After Thompson saw the officers, he turned and hurried back towards the house.

Thompson knocked on the door of the house and said "it's the police" loudly enough for the officers to hear as they followed him. Defendant opened the door to let Thompson into the home. Thompson left the door open as he entered. One officer put his foot through the threshold of the door and told the occupants that he wanted to speak with them. After Thompson declined to step outside, the officer fully entered the home, while another officer moved into the doorway.

The second officer observed defendant close a safe that was sitting on a table in the center of the room. The officer saw defendant lock the safe and put a key in his pocket. That officer also saw baggies, razor blades, and white powder on the same table.

There were two other individuals in the house with Thompson and defendant. Officers asked the occupants who lived in the home. One of the occupants, James Deitz,[1] told the officers that he resided in the home. Officers later learned that Deitz is defendant's uncle.

The officers asked Deitz for permission to search the home, and Deitz consented. When the officers asked to search the safe, defendant claimed the safe was not his. Defendant then objected to the officers

1. The State uses the name "James Deitz." Defendant uses the name "James Deese." As explained below, because the trial court did not enter a written order, the record does not definitively resolve the correct spelling of this witness's surname.

searching the safe and refused to provide them with the key. When the officers asked defendant if he lived in the home, he stated, "I don't have anything to do with anything that's in here. I don't live here. This has nothing to do with me."

Defendant further explained, "I came to visit my uncle. I don't live in here period, there is nothing here in my name." When the officers again asked if defendant lived at the home, he responded, "No, I don't live here." The officers then pointed out that because defendant had the key to the safe, he must at least own what is in the safe, but defendant again responded, "No."

The officers discussed with Deitz who resided in the house. Deitz told the officers that Thompson had been staying in the house for a few days. Thompson confirmed that he had various belongings in the home. Neither Deitz nor Thompson indicated that defendant also stayed at the home, which was relatively small and had only one bedroom, and no one identified any of defendant's belongings inside the home.

The officers later obtained a warrant to search the safe and the home. Inside the safe, the officers found a firearm, cocaine in different baggies, and money. Throughout the home, the officers found baggies, syringes, razor blades, and scales.

The State charged defendant with trafficking cocaine, possession of a firearm by a felon, possession of drug paraphernalia, and attaining habitual felon status.

Before trial, defendant filed a motion to suppress the evidence, claiming that the officers unlawfully entered Deitz's home. At the hearing, both parties briefly addressed the issue of defendant's expectation of privacy in the home, but it was not a focus of either side's arguments.

At the end of the hearing, the trial court orally denied defendant's motion to suppress. As is common in these scenarios, the trial court's oral ruling did not include clearly defined findings of fact and conclusions of law. Instead, the trial court indicated that it would enter a written order memorializing the oral ruling. The court instructed the State to prepare a draft order. The parties acknowledge on appeal that the trial court never entered a written order as anticipated at the hearing.

A jury later found defendant guilty of trafficking cocaine, possession of a firearm by a felon, and possession of drug paraphernalia. Defendant then pleaded guilty to attaining habitual felon status. After entry of judgment, defendant appealed from the judgments, arguing that the trial court erred by denying his motion to suppress.

On appeal, the Court of Appeals reversed the trial court's order and remanded the case. *See State v. Jordan*, 282 N.C. App. 651 (2022). We allowed the State's petition for discretionary review.

**Analysis**

By statute, when a trial court rules on a motion to suppress, the court must "make findings of fact and conclusions of law which shall be included in the record." N.C.G.S. § 15A-974(b) (2023); *see also id.* § 15A-977. The need to make findings of fact is crucial for appellate review because appellate courts "cannot find facts." *Pharr v. Atlanta & Charlotte Air Line Ry. Co.*, 132 N.C. 418, 423 (1903). Instead, appellate courts examine only "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68 (2011). When the trial court does not make findings of fact, this can frustrate our ability to engage in appellate review because we have no underlying facts to which we can apply the law. *Bartlett*, 368 N.C. at 312.

Although trial courts can make the necessary findings of fact in an oral ruling, we have long held that entering a written order with findings of fact "is the better practice." *Id.* One reason for doing so is that it can be difficult in an oral ruling to distinguish between "a mere recitation of the evidence" and "true findings." *Harrison v. Gemma Power Sys., LLC*, 369 N.C. 572, 583 (2017).

For example, when announcing an oral ruling, trial courts often will describe the testimony and evidence received at the hearing. The court might say, "The officer testified that the door was open." Is this a finding that the officer's testimony is credible and, thus, a finding that the door was indeed open? On a cold appellate record, it can be hard to tell.

As a result, when the trial court fails to make express findings of fact, either orally or in a written order, we typically remand the matter for the trial court to do so as required by the applicable statutes. *See State v. Salinas*, 366 N.C. 119, 122–26 (2012). But we have also recognized an exception to this general rule: "Although the statute's directive is in the imperative form, only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling." *Bartlett*, 368 N.C. at 312. When there is no material conflict in the evidence, "the trial court's findings can be inferred from its decision." *Id.*

Here, we cannot infer the necessary findings under *Bartlett* because there is a material conflict in the evidence that the trial court

must resolve. The central issue in this motion to suppress is whether defendant has standing to challenge the officers' search of the home. A defendant may move to suppress evidence only when the defendant's own rights, "not those of some third party," have been violated. *State v. Taylor*, 298 N.C. 405, 415 (1979). Thus, before a defendant may challenge the legality of a search, he must demonstrate that the room in the home "where the search occurred was an area in which he had a reasonable expectation of privacy." *Id.* at 416. The burden is on the defendant to prove that he had the requisite expectation of privacy. *State v. Jones*, 299 N.C. 298, 306 (1980).

There is no fixed test for assessing a defendant's expectation of privacy, but the expectation must be "one that society deems to be reasonable." *State v. Wiley*, 355 N.C. 592, 602 (2002). Every case is fact specific. For example, overnight guests typically have a reasonable expectation of privacy in the area where they are staying, even if they are merely a temporary visitor. *Minnesota v. Olson*, 495 U.S. 91, 98–99 (1990). Similarly, a family member who is a "frequent visitor" to the home of a relative may develop a reasonable expectation of privacy in the relative's home. *E.g.*, *Bonner v. Anderson*, 81 F.3d 472, 475 (4th Cir. 1996). By contrast, one who visits another's home "for a business transaction" and remains there only to conduct that transaction likely does not have a reasonable expectation of privacy in the home. *Minnesota v. Carter*, 525 U.S. 83, 90 (1998).

Here, there are fact questions that must be resolved to apply these legal principles to this case. For example, defendant told the officers that he did not live in the home and that "there is nothing here in my name." Deitz, who identified himself as the resident of the home, consented to the search. Deitz also explained to the officers that Thompson—the man police had followed from the stolen car to the home—was staying in the house for a few days. Thompson confirmed that he had various belongings in the home.

Importantly, Deitz did not tell the officers that defendant also was staying at the home or that defendant had any belongings there. Nor is there any direct evidence of whether defendant was a frequent visitor to Deitz's home or had the sort of relationship with Deitz that could give defendant a reasonable expectation of privacy in the home.

The trial court reasonably could infer from the statements of Deitz and Thompson that only those two individuals had a reasonable expectation of privacy in the home and that the others present were there solely to participate in the illegal drug operation. *See Carter*, 525 U.S.

at 90. This finding would support the trial court's conclusion that defendant, unlike Deitz and Thompson, did not have a reasonable expectation of privacy in the home. But, as noted above, the trial court did not make that fact finding because it did not make any fact findings.

The dissent insists that there is no need for further fact-finding because there are "uncontroverted" facts that show an expectation of privacy. In doing so, the dissent merely highlights why further fact-finding is needed.

For example, the dissent asserts that defendant had "authority to let persons into the home regardless of whether Mr. Deitz was present." There is no direct evidence of this. Deitz did not say this was so. Nor did defendant. This is an *inference* that defendant draws in his appellate briefing from the fact that he opened the door and let Thompson in.

But a fact-finder would not be compelled to draw this inference. Indeed, a fact-finder might reasonably infer the opposite—that defendant ordinarily would not have permission to let others into the home, but did so here because Thompson was pounding on the door shouting, "it's the police," and Deitz was not in the room at the time.

The same is true of the other purported facts identified by the dissent; they are not facts, they are inferences. And for each of them, a fact-finder also could draw a competing inference in the opposite direction. This Court cannot choose between these competing inferences. When "different inferences may be drawn from the evidence," only the trial court, as fact-finder, can determine "which inferences shall be drawn and which shall be rejected." *Knutton v. Cofield*, 273 N.C. 355, 359 (1968).

Accordingly, we reject the Court of Appeals' determination that the trial record "does not support a finding that Defendant lacked a reasonable expectation of privacy in the residence searched." *Jordan*, 282 N.C. App. at 660. We hold that the record *could* support the necessary findings, but there are material fact questions that must be resolved by the fact-finder before any legal conclusion can be reached.

In sum, because the trial court did not enter a written order as intended at the conclusion of the suppression hearing, the trial court did not make adequate findings of fact "that resolved the material conflict in the evidence." *See Bartlett*, 368 N.C. at 312. "Without such a finding, there can be no meaningful appellate review of the trial judge's decision." *Id.*

When the trial court fails to resolve fact issues necessary to review the trial court's legal conclusions, "an appellate court may remand the

cause for appropriate proceedings without ordering a new trial." *State v. Lang*, 309 N.C. 512, 523–24 (1983). We therefore reverse the decision of the Court of Appeals and remand with instructions to further remand this matter to the trial court to make the necessary findings of fact based on the trial record. The trial court, based on those new findings, may again deny the motion to suppress, leaving defendant's convictions intact, or it may grant the motion to suppress in whole or in part and order a new trial. *See Hammonds*, 370 N.C. at 160–62.

**Conclusion**

We reverse the decision of the Court of Appeals and remand for further proceedings.

REVERSED AND REMANDED.

Justice RIGGS dissenting.

The majority remands this matter to the trial court for further findings of fact that it believes are necessary to conclude that Mr. Jordan possessed a reasonable expectation of privacy in the premises illegally searched by law enforcement. Because I believe there is already adequate uncontradicted evidence in the record to establish such a conclusion, I respectfully dissent.

I begin with the uncontroverted facts established from the evidence introduced at the suppression hearing. Mr. Jordan's uncle, Mr. Deitz, resided in the premises searched.[1] Mr. Jordan himself had permission to be in the residence late at night, even when Mr. Deitz was not at home. Mr. Jordan also had authority to let persons into the home, regardless of whether Mr. Deitz was present.[2] Mr. Jordan was likewise familiar with the home and the fact that the house had been divided to allow businesses, like a salon, to operate out of the space.[3] And Mr. Jordan, at a minimum, had access to and control over a safe in the home—and

1. There is no question from the evidence that the premises searched belonged to Mr. Deitz, or that Mr. Deitz was Mr. Jordan's uncle.

2. The majority asserts this is exclusively based on an inference from the fact that Mr. Jordan opened the door for Mr. Thompson. It is not; instead, it is supported by a witness's statement—captured on an officers' body camera video and introduced into evidence at the suppression hearing—that Mr. Jordan and Mr. Thompson were the only persons present at the home when she arrived.

3. Mr. Jordan evinced such knowledge in direct statements on the body camera footage introduced into evidence.

a safe's very purposes are to sharply limit indiscriminate access, deter discovery, and ensure the privacy of its contents.[4]

The above undisputed facts establish Mr. Jordan's reasonable expectation of privacy in the premises searched. Familial relations certainly weigh in favor of that conclusion. *See, e.g.*, *United States v. Washington*, 573 F.3d 279, 289 (6th Cir. 2009) (holding a nephew had a reasonable expectation of privacy in his uncle's apartment); *United States v. Heath*, 259 F.3d 522, 533 (6th Cir. 2001) (cousins); *Figueroa v. Mazza*, 825 F.3d 89, 110 (2d Cir. 2016) (mother and son); *cf. United States v. Gray*, 491 F.3d 138, 153 (4th Cir. 2007) (recognizing Fourth Amendment standing of "social visitors with near-familial relationships"). That Mr. Jordan was entrusted to be at the home without Mr. Deitz likewise discloses a substantial measure of control over and acceptance into the household. *Cf. Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (noting that overnight guests are likely to have a reasonable expectation of privacy in another's residence because "[i]t is unlikely that the guest will be confined to a restricted area of the house; and when the host is away or asleep, the guest will have a measure of control over the premises"). So, too, does the fact that Mr. Jordan had the ability to control admission into the home. *See Rakas v. Illinois*, 439 U.S. 128, 149 (1978) (holding a visitor had a reasonable expectation of privacy in a friend's apartment because he "had complete dominion and control over the apartment and could exclude others from it"). Further, his ownership and/or control over a safe in the home—together with repeated assertions that police lacked permission to access it—necessarily bestowed him with authority to "preserve as private" materials in the home. *Katz v. United States*, 389 U.S. 347, 351 (1967). All of these facts establish that Mr. Jordan, as a trusted family member of Mr. Deitz with substantial unsupervised control over access to the home and the locked safe within, had "a legitimate expectation of privacy there." *See Olson*, 495 U.S. at 96.

I do not believe the conflicts in the evidence identified by the majority undercut that conclusion. Whether Mr. Deitz and Mr. Thompson were the only overnight residents of the home with common law property interests in the possessions therein is not dispositive. *See Gray*, 491 F.3d at 153 ("[W]e have recognized that persons other than overnight guests can have a legitimate expectation of privacy in the home of another . . . in the context of social visitors with near-familial relationships."); *Rakas*, 439 U.S. at 144 n.12 ("Expectations of privacy protected by the Fourth

4. That Mr. Jordan had access to and control over the safe is not disputed by the evidence and is accepted by the majority.

Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest."). Nor does that question diminish the fact that Mr. Jordan is a family member with the right to control and access both the home—including outside Mr. Deitz's presence—and a safe found inside it. The fact that illegal activity was underway at the time police arrived does not change the calculus; a college student with free and unsupervised access to a relative's home and locked liquor cabinet is still a familial relation with substantial acceptance into the relative's household—even if the student uses the space for a homeowner-approved and invite-only illegal poker game involving underage drinking.[5] Privacy interests of close friends and family with acceptance into and control over the home are not erased because the location is being used for illegal activity at the time of the search. *See*, *e.g.*, *United States v. Pollard*, 215 F.3d 643, 647 (6th Cir. 2000) (holding a defendant had a reasonable expectation of privacy in a friend's home despite his use of the house "to complete an illegal sale of cocaine"); *United States v. Poe*, 556 F.3d 1113, 1122 (10th Cir. 2009) (holding a social guest who was permitted to remain in the home to conduct a drug sale after the resident left had a reasonable expectation of privacy in the home).

In sum, I do not agree with the majority that the identified conflicts in the evidence require resolution to conclude that Mr. Jordan had Fourth Amendment standing to challenge the search of his uncle's residence. His familial relationship, familiarity with the home, unsupervised control of admittance into the house during late-night hours, and his authority over access to the safe inside combine to establish that he was so accepted into the residence as to have a reasonable expectation of privacy independent of his purposes for being there, his status as a non-overnight guest, or his lack of legal ownership. I would therefore affirm the Court of Appeals' decision and respectfully dissent.

Justice EARLS joins in this dissenting opinion.

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5. The majority relies on *Minnesota v. Carter*, 525 U.S. 83, 90 (1998), for the proposition that Mr. Jordan lacked a reasonable expectation of privacy if he was present "solely to participate in the illegal drug operation." This is an overreading of *Carter*, which held that non-overnight guests lacked a reasonable expectation of privacy in the searched premises because they "were essentially present for a business transaction[,] . . . [t]here [was] *no suggestion that they had a previous relationship with* [the resident,] . . . [n]or was there anything similar to the overnight guest relationship . . . *to suggest a degree of acceptance into the household*." *Id.* (emphases added); *see also United States v. Gamez-Orduño*, 235 F.3d 453, 458 (9th Cir. 2000) ("An individual whose presence on another's premises is *purely* commercial in nature . . . has no legitimate expectation of privacy in that location." (emphasis added) (citing *Carter*, 525 U.S. at 90)).

**STATE v. WALKER**

[385 N.C. 763 (2024)]

STATE OF NORTH CAROLINA
v.
KENNETH LOUIS WALKER

No. 202PA22

Filed 22 March 2024

**1. Criminal Law—motion for appropriate relief—standard of review—case overruled**

In an appeal from the denial of a criminal defendant's motion for appropriate relief (MAR), in which defendant asserted that he received ineffective assistance of counsel at trial and in his prior appeal, the Supreme Court upheld the standard of review for MARs laid out in N.C.G.S. § 15A-1420(c) while overruling the standard set forth in *State v. Allen*, 378 N.C. 286 (2021), which stated that the factual allegations contained in a defendant's MAR should be reviewed in the light most favorable to the defendant.

**2. Constitutional Law—effective assistance of counsel—trial counsel—right to testify at trial—appellate counsel—Anders brief—motion for appropriate relief**

The denial of a criminal defendant's motion for appropriate relief (MAR) was affirmed where defendant's claims of ineffective assistance of counsel (IAC) lacked merit. With respect to his first IAC claim, the record did not support defendant's argument that his trial counsel had neither informed him of his right to testify at trial nor allowed him to testify despite his desire to do so; rather, the trial court's colloquy with defendant revealed that defendant was aware of his right to testify, and nothing in the record suggested that defendant intended to exercise that right. With respect to defendant's second IAC claim, defendant's appellate counsel—who filed an *Anders* brief in defendant's appeal—was not ineffective for declining to argue that the trial court erred in limiting the testimony of defendant's expert witness, since defendant's MAR failed to demonstrate that the court abused its discretion in limiting that testimony.

Justice BERGER concurring.

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review a unanimous, unpublished opinion of the Court of Appeals, No. COA21-535 (N.C. Ct. App. June 7, 2022), affirming an order entered on 8 April 2020 by Judge Paul C. Ridgeway in Superior Court, Wake County, denying defendant's motion for appropriate relief. Heard in the Supreme Court on 1 November 2023.

*Joshua H. Stein, Attorney General, by Benjamin Szany, Assistant Attorney General, for the State-appellee.*

*Glenn Gerding, Appellate Defender, by Katy Dickinson-Schultz, Assistant Appellate Defender, for defendant-appellant.*

BARRINGER, Justice.

In this case, we are tasked with determining whether the Court of Appeals properly dispensed with defendant's ineffective assistance of counsel claim and motion for appropriate relief (MAR). For the following reasons, we affirm.

## I. Background

On 22 October 1999, defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. On appeal, defendant's attorney filed an *Anders* brief, *see Anders v. California*, 386 U.S. 738 (1967), and the Court of Appeals found no error at trial.

Over two decades later, defendant filed a pro se MAR on 1 April 2020. Defendant raised, for the first time, that his trial counsel had not informed him of his right to testify, denied him the opportunity to testify, and prevented him from testifying despite defendant's desire to do so. Defendant also claimed that the trial court erred in limiting the testimony of defendant's expert witness, a forensic psychiatrist. Further, he alleged he had been denied effective assistance of appellate counsel because his counsel filed an *Anders* brief. The trial court denied the MAR because defendant had "not shown that he was unable, at the time of his appeal, to raise the issues he now raises in his present [MAR]."

The Court of Appeals reviewed the trial court's order to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Walker*, No. COA21-535, slip op. at 4 (N.C. Ct. App. June 7, 2022) (unpublished)

(quoting *State v. Peterson*, 228 N.C. App. 339, 343 (2013)); *see also State v. Stevens*, 305 N.C. 712, 720 (1982). However, when it recounted the standard of review for an MAR, the Court of Appeals failed to state that review is "in the light most favorable to [defendant]," which was first established in an opinion of this Court published in August 2021. *See State v. Allen*, 378 N.C. 286, 296 (2021).

## II. Standard of Review

**[1]** Questions of law are reviewed de novo. *State v. Thomsen*, 369 N.C. 22, 24 (2016). In *Allen*, this Court established that the factual allegations contained in a defendant's MAR should be reviewed "in the light most favorable to [defendant]." 378 N.C. at 296. Under *Allen*, for the first time in our jurisprudential history, MARs were to be read in the light most favorable to defendants. We now return to the standard of review which existed prior to *Allen*—that of statutory review pursuant to N.C.G.S. § 15A-1420(c). *Id.* at 324 (Berger, J., dissenting).

Reviewing a defendant's asserted grounds for relief in the light most favorable to defendant is a departure from this Court's longstanding standard of review. *See*, *e.g.*, *State v. McHone*, 348 N.C. 254 (1998); *State v. Stevens*, 305 N.C. 712 (1982); *Branch v. State*, 269 N.C. 642 (1967); *State v. Graves*, 251 N.C. 550 (1960); *Miller v. State*, 237 N.C. 29, *cert. denied*, 345 U.S. 930 (1953). The mere fact that some ground for relief is asserted does not entitle defendant to a hearing or to present evidence. *McHone*, 348 N.C. at 256. An MAR court need not conduct an evidentiary hearing if a defendant's MAR offers insufficient evidence to support his claim or only asserts general allegations and speculation. N.C.G.S. § 15A-1420 (2023); *see State v. Harris*, 338 N.C. 129, 143 (1994), *cert. denied*, 514 U.S. 1100 (1995).

Although the dissent argues that we are overruling a standard which *Allen* did not prescribe, the Court of Appeals has expressed uncertainty on how to approach *Allen*. In *State v. Ballard*, for example, the concurrence voiced concern over the "novel precedent set out in *Allen*." 283 N.C. App. 236, 250 (2022) (Griffin, J., concurring). The concurrence further wrote that *Allen* is not supported by our jurisprudence nor the text of the North Carolina General Statutes. *Id.* The holding in *Allen* "clearly frustrates the plain language of the statute, takes away discretion from our trial judges, and shows a need for our Supreme Court to revisit its holding." *Id.* Despite the arguments made by our dissenting colleagues, the Court of Appeals has highlighted the continuing issues caused by *Allen*. We now correct these issues.

In the present case, defendant made ineffective assistance of counsel allegations against both his trial and appellate counsel. The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *State v. Braswell*, 312 N.C. 553, 561 (1985). When asserting that counsel is ineffective, defendant must show that their counsel fell "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To do so, defendant must first show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim." *State v. Todd*, 369 N.C. 707, 711 (2017).

## III. Analysis

**[2]** Defendant argues that his trial counsel refused to allow him to testify, despite his desire to testify. However, the record does not support defendant's argument. Defendant knew of his right to testify, as evidenced by the trial court's colloquy with defendant.

> THE COURT: [Defendant], do you understand, sir, you have the right to remain silent, you don't need to make any statement at this point.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that you're charged here today with first degree murder allegedly occurring on November 14, 1998, in which you were charged with malice . . . [a]forethought, premeditation, murdering one Stephanie V. Keith. Do you understand that you're charged with that, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: State is calling this as a first degree murder case.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Your attorneys advised me, sir, that they don't intend to contest certain aspects of that charge; that is to say they anticipate that they would not contest that decedent Ms. Keith was, in fact, shot

by you and that she died as a result thereof. Have they discussed that with you prior to trial?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that they don't want to contest those two aspects on your behalf.

THE DEFENDANT: Yes, sir.

THE COURT: That is, they're not pleading guilty to any particular offense at this point on your behalf, but they don't intend to contest the fact that she was shot and that you were the person that shot her. Have they discussed that with you, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Have you given them your specific permission to do that during the course of the trial?

THE DEFENDANT: Yes, sir.

THE COURT: Any other questions or concerns about that issue at this point?

THE DEFENDANT: No, sir.

THE COURT: All right. Be seated.

Contrary to his arguments to this Court, defendant stated, through counsel, to the trial court that he "ha[d] not made a decision yet on whether [he] will testify or not." At no point during trial did defendant indicate he wished to testify.

The only suggestion that defendant wished to testify is contained within defendant's MAR. Furthermore, nothing in the record supports defendant's argument. Defendant has not shown that he intended to testify at trial nor that his trial counsel's conduct fell below an objective standard of reasonableness. Accordingly, he has failed to meet his burden. The Court of Appeals correctly determined that defendant's ineffective assistance of trial counsel claim is without merit.

Defendant further contends that his appellate counsel was ineffective for failing to challenge the trial court's limitation on defendant's forensic psychologist expert witness, Dr. Holly Rogers. In advancing this argument, defendant filed a Motion to Take Judicial Notice, requesting this Court take judicial notice of the prior appellate filings in his case. Judicial notice of the appellate filings is proper, and therefore,

defendant's motion is allowed. *See In re McLean Trucking Co.*, 285 N.C. 552, 557 (1974); N.C.G.S. § 8C-1, Rule 201 (2023).

An expert may not "testify to a particular legal conclusion or that a legal standard has or has not been met." *State v. Fisher*, 336 N.C. 684, 703–04 (1994). The trial court's ruling on whether expert testimony shall be admitted "will not be reversed on appeal absent a showing of abuse of discretion." *E.g.*, *State v. McGrady*, 368 N.C. 880, 893 (2016) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458 (2004)).

In this case, the trial court prohibited Dr. Rogers from using legal terminology in her testimony. *See Fisher*, 336 N.C. at 703–04. However, the trial court allowed Dr. Rogers to testify about defendant's

> major depressive disorder, that he was vulnerable to intense emotion and loss of control. And that because of this depressive disorder . . . it [a]ffected his ability to carry out or make plans to commit murder, or it inhibited his ability to reflect on his actions in a meaningful way. And . . . she can testify that it contributed to or [a]ffected his ability to create a plan or scheme to commit or carry out a murder.

The trial court's limitations on Dr. Rogers' testimony were permissible, as it restricted her use of legal terminology. Accordingly, defendant's MAR did not demonstrate the trial court abused its discretion in limiting Dr. Rogers' testimony. As such, defendant's appellate counsel was not deficient and did not prejudice defendant by failing to raise the issue on appeal. Thus, defendant's allegations of ineffective assistance of appellate counsel are without merit.

## IV. Conclusion

The Court of Appeals properly dispensed with defendant's ineffective assistance of counsel claims and MAR. Accordingly, we affirm the Court of Appeals' opinion.

AFFIRMED.

Justice BERGER concurring.

I concur in the majority opinion but write separately because the question arises here whether we should follow the plain language of the post-conviction statutes and our precedent in *State v. McHone*, 348 N.C. 254 (1998), or the recently decided case o*f State v. Allen*, 378 N.C. 286 (2021).

This Court has long understood the extent to which prior decisions may bind future courts. While some distinction has been made for cases involving property and contractual rights not relevant here, in *State v. Ballance*, 299 N.C. 764 (1949), we stated that

> [i]n adjudicating a case, a court is not concerned with what the law ought to be, but its function is to declare what the law is. Moreover, the law must be characterized by stability if men are to resort to it for rules of conduct. These considerations have brought forth the salutary doctrine of *stare decisis* which proclaims, in effect, that where a principle of law has become settled *by a series of decisions*, it is binding on the courts and should be followed in similar cases.

*Id.* 767 (second emphasis added).

Justice Ervin authored the opinion for the Court in *Ballance*, and he noted that precedential value may be lacking where this Court is "confronted by a single case which is much weakened as an authoritative precedent by a [strong and well-reasoned] dissenting opinion." *Id.*; *See also Sidney Spitzer & Co. v. Commissioners of Franklin Cnty.*, 188 N.C. 30, 123 (1924) (when the Court is "presented with *a single decision*, which we believe to have been inadvisedly made, it is incumbent on us to overrule it, if we entertain a different opinion.") (cleaned up) (emphasis added). Put another way, an isolated holding may be persuasive, but it is not binding, especially when met with a sound dissent. Such is the case here.

My dissent in *State v. Allen*, 378 N.C. 286 (2021), joined by two of my colleagues, addressed several very real concerns with the Court's reasoning in that case. The Court in *Allen* set its thumb upon the scales when it declared for the first time that post-conviction evidentiary matters must be viewed in the light most favorable to the defendant. *Id.* at 296. With this novel approach, the majority gratuitously injected merit into any post-conviction claim that a defendant could imagine. After all, a defendant's factual assertions are deemed by *Allen* to be true in every circumstance.

But *Allen* is an isolated opinion which is not grounded in the plain language of our post-conviction statutes or our case law interpreting the same. Point after point in the dissent was met with silence from the majority, save and except an assertion in a footnote concerning the procedural posture in *State v. McHone* 348 N.C. 254 (1998), and a comment in another footnote concerning the experience level of Allen's trial

counsel. *Id*. at 297, n. 5, 301 n. 6. The conspicuous absence of a cogent rebuttal underscores the soundness of the positions taken in my dissent.

Now, however, it is suggested that the Court's application of the plain language of N.C.G.S. § 15A-1420 and our precedent in *McHone* is somehow improper. But, as Justice Ervin emphasized, "the doctrine of *stare decisis* will not be applied in any event to preserve and perpetuate error and grievous wrong." *Ballance* at 229 N.C. at 767. *See also Patterson v. McCormick*, 177 N.C. 448 (1919) ("The rule of *stare decisis* cannot be applied to perpetuate error."). *Allen* was a grievous wrong, and we appropriately correct course with our opinion today.

Justice EARLS concurring in part and dissenting in part.

I agree with the Court that Mr. Walker's motion for appropriate relief (MAR) lacked the factual support required for an evidentiary hearing. I disagree, however, with the majority's purported and gratuitous reversal of *State v. Allen*, 378 N.C. 286 (2021), in discussing the standard of review.

Despite the majority's framing, *Allen* was not some ahistorical aberration from long-settled law. Just the opposite. In that case, this Court interpreted N.C.G.S. § 15A-1420 to explain when an MAR court must hold an evidentiary hearing. Under that statute, a defendant who files an "MAR within the appropriate time period 'is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit.' " *Allen*, 378 N.C. at 296 (quoting N.C.G.S. § 15A-1420(c)(1) (2019)). The question for the court is "whether an evidentiary hearing is required to resolve questions of fact." *Id.* (cleaned up); *see* N.C.G.S. § 15A-1420(c)(1) (2023). That is because a court *must* decide an MAR "without an evidentiary hearing," when the "motion and supporting and opposing information" raise "only questions of law." *Allen*, 378 N.C. at 296 (cleaned up). By contrast, if the "court cannot rule upon the motion without the hearing of evidence," it must hold that hearing and find facts. N.C.G.S. § 15A-1420(c)(4) (2023).

In construing those provisions, *Allen* did not sail in uncharted waters. This Court's decision in *State v. McHone*, 348 N.C. 254 (1998)—the very case the majority cites—applied the statute to evidentiary hearings:

> Under subsection (c)(4), read *in pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary

> hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief *even if resolved in his favor* . . . .

*Id.* at 258 (second emphasis added).

*Allen* thus explained that MAR courts "are obligated to conduct an evidentiary hearing to resolve any disputed facts unless" the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor. *Allen*, 378 N.C. at 296 (citing *McHone*, 348 N.C. at 257). So when a court summarily dismisses an MAR without a hearing, we review that decision by asking whether the evidence in the record and MAR—"considered in the light most favorable to [the defendant]"—would "if ultimately proven true, entitle him to relief." *Id.* (citing *McHone*, 348 N.C. at 258). Put another way, an evidentiary hearing is required if an MAR's "factual allegations would entitle the defendant to relief if true" and the "filings provide some evidentiary basis for the allegations." *Id.* at 297. In that case, a court must "determine the facts necessary to resolve the claim on its merits." *Id.*

Rather than confront *Allen* head-on, the majority constructs a strawman. As the majority tells it, that decision required MAR courts to review "a defendant's asserted grounds for relief in the light most favorable to defendant." *Allen*, however, did no such thing. As explained above, *Allen* examined when an evidentiary hearing is required to resolve an MAR. We did not prescribe how courts should weigh a defendant's "asserted grounds for relief," as the majority would have it. *Allen* instead focused attention on the "evidence contained in the record and presented in [the defendant's] MAR." *Allen*, 378 N.C. at 296. Only those factual allegations are viewed in the defendant's favor and only "when making the initial determination as to whether the facts alleged by the defendant would entitle the defendant to relief if proven true." *Id.* at 297 n.4. In fact, *Allen* took pains to explain its scope, cautioning that "[n]othing in this opinion alters the undisputed premise that the defendant ultimately bears the burden of proving by a preponderance of the evidence the existence of the asserted grounds for relief." *Id.* (cleaned up). The majority thus criticizes *Allen* for something it did not say and overrules a standard *Allen* did not prescribe. And in all events, *Allen* did not work the sea change the majority wrings from it or conjure up a novel standard. Instead, it moored its holding in the text of Section 15A-1420 and our precedent interpreting it. That remains true, even if the dissent in that case disagreed.

Reversing our precedent is also gratuitous. Here, the parties did not dispute *Allen*'s vitality or ask us to revisit it. And overturning that

decision is as unnecessary as it is unexamined. The Court unanimously agrees that Mr. Walker's MAR lacks the evidentiary support needed for a hearing. Whether or not we view the evidence in Mr. Walker's favor, the outcome is the same. For that reason, I see no need to reach out, misrepresent a precedent, and then needlessly reverse it. Indeed, that holding is mere dicta and should be treated as such.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

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GARY W. SURGEON AND MARLA LEPLEY-STARR,
INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARITY SITUATED
v.
TKO SHELBY, LLC, TRADING AS NISSAN OF SHELBY; INTEGRITY AUTOMOTIVE PROMOTIONS, LLC; A TO Z STAFFED EVENTS, INC.; BRIAN LEACHMAN; MICHAEL SMITH; AND TRAVIS K. OSTROM, D/B/A THE TKO GROUP, DEFENDANTS; DEALER COMPLIANCE SERVICES, INC., CROSS-CLAIM DEFENDANT

No. 198A22

Filed 22 March 2024

**Class Actions—class certification—inconsistent definitions of class—further issues for review on remand**

In a class action lawsuit arising from an allegedly deceptive promotional flyer that a car dealership sent to plaintiffs—who were led to believe that they had won either a large cash prize or a free car when, in fact, they had won only two dollars—the trial court's class certification order was vacated because of an internal inconsistency in the order that precluded meaningful appellate review. Specifically, the court's order defined the prospective class in one way—as individuals who called the hotline listed on the flyer and then went to the car dealership to claim their prize—when analyzing the certification criteria, but then defined the class differently—as individuals who went to the car dealership to claim the prize regardless of whether they called the hotline—when certifying the class. The matter was remanded with additional instructions for the trial court to determine whether any conflicts of interest existed within the proposed class and whether any potential inefficiencies existed that would render class certification inappropriate—two issues that

could only be resolved after the court settled on one definition of the class.

Appeal pursuant to N.C.G.S. § 7A-27(a)(4) from an order granting plaintiff's motion for class certification entered on 13 December 2021 by Judge Forrest D. Bridges, in Superior Court, Gaston County. Heard in the Supreme Court on 12 September 2023.

*Higgins Benjamin, PLLC, by John F. Bloss and Frederick L. Berry, for plaintiff-appellees.*

*Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by Michael L. Carpenter and D. Scott Hester, Jr.; Wilson Elser Moskowitz Edelman & Dicker LLP, by Jeremy A. Stephenson; and Barnes, Alford, Stork & Johnson, LLP, by Curtis W. Dowling and Matthew G. Gerrald, for defendant-appellants.*

DIETZ, Justice.

Plaintiffs brought this class action lawsuit after receiving a promotional flyer from a car dealership. They allege that the flyer was deceptive and misled them into believing they won a free car or $20,000 cash. Instead, they received a $2 prize. Plaintiffs allege that they and nearly one thousand other people were harmed by the deceptive promotion.

The trial court certified plaintiffs' case as a class action in a detailed written order, and defendants appealed. At oral argument, the parties acknowledged that the trial court's certification order is internally inconsistent. Specifically, the trial court's order used one class definition to analyze the certification criteria, then changed the definition when actually certifying the class.

This inconsistency requires us to vacate the order and remand for further proceedings. As explained below, we cannot engage in meaningful appellate review of a trial court order—particularly one that includes a discretionary component—when the order suffers from this type of internal contradiction.

Because we vacate the order on this basis, we need not address all of defendants' arguments in this appeal, many of which may be mooted by entry of a new order. We limit our analysis to a few issues, such as conflicts of interest and efficiency concerns, that are likely to persist on remand even after the inconsistency is corrected.

## Facts and Procedural History

### I. The promotional sales event

In 2018, plaintiffs Gary Surgeon and Marla Lepley-Starr received a promotional flyer in the mail advertising a "Game On Tent Sale Event" held exclusively at Nissan of Shelby, an automobile dealership. The flyer informed recipients that they had the chance to win one of six "grand prizes," including the largest prize, a 2018 Nissan Sentra SR or $20,000 in cash. In the middle of a grid displaying these grand prizes, there was a scratch-off area that revealed a contest code.

On the flyer, promotional language stated that recipients who "scratch and match" their scratch-off codes with one of the numbers assigned to a prize become a "guaranteed winner." The flyer instructed recipients with a matching code number to call the event hotline and come to the dealership during the sales event to claim their prize.

Although not evident from the flyer itself, the code number beneath the scratch-off portion of all 50,000 flyers was the same. It matched the code number assigned to the largest grand prize, the 2018 Nissan Sentra SR or $20,000 in cash. This scratch-off code was not the code number used to identify the winning contestants of the contest. Instead, each flyer had a separate "activation code" located in a red box under the contest instructions. This code, which was unique to each flyer, was used to identify the contest winners.

After receiving the flyer, plaintiffs each scratched off the area labeled "scratch and match" on their flyers and revealed the code number matching the 2018 Nissan Sentra SR or $20,000 prize. Plaintiffs called the event hotline to claim their prize. An automated answering system congratulated them on winning and prompted them to come to the dealership to claim their prize.[1]

As a result, both plaintiffs visited the dealership during the sales event. When they tried to claim their prizes, plaintiffs learned that they were not winners of the 2018 Nissan Sentra or $20,000. Dealership agents told plaintiffs that the hidden numbers beneath the scratch-off area of their contest flyers did not mean anything. Instead, the agents explained, the "activation code" in the red box on the flyer determined which prize each recipient had won. Those activation code numbers

1. As noted below, the complaint alleges that plaintiff Marla Lepley-Starr called the event hotline, but the record indicates she may have called the dealership directly and spoken to a sales agent.

matched numbers on a poster displayed at the dealership. In addition to the six "grand prizes" on the contest flyer, there was a seventh prize box on the poster that awarded a $2 cash prize. The sales agents at the dealership told plaintiffs that, based on their activation codes, they won the $2 prize.

**II. The class action lawsuit**

Plaintiffs later brought a class action complaint against the dealership and various other parties connected to the sales promotion. They sought to certify a class of "all individuals who received a contest [f]lyer which had the scratch-off number 801602," which was the number matching the 2018 Nissan Sentra SR or $20,000 cash prize, and who then "went to Nissan of Shelby to claim their prizes."

Plaintiffs alleged that defendants created a deceptive contest flyer in violation of North Carolina law governing unfair or deceptive trade practices; breached the terms of a contract with recipients of the flyer by failing to deliver the prizes; and negligently created and implemented the sales event.

During discovery, defendants produced a log with contact information for approximately 50,000 households that received the flyer in the mail. Defendants also produced a log of the 2,557 people who called the event hotline to claim their prize. That log lists 1,167 people as using the hotline to make an appointment to visit the dealership.

Defendants did not produce any records identifying the people who actually visited the dealership to claim a prize. There is a factual dispute concerning what happened to those records and who is responsible. At this stage in the proceeding, defendants estimate that 927 people visited the dealership during the sales event, although not all of those people necessarily visited to claim a promotional prize.

**III. The trial court's class certification**

Several years into the lawsuit, the trial court granted plaintiffs' motion to certify a class. *Surgeon v. TKO Shelby, LLC*, No. 18 CVS 3983, 2021 WL 9772618, at *5 (N.C. Super. Dec. 13, 2021).

The trial court defined the class of plaintiffs in its written order as follows:

> All individuals who received at their place of residence a contest Flyer promoting a contest held at Nissan of Shelby in late April and/or early May 2018, which had the scratch-off number 801602 that matched the

> number for Prize 5 (the 2018 Nissan Sentra SR or $20,000.00 cash), and who went to Nissan of Shelby to claim their prize.

*Id.* at *5.

In its analysis in the order, the trial court explained that it intended to certify a class of the "Ups." *Id.* at *4. The trial court's order defines the "Ups" as "the approximately 927 people who called the number and who showed up at the dealership." *Id.* Notably, the definition of "Ups" used in the court's analysis includes a requirement that the class members both "called the number" and "showed up at the dealership." *Id.*

The class definition quoted above, by contrast, applies to anyone who received the flyer and then "went to Nissan of Shelby to claim their prize" regardless of whether they called the event hotline as the flyer instructed. *Id.* at *5.

Then, in the trial court's instructions regarding notice to potential class members, the court ruled that notice should be sent to the "1,167 people who called the telephone number on the contest flyer and made an appointment to come to the dealership for the sales event," limiting notice to those people who called the event hotline *and* made an appointment—a smaller subset of the 2,557 people who called the hotline to claim a prize, and who may have gone to the dealership without making an appointment. *Id.*

Defendants appealed the trial court's class certification order directly to this Court under N.C.G.S. § 7A-27(a)(4).

## Analysis

This Court reviews a trial court's class certification order for abuse of discretion. *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 209 (2016). The "test for abuse of discretion is whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Frost v. Mazda Motor of America, Inc.*, 353 N.C. 188, 199 (2000) (cleaned up). Within this analysis, we review the trial court's conclusions of law, including its evaluation of the legal criteria to establish a class, de novo. *Fisher*, 369 N.C. at 209.

### I. Class certification criteria

We begin our analysis by reviewing the criteria for class certification. Rule 23 of the North Carolina Rules of Civil Procedure permits class actions when the "persons constituting a class are so numerous

as to make it impracticable to bring them all before the court." N.C.G.S. § 1A-1, Rule 23(a) (2023).

The party seeking class certification bears the burden to show that a proper class exists, meaning "the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280 (1987).

Beyond this threshold requirement, the party seeking class certification also must satisfy a number of other certification criteria, including: (1) that the class representatives have the ability to fairly and adequately represent the interest of all class members; (2) that there are no conflicts of interest between the class representatives and the unnamed class members; (3) that the class representatives have a genuine personal interest in the outcome of the suit; and (4) that the class representatives have the ability to adequately represent class members outside of the jurisdiction; (5) that the proposed class members are so numerous that it is impractical to bring them all before the court; and (6) that it is possible to provide sufficient notice to all putative class members. *Id.* at 282–83.

Once these legal prerequisites are met, the trial court may, in its discretion, certify a class. *Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C.*, 345 N.C. 683, 697 (1997). In evaluating whether class certification is appropriate, the trial court should consider "whether a class action is superior to other available methods" to adjudicate the controversy and whether the class action is "likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Crow*, 319 N.C. at 284. The court also should balance the potential benefits of class certification against "inefficiency or other drawbacks" to class certification. *Id.* This "inefficiency" includes the possibility that the costs of administering a class action exceed the plaintiffs' potential recovery. *Maffei v. Alert Cable TV of N.C., Inc.*, 316 N.C. 615, 620 (1986).

Defendants argue that the trial court's class certification order fails to comply with many aspects of this multi-step test. They first challenge several of the trial court's conclusions of law, arguing that the class members are not sufficiently ascertainable; that there are irreconcilable conflicts of interest; and that any common issues of law or fact do not predominate over the many other issues affecting individual class members.

Defendants also argue that the trial court abused its discretion by certifying the class because the costs and drawbacks of this particular

class far outweigh any benefits to the putative class members. Before we address defendants' arguments, we first address a conflict in the wording and reasoning of the trial court's order.

## II. Conflicting class definitions

In its order, the trial court stated that the "Class consists of the approximately 927 people who called the number and who showed up at the dealership—the 'Ups.' " The court then explained that the plaintiffs "have the names of most class members" because that information is contained in the list of 1,167 people who called the hotline number and made an appointment to go to the dealership to claim their prize.

The trial court used this definition of "Ups"—people who both called the hotline number and went to the dealership to claim a prize—to conduct its class certification analysis, including its analysis of whether class members were sufficiently ascertainable, whether there were conflicts of interest among members of the class, and whether it was possible to provide sufficient notice to class members.

But then, when the trial court certified the class, it used a broader definition that included any person who received the promotional flyer and went to the dealership to claim a prize, regardless of whether that person first called the contest hotline or made an appointment:

> All individuals who received at their place of residence a contest Flyer promoting a contest held at Nissan of Shelby in late April and/or early May 2018, which had the scratch-off number 801602 that matched the number for Prize 5 (the 2018 Nissan Sentra SR or $20,000.00 cash), and who went to Nissan of Shelby to claim their prize.

This definition of the class does not match the one the court used in its certification analysis.

The mismatch between the class the trial court analyzed and the one it ultimately certified requires us to vacate the order and remand the matter for further proceedings. We cannot engage in meaningful appellate review of a trial court order—particularly one that includes a discretionary component—when the court's ultimate decision on an issue cannot be squared with the reasoning used to reach that decision. *See*, *e.g.*, *Coble v. Coble*, 300 N.C. 708, 714 (1980); *Lackey v. Hamlet City Bd. of Educ.*, 257 N.C. 78, 84 (1962). Accordingly, we vacate the trial court's order and remand for further proceedings.

**III. Potential conflicts of interest & inadequate representation**

Because we vacate and remand this matter to address the inconsistent class definitions in the order, we need not address all of defendants' arguments in this appeal, many of which may be mooted by entry of a new order on remand. But several of defendants' arguments are intertwined with the mismatched class definitions and warrant further discussion to guide the trial court's analysis on remand.

The first of these issues concerns potential conflicts of interest within the class. To obtain class certification, the named plaintiffs must show that "there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected." *Crow*, 319 N.C. at 282. Likewise, the named plaintiffs must show that there are no conflicts within the broader class that prevent class member interests from aligning on key factual or legal questions. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118–19 (2d Cir. 1999). These intraclass conflicts, depending on their extent, could require certification of subclasses with separate counsel, or could preclude class certification altogether. *Id.*; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864–65 (1999).

Here, some of plaintiffs' claims raise potential conflict-of-interest concerns. For example, plaintiffs' contract claim relies on the Court of Appeals' holding in *Jones v. Capitol Broad. Co., Inc.*, 128 N.C. App. 271, 273–74 (1998). In *Jones*, the plaintiff filled out an entry form for a public raffle, with hopes of winning a new Ford F-150 pickup truck. *Id.* at 272. After the plaintiff submitted the form, defendants called plaintiff and informed him that he had won the truck. *Id.* Later that day, defendants again called plaintiff to tell him that he had not won the contest and the truck had been given to someone else. *Id.* at 272–73.

The Court of Appeals held that this type of contest can create contractual rights. *Id.* at 273. Relying on cases from other jurisdictions, the court held that "advertising a promotion contest to the public is in the nature of an offer. An enforceable contract is formed when a party accepts that offer and consideration is provided by entering the contest and complying with all of the terms of the offer." *Id.* at 274.

Importantly, under the contract theory articulated in *Jones*, the contest participant must have complied with "all of the terms of the offer"—meaning the contest rules set out in the promotion. *Id.*

Assuming plaintiffs proceed under the contract theory articulated in *Jones*, the requirement that contest participants must have complied

with all terms of the offer could create potential conflicts of interest among class members. The "terms of the offer" in these contest cases generally are understood to mean the specific rules or instructions contained in the promotional material. *Id.*

The flyer in this case contains instructions telling winners to call the event hotline number and then go to the dealership immediately to claim their prize:

> HOW TO WIN: SSCRATCH [sic] OFF THE CIRCLE IN THE DICE BELOW AND MATCH THE ACTIVATION CODE. IF THE SCRATCH OFF BELOW MATCHES ONE OF THE SIX LUCKY NUMBER GAME PRIZE BOXES, YOU ARE A GUARANTEED WINNER OF ONE OF THESE PRIZES! CALL THE EVENT HOTLINE NOW AT 980.289.4680 & PROCEED TO NISSAN OF SHELBY IMMEDIATELY!

At the bottom of the flyer, there are additional instructions stating that participants whose scratch-off reveals winning numbers should "call the event hotline" and "proceed to the dealership immediately to claim your prize."

On the reverse side of the flyer, large instructions next to the "SWEEPSTAKES PRIZE BOARD" with images of the prizes states: "If your scratch off matches a lucky number prize box YOU HAVE WON! CALL 908.289.4680 & be sure to have your activation code ready. Then, come to dealership to claim your prize!"

Finally, in very small print at the bottom of the flyer, there is a lengthy statement with more specific contest rules, such as information about who is eligible and when the contest expires. Those rules state that "in order for the grand prize to be awarded, the randomly selected individual designated to receive the winning mail piece must redeem the mail piece in person, and their name and address must match the information on file with promoter." These fine-print rules do not mention a requirement to call the event hotline.

If, as plaintiffs allege, this contest language is an offer under *Jones*, then acceptance of the offer requires complying with the specific terms set out in the offer. *Jones*, 128 N.C. App. at 274. This raises a thorny question about the purported contract language in this case: Is calling the event hotline a term of this purported contract? After all, the promotional flyer repeatedly instructs contestants to do so before going to the dealership to claim the prize.

The answer to this question is meaningful because, as noted above, the trial court's class certification analysis focused on a putative class (the so-called "Ups") that both called the hotline and went to the dealership. To this potential class, assessing whether a call to the hotline is a contract term or not is irrelevant, because they complied with that potential contract term.

By contrast, the class that the trial court actually certified—everyone who received the winning contest flyer and then went to the dealership—includes an unknown number of potential class members who did *not* call the event hotline. Indeed, there is even evidence in the record suggesting that one of the named plaintiffs, Marla Lepley-Starr, did not call the event hotline as alleged in the complaint (the record suggests she may have called the dealership directly and spoken to a sales agent).

Assuming plaintiffs established a valid contract under *Jones*, class members who did not call the event hotline could face contract hurdles that other class members do not. This is precisely the sort of potential conflict that must be examined and resolved in the class certification order. *Crow*, 319 N.C. at 282.

Thus, on remand, the trial court should examine whether the proposed class creates conflicts of interest and, if so, take appropriate steps to remedy the conflict, such as dividing the class into subclasses with separate counsel, or denying class certification of this proposed class altogether. *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 343 (2014); *Dewalt v. Hooks*, 382 N.C. 340, 350 (2022); *Ortiz*, 527 U.S. at 864–65; *Boucher*, 164 F.3d at 118–19.

## IV. Potential inefficiencies in the class

Another issue highlighted by the mismatch in class definitions is the potential for inefficiencies that could render class certification inappropriate.

Before certifying a class, the trial court must balance the potential benefits of certifying the proposed class against any "inefficiency or other drawbacks." *Crow*, 319 N.C. at 284. The entire notion of class actions is grounded in this concept of efficiency; class actions provide a means for potential litigants with valid legal claims to have those claims "aggregated in an efficient and economically reasonable manner." *Maffei*, 316 N.C. at 620.

Thus, although class certification analysis ordinarily does not involve an inquiry into the merits of the plaintiffs' claims, it is appropriate for

the trial court to consider, as a matter of law, what remedies would be available if the plaintiffs prevailed on their claims.

In *Maffei*, for example, the trial court determined that the "damages recoverable by any one member of the proposed class could not exceed $.29," and therefore "certification of this action as a class action would be inadvisable, inefficient and inappropriate." *Id.* at 617.

We affirmed the trial court's ruling, holding that class members' recovery "would conceivably not even cover the cost of postage and stationery for a claimant to notify the court of his inclusion within the class." *Id.* at 621. We further held that, when "balancing the costs of litigation against the likely benefits," the costs of administering a class action, compared to the plaintiffs' potential recovery, may render the class action so inefficient that it does not warrant certification. *Id.*

On remand in this case, there are similar analyses that may be appropriate, depending on the class actually certified. For example, the complaint asserts claims for unfair and deceptive trade practices and negligence. The remedy for both negligence claims and unfair and deceptive trade practices claims is damages based on the actual injury suffered by the claimant. *Hansley v. Jamesville & Washington R.R. Co.*, 115 N.C. 602, 605 (1894) (negligence); *Pearce v. Am. Def. Life Ins. Co.*, 316 N.C. 461, 471 (1986) (unfair and deceptive trade practices).

Defendants contend that the only actual injury applicable to these claims is potential class members' wasted time traveling to the dealership and unsuccessfully attempting to claim the grand prize. The value of this wasted time, defendants contend, is so "de minimis" that it precludes class certification under *Maffei*. Plaintiffs, by contrast, contend that each class member suffered an actual injury equal to "the $20,000 grand prize" itself.

On remand, the trial court should examine the potential recovery available for each of plaintiffs' claims and assess whether some or all of those claims present the problem identified by *Maffei*, where the costs of litigating that claim so greatly exceeds class members' potential damages that it renders class certification prohibitively inefficient. 316 N.C. at 617, 621. If so, the court should consider whether, in its discretion, some or all of plaintiffs' claims are inappropriate for class certification.

**Conclusion**

Because the trial court's class certification order is internally inconsistent, we vacate that order and remand for further proceedings.

VACATED AND REMANDED.

**TAYLOR v. BANK OF AMERICA, N.A.**

[385 N.C. 783 (2024)]

CHESTER TAYLOR III, RONDA AND BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE AND ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE

v.

BANK OF AMERICA, N.A.

No. 102A20-3

Filed 22 March 2024

**Statutes of Limitation and Repose—fraudulent denial of mortgage modification—date of discovery—lack of diligence—claims time-barred**

In an action brought by homeowners (plaintiffs) alleging that a bank (defendant) operated a fraudulent scheme to delay plaintiffs' mortgage modification requests—submitted pursuant to a federal mortgage relief program—while continuing to collect trial period payments from them, which eventually resulted in the foreclosure of their homes, the trial court properly dismissed plaintiffs' claims as being time-barred because the claims were filed outside of the applicable statutory time limits from the date plaintiffs knew or should have known of their injuries and of the alleged fraud. At the latest, the statutes of limitations for all of plaintiffs' claims (both non-fraud and fraud) began to run by the date that each plaintiff lost his or her home. Although plaintiffs argued that they could not have discovered defendant's fraud until later, given the nature and frequency of their interactions with defendant without any progress being made on the modification application process, plaintiffs should have known of defendant's misdeeds through the exercise of ordinary diligence.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2021) from the decision of a divided panel of the Court of Appeals, 287 N.C. App. 358, 882 S.E.2d 605 (2022), reversing an order entered on 3 October 2019 by Judge Lisa C. Bell in Superior Court, Mecklenburg County, and remanding to the trial court for further proceedings. Heard in the Supreme Court on 2 November 2023.

*Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding; Aylstock, Witkin, Kreis, & Overholtz, PLLC, by Samantha Katen, Chelsie Warner, pro hac vice, and Caitlyn Miller, pro hac vice; and Robert F. Orr, for plaintiffs-appellees.*

*McGuireWoods LLP, by Bradley R. Kutrow and Dylan M. Bensinger; and Goodwin Procter, LLP, by Keith Levenberg, pro hac vice, and James W. McGarry, pro hac vice, for defendant-appellant.*

NEWBY, Chief Justice.

North Carolina law has long recognized that a plaintiff must initiate an action within the statutorily prescribed period to avoid dismissal of his claim. These statutes of limitations strike a balance between one party's right to assert a claim and another party's right to be free from a stale claim. Here plaintiffs' claims arise from defendant's alleged scheme to fraudulently deny mortgage modifications to plaintiffs and then foreclose on their homes. The complaint reveals that each plaintiff knew, or reasonably should have known, of his or her injuries and the alleged fraud at least four to seven years before filing the complaint. As a result, plaintiffs' claims are time-barred by the applicable statutes of limitations. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiffs are citizens of North Carolina, California, Wisconsin, Arizona, Michigan, or Nevada.[1] Their claims arise from defendant's alleged misadministration of the Home Affordable Modification Program (HAMP). HAMP was a federal mortgage relief program "implemented in March of 2009 to assist the millions of American homeowners facing foreclosure" after the 2008 recession. Under the program, homeowners, including plaintiffs, were given the opportunity to modify the terms of their mortgages after submitting an application and completing a brief trial payment period.

Each plaintiff elected to participate in HAMP through his or her mortgage servicer, defendant. Plaintiffs alleged they were each a victim of defendant's "fraudulent scheme" to "intentionally prevent thousands of eligible applicants from receiving permanent HAMP modifications." Specifically, plaintiffs alleged that defendant collected plaintiffs' HAMP

1. Because we must assume that plaintiffs' allegations are true when considering this matter, *see Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 559, 681 S.E.2d 770, 774 (2009), the following recitation of facts is taken from plaintiffs' amended complaint.

trial period payments while simultaneously delaying their permanent mortgage modifications in order to "set [p]laintiff[s] up for foreclosure."

For example, one of the plaintiffs, Chester Taylor III, contacted defendant seeking a HAMP modification in February 2010. According to the complaint, defendant's loan representative advised Taylor "to refrain from making his regular mortgage payments" because he "had to be two to three months behind on his mortgage loan" to qualify for HAMP. Taylor later learned that this statement was false, but at the time, he relied on this statement and defaulted on his mortgage so that he could participate in HAMP.

About one month later, Taylor submitted a "properly completed" HAMP application to defendant. Taylor received a letter approving him for a HAMP trial period and requesting that he make three "trial payments" to receive a permanent modification to his mortgage terms. Taylor then began making trial payments to defendant hoping that he would receive a permanent modification and "save his home" from foreclosure.

Over the course of the next two years, however, defendant collected Taylor's trial period payments while also purposefully delaying Taylor's permanent loan modification. Defendant delayed the modification process by repeatedly telling Taylor there were problems with his application and requesting that he resubmit certain paperwork. For example, defendant would tell Taylor that his documents were "not current," "incorrect," or "missing" even though defendant had already received all necessary documents. Taylor alleges that defendant's representatives made these false statements "for the specific purpose of frustrating the HAMP application process to ensure a modification was ultimately denied, resulting in foreclosure." Continuing to rely on these statements, Taylor resubmitted his application and documentation more than thirty times between 2010 and 2012. Ultimately, defendant never approved Taylor for a permanent HAMP modification and foreclosed on Taylor's home in September 2012. By the time defendant foreclosed on Taylor's home, Taylor had made fourteen trial period payments to defendant. Defendant retained the money but never applied these payments to Taylor's account.

All plaintiffs allege that they experienced a similar pattern of conduct after applying with defendant for a HAMP modification. The complaint reveals that each plaintiff lost his or her home to foreclosure between April 2011 and January 2014. Plaintiffs further allege that defendant "fraudulently concealed the facts giving rise to" their claims

and that, as a result, they "could not have reasonably discovered the facts that formed the basis of their fraud claims against [defendant] until they retained their attorneys."

As alleged in their complaint, plaintiffs are not the only purported victims of defendant's fraudulent misadministration of HAMP. Homeowners filed numerous lawsuits "across the country" in state and federal courts alleging claims based on the exact same conduct. *See, e.g.*, *In re Bank of Am. Home Affordable Modification Program (HAMP) Cont. Litig.*, M.D.L. No. 10-2193-RWZ, 2013 WL 4759649 (D. Mass. Sept. 4, 2013). Defendant's scheme was so widespread that in March 2012, the federal government and forty-nine state attorneys general sued defendant for conduct "involv[ing] identical issues in fact and law" as those alleged by plaintiffs. Under a consent judgment entered in that lawsuit in April 2012, defendant agreed to pay over $2 billion to homeowners to "remediate harms" resulting from its HAMP misconduct. These lawsuits were ongoing during the time that plaintiffs were seeking their own HAMP modifications from defendant, and plaintiffs acknowledged the existence of these lawsuits in their complaint.

Plaintiffs filed their complaint in this case on 1 May 2018 and their amended complaint on 13 March 2019. The complaint alleged claims based on common law fraud, fraudulent concealment, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, unfair and deceptive trade practices, and, in the alternative, negligence. On 11 April 2019, defendant filed a motion to dismiss the amended complaint. The trial court granted defendant's motion to dismiss on the grounds that all plaintiffs' claims were barred by the applicable three-year and four-year statutes of limitations.[2] *See* N.C.G.S. §§ 1-52(9), 75-16.2 (2021). Plaintiffs appealed to the Court of Appeals.

In a 29 December 2022 opinion, the Court of Appeals majority held that the trial court erred in dismissing plaintiffs' claims as barred by the statute of limitations. *Taylor v. Bank of Am., N.A.*, 287 N.C. App. 358, 361, 882 S.E.2d 605, 608 (2022). The Court of Appeals majority reasoned that because the complaint "suggest[s] [p]laintiffs remained unaware of [d]efendant's alleged fraudulent scheme for many years," plaintiffs had pled sufficient facts to avoid dismissal of their claims on statute of limitations grounds. *Id.* at 360, 882 S.E.2d at 607. Accordingly, the Court of Appeals reversed the trial court's ruling and remanded the matter for further proceedings. *Id.* at 361, 882 S.E.2d at 608.

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2. The trial court concluded that plaintiffs' claims were also barred by *res judicata* and collateral estoppel.

The dissent would have affirmed the trial court and held that all plaintiffs' claims were barred by the statute of limitations. *Id.* at 361, 882 S.E.2d at 608 (Dillon, J., dissenting). The dissent concluded that, at the very latest, the statute of limitations began to run when defendant foreclosed on each of plaintiffs' homes. *Id.* The dissent reasoned that "the statute of limitations ceased to be tolled" at that time because "each plaintiff became aware of his/her injury" at that moment. *Id.* Accordingly, because the foreclosures occurred "more than three years before the complaint was filed," the dissent concluded that all plaintiffs' claims were time-barred. *Id.* Defendant appealed to this Court based on the dissent. *See* N.C.G.S. § 7A-30(2) (2021).[3]

Here we must determine whether the trial court erred in dismissing plaintiffs' claims as time-barred by the applicable statutes of limitations. We review dismissals under Rule 12(b)(6) of the Rules of Civil Procedure de novo. *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016). In doing so, we "treat the plaintiff[s'] factual allegations as true" and view them "in the light most favorable to plaintiffs." *Turner*, 363 N.C. at 559, 681 S.E.2d at 774. Dismissal pursuant to Rule 12(b)(6) is "proper when the complaint 'fail[s] to state a claim upon which relief can be granted.' " *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (alteration in original)). "When the complaint on its face . . . discloses facts that necessarily defeat the claim," the complaint must be dismissed. *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 8 (citing *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). Specifically, dismissal is appropriate when a complaint alleges "uncontroverted facts" demonstrating that the cause of action is barred by the statute of limitations. *Latham v. Latham*, 184 N.C. 55, 61, 113 S.E. 623, 626 (1922).

This Court has "long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim." *Christenbury*, 370 N.C. at 5, 802 S.E.2d at 891. Statutes of limitations are intended to "afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Id.* at 5–6, 802 S.E.2d at 891 (quoting *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957), *superseded by statute*, N.C.G.S. § 1-15(b) (1971),

3. *See* N.C.G.S. § 7A-30(2) (2021), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-134.pdf. The repeal of N.C.G.S. § 7A-30(2) only applies to cases filed with the Court of Appeals on or after 3 October 2023. *See* Current Operations Appropriations Act § 16.21(e).

*as enacted by* An Act to Provide that a Cause of Action Accrues When Injury Is Or Should Have Been Known, ch. 1157, § 1, 1971 N.C. Sess. Laws 1706, 1706, *on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630–31, 325 S.E.2d 469, 473 (1985)). This protection is strictly enforced because "[w]ith the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed." *Estrada v. Burnham*, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute*, N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988), *as enacted by* An Act . . . to Make Changes in Rule[ ] . . . 11(a) of the Rules of Civil Procedure, ch. 1027, § 55, 1985 N.C. Sess. Laws (Reg. Sess. 1986) 617, 639, *on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163–64, 381 S.E.2d 706, 712–13 (1989).

A three-year statute of limitations applies to all of plaintiffs' claims, N.C.G.S. § 1-52(1), (4), (5), (9), (16) (2021), except for their unfair and deceptive trade practices claim, which is subject to a four-year statute of limitations, *id.* § 75-16.2.[4] Generally, a statute of limitations runs from the moment a plaintiff is injured. *Shearin*, 246 N.C. at 367, 98 S.E.2d at 511 ("In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises."). For claims sounding in fraud, however, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C.G.S. § 1-52(9). This Court has repeatedly held that the statute of limitations for fraud claims is tolled until "discovery of the facts" constituting the fraud "or from the time when they should have been discovered in the exercise of proper diligence or reasonable . . . prudence." *Latham*, 184 N.C. at 64, 113 S.E. at 627; *see also Feibus & Co. (N.C.) v. Godley Constr. Co.*, 301 N.C. 294, 304–05, 271 S.E.2d 385, 392 (1980).

This discovery rule tolls the statute of limitations for fraud claims because fraud involves intentional deception and, therefore, may not always be readily discoverable at the moment a plaintiff's injury is complete. *See Forbis v. Neal*, 361 N.C. 519, 526–27, 649 S.E.2d 382, 387

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4. Because plaintiffs are from six different states, we must first decide which states' statutes of limitations apply to plaintiffs' claims—the statutes of limitations where plaintiffs' homes were located (the situs of the claims) or North Carolina's statutes of limitations (the forum of the suit). Generally, matters affecting substantive rights of the parties are determined by the law of the situs of the claim, while matters relating to procedure are governed by the laws of the forum state. *Howle v. Twin States Express, Inc.*, 237 N.C. 667, 671–72, 75 S.E.2d 732, 736 (1953). This Court has generally held that "statutes of limitation are clearly procedural" because they "affect[ ] only the remedy" available to a party "and not the right to recover." *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988). Therefore, North Carolina's statutes of limitations apply to plaintiffs' claims.

(2007). Nevertheless, a plaintiff is not permitted "to close his eyes to facts observable by ordinary attention" and thereby to toll the statute of limitations indefinitely. *Latham*, 184 N.C. at 64, 113 S.E. at 627 (quoting *In re Will of Johnson*, 182 N.C. 522, 525, 109 S.E. 373, 375 (1921)). "[A]s soon as the injury becomes apparent to the [plaintiff] or should reasonably become apparent, the cause of action is complete and the limitation period begins to run." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985).

The discovery rule is an objective standard, not a subjective one. It tolls the statute of limitations only until a reasonable person should have discovered the fraud under the circumstances and in the exercise of reasonable prudence. The particular moment that a specific plaintiff alleges he *actually* discovered the fraud is irrelevant. *See Latham*, 184 N.C. at 66, 113 S.E. at 627 (citing *In re Will of Johnson*, 182 N.C. at 525–27, 109 S.E. at 375).

Here we must determine when the statutes of limitations began to run for plaintiffs' claims. As for plaintiffs' non-fraud claims, the allegations of the complaint reveal that each plaintiff's injuries were complete—at the very latest—when they lost their homes. It is clear that by that point in time plaintiffs knew they would not receive a permanent HAMP modification, that defendant would not apply their trial period payments to their mortgage accounts, and that plaintiffs could not save their homes from foreclosure. Thus, the statutes of limitations that apply to plaintiffs' non-fraud claims began to run on the date that each plaintiff lost his or her home.

As for plaintiffs' fraud claims, the complaint makes clear that the statute of limitations also began to run—at the very latest—by the date they lost their homes. At that point in time, each plaintiff knew, or reasonably should have known, of the "facts constituting [defendant's] fraud," N.C.G.S. § 1-52(9), that is, defendant's wrongful delay and denial of plaintiffs' HAMP applications and the resulting foreclosures on plaintiffs' homes. By the time plaintiffs lost their homes, they were clearly aware of all facts regarding their prior interactions with defendant during the HAMP application process. Thus, on the dates that plaintiffs lost their homes, plaintiffs knew all the facts from which their fraud claims arise, and therefore, the statute of limitations for those fraud claims began to run.

Accordingly, all plaintiffs' claims accrued and the statutes of limitations began to run at the latest by the date that each plaintiff lost his or her home. Each plaintiff lost his or her home sometime between

April 2011 and January 2014. Thus, the latest point in time any plaintiff could have filed a complaint was January 2017, or in the case of an unfair and deceptive trade practices claim, January 2018. Plaintiffs did not file their original complaint until May 2018. Therefore, their claims are time-barred.

Plaintiffs argue that the discovery rule tolls the statute of limitations for their fraud claims beyond the dates of their foreclosures because they could not have discovered defendant's fraud until they consulted their current counsel. Plaintiffs' own allegations foreclose this argument, however, because their alleged experiences during the HAMP application process should have put a reasonable person on notice that something was wrong. The complaint reveals that each plaintiff "contacted [d]efendant repeatedly" during the application process "to ensure proper compliance with HAMP." Defendant, however, repeatedly asked plaintiffs to resubmit the same application materials numerous times without ever advancing the application process. Some plaintiffs complied with these resubmission requests fifteen, nineteen, or even thirty times over the course of several years.

Simultaneously, defendant told each plaintiff he or she could receive a permanent mortgage modification after making three trial payments. Defendant, however, collected as many as fourteen trial payments from plaintiffs without ever modifying their mortgages. All the while, defendant continued to delay approval of plaintiffs' applications and eventually, foreclosed on their homes. Even if plaintiffs did not understand the full extent of defendant's misconduct at the time of their foreclosures, their own alleged frustrations with the HAMP application process were sufficient to put them on notice that defendant had not acted in good faith and that they needed to investigate further.

Additionally, the complaint makes clear that had plaintiffs investigated further, they could have easily discovered the ongoing, nationwide litigation involving defendant's similar mistreatment of homeowners throughout the country. They also would have discovered the settlement to which defendant agreed in response to a 2012 lawsuit brought by the federal government and forty-nine state attorneys general for the exact same conduct underlying plaintiffs' claims. Plaintiffs' complaint alleges no facts suggesting that defendant fraudulently concealed any of this public information from plaintiffs. Even when viewed in the light most favorable to plaintiffs, these facts indicate that plaintiffs either knew of defendant's fraud or "should have [ ] discovered [it] in the exercise of ordinary diligence" by the time they lost their homes. *Latham*, 184 N.C. at 64, 113 S.E. at 627 (quoting *In re Will of Johnson*, 182 N.C. at

526, 109 S.E. at 375). Thus, the statute of limitations for plaintiffs' fraud claims began to run on the date that each plaintiff lost his or her home and was not tolled beyond that point in time.

While civil causes of action exist to provide remedies to aggrieved parties, statutes of limitations operate inflexibly and without reference to the merits of a cause of action. Even in the case of fraud, a plaintiff cannot avoid the statute of limitations by "sit[ting] on [his] rights," *Pembee Mfg. Corp.*, 313 N.C. at 493, 329 S.E.2d at 354, or "clos[ing] his eyes to facts observable by ordinary attention," *Latham*, 184 N.C. at 64, 113 S.E. at 627 (quoting *In re Will of Johnson*, 182 N.C. at 525, 109 S.E. at 375). Plaintiffs' complaint reveals that they had notice of their injuries and defendant's alleged fraud at least four to seven years before filing their complaint. Whatever injuries plaintiffs suffered, they lost the right to pursue a remedy for those injuries by failing to exercise ordinary diligence within the statutory limitations period. Because plaintiffs failed to timely file their action before the statutes of limitations expired, their claims are time-barred, and the trial court did not err in dismissing their complaint. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

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

Justice RIGGS dissenting.

I do not agree with the majority's application of the discovery rule to the plaintiffs' fraud claims because the majority's analysis does not fully align with our discovery rule jurisprudence. The majority anchors its conclusion that the discovery rule does not toll the statute of limitations for plaintiffs' fraud claims beyond the date of foreclosure to two facts or perceptions: (1) that plaintiffs encountered numerous difficulties during the HAMP application process; and (2) that plaintiffs "could have easily discovered" Bank of America's widespread mistreatment of homeowners through the nationwide litigation and a consent judgment entered in that litigation. Relying on these facts and perceptions, the majority concludes that the statute of limitations "began to run—at the very latest—by the time [plaintiffs] lost their homes." This conclusion disregards portions of the complaint and gives the news coverage of problems with the HAMP program more legal significance than

the allegations and record support. After considering the complaint and the allegations therein, especially the implications of the consent judgment in earlier Bank of America HAMP program litigation, I would hold that the statute of limitations should be equitably tolled for the fraud claims of those plaintiffs who lost their homes after Bank of America executed the consent judgment. I respectfully dissent.

## I. Analysis

Broadly speaking, our discovery rule jurisprudence demonstrates that foreclosure itself is insufficient to cause the fraud claims to accrue. That is because the foreclosure process itself does not represent an act constituting fraud nor do the facts surrounding a foreclosure give rise to an inference of fraud. Indeed, the facts that the majority wants us to believe would put a reasonable person on notice to look for fraud—the HAMP application process and news coverage of litigation related to Bank of America's administration of the HAMP program—are not nearly as informative to a reasonable person as the majority would suggest. I dissent because, while I recognize that our jurisprudence requires us to apply an "objective" reasonable person standard to the discovery of fraud, I do not believe we are required to filter every fact through a lens least sympathetic to regular citizens trying to navigate complex bureaucracies.

Under N.C.G.S. § 1-52(9), a cause of action in fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C.G.S. § 1-52(9) (2023). This Court has interpreted this discovery rule "to set accrual at the time of discovery *regardless* of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Feibus & Co. N.C., v. Godley Constr. Co.*, 301 N.C. 294, 304 (1980). Typically, however, a duty of inquiry begins "when an event occurs to 'excite [the aggrieved party's] suspicion or put [that party] on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud.' " *Forbis v. Neal*, 361 N.C. 519, 525 (2007) (first alteration in original) (quoting *Vail v. Vail*, 233 N.C. 109, 117 (1951)). Significantly, and what the majority does not address is that this Court has held "[e]quity will deny the right to assert the defense of the statute of limitations when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Duke Univ. v. Stainback*, 320 N.C. 337, 341 (1987) (citing *Nowell v. Great Atl. & Pac. Tea Co.*, 250 N.C. 575 (1959)).

Applying this principle, we have held that "discovery rules are capable of being construed broadly to comport with the policy of fairness to

plaintiffs who are unaware that they have been injured in a legal sense." *Black v. Littlejohn*, 312 N.C. 626, 645 (1985). To determine when these fraud claims would accrue in this complex and allegedly dishonest mortgage assistance program scenario, it is instructive to consider this Court's application of the discovery rule in a different context. In *Black v. Littlejohn* this Court considered the discovery rule in the context of a medical malpractice matter, in which actions accrue when the plaintiff knew or should have known of a latent injury. *Id.* at 628. In that case the plaintiff underwent a hysterectomy after being told by her doctor that nothing else would resolve her endometriosis. *Id.* at 627. After the statute of limitations had run, using the date of the surgery as the date from which the action accrued, plaintiff learned of an FDA-approved medication that may have resolved her condition without requiring a hysterectomy. *Id.* The Court clarified that an injury only triggers the statute of limitations when the plaintiff "discovers, or in the exercise of reasonable care, should have discovered, that she was injured *as a result of defendant's wrongdoing*." *Id.* at 642 (emphasis added). The Court concluded that the removal of the reproductive organs was not the injury from which the action accrued; instead, the action accrued only once the plaintiff learned that the defendant was negligent by failing to advise her of the alleged alternative treatment. *Id.* at 637, 646–47.

Similarly, here, the facts constituting the fraud are not the foreclosure or loss of the home, but instead the fraudulent business practices Bank of America allegedly employed in each plaintiff's HAMP application process. The majority's assertion that the frustrating HAMP application process itself should have put plaintiffs on notice of fraud conflates what many Americans struggle with daily—navigating financial bureaucracies—with evidence of fraud. Here, in concluding that having to contact Bank of America repeatedly, resubmitting the same application materials numerous times, and making trial payments should have put the plaintiffs on notice of the fraud dramatically expands the investigatory burdens placed on harmed citizens in seeking justice in a court of law, and imposes those burdens earlier. I agree that plaintiffs are not permitted "to close [their] eyes to facts observable by ordinary attention," thereby tolling the statute of limitations indefinitely. *Latham v. Latham*, 184 N.C. 55, 64 (1922) (quoting *In re Will of Johnson*, 182 N.C. 522, 525 (1921)). But the majority's "discovery" inference from plaintiffs' allegations that a complex, bureaucratic loan modification process was difficult to navigate just undercuts the equity inherent in the discovery rule, particularly when there is a power imbalance between the harmed citizen and the sophisticated business perpetrating fraud. Beyond that, submitting application information,

contacting Bank of America, and making trial payments are also part of the normal HAMP servicing guidelines. The line between a HAMP application process that aligns with the servicing guidelines and a fraudulent process is not so bright a line as the majority believes.

This Court has noted that "[t]he presence of fraud, when resorted to by an adroit and crafty person, is at times exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote it." *Standard Oil Co. v. Hunt*, 187 N.C. 157, 159 (1924). In identifying characteristics of the HAMP application process that—according to the majority—should have put plaintiffs on notice of fraud, the majority overlooks the numerous tactics that plaintiffs allege, and we must assume are true, Bank of America employed to hide, deny, and normalize these deceptive processes. For example, while plaintiffs contacted Bank of America repeatedly during the application process to ensure their compliance with servicing guidelines, the plaintiffs did not know until 2017 that Bank of America was trying to "prevent as many homeowners as possible from obtaining permanent HAMP loan modification while leading the public and the government to believe that it was making efforts to comply with HAMP." Additionally, while each plaintiff was aware that he or she had resubmitted the application material numerous times, the plaintiffs did not know until 2017 that Bank of America purposefully delayed HAMP applications by telling customers that documents were incomplete or missing when, in actuality, the documents were routinely shredded without review. Finally, the plaintiffs did not have access until 2017 to the declaration from a Bank of America home retention specialist documenting its practice of not providing permanent modifications and of sending foreclosure notices to borrowers who were current on their temporary modification payments.

Because of the nature of these fraud claims, the facts constituting the fraud reside primarily within the files of Bank of America, its computer systems, and the memories of its employees. As such, "a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis*, 361 N.C. at 524. The notions of fundamental fairness underpinning the discovery rule contradict an argument that the statute of limitations can bar plaintiffs' claims before plaintiffs are aware of defendant's tortious conduct—especially when the defendant's deceptive denials delayed or interfered with the plaintiffs' discovery of the conduct. *Misenheimer v. Burris*, 360 N.C. 620, 626 (2006). In the context of a complex federal mortgage modification program, when the plaintiffs are not experienced or trained

financial experts and are simply trying to navigate what are undoubtedly challenging processes, the majority's cramped application of the discovery rule rewards Bank of America's deceptive behaviors.

Next, in its focus on what plaintiffs might have "easily discovered" based on widespread litigation related to Bank of America's activities during the mortgage crisis, the majority misses the forest for the trees. It seems to me to be a dangerous path to tread—looking to news coverage or public understanding of complicated financial operations or litigation surrounding that—to make assumptions about what an average, "reasonable" person would derive from the existence of widespread litigation. I would not adopt this approach at all, but to the extent we credit the "easy" discovery of Bank of America's alleged misdeeds, there was also available in the public domain the "easy" discovery of Bank of America's denials and repudiation of any malfeasance. In early 2012, Bank of America publicly affirmed in a consent judgment—without admitting prior fraudulent behavior—that it would properly administer the HAMP program per the servicing guidelines moving forward from 2012. This assurance coincided with an agreement to pay more than two billion dollars in penalties to reimburse Bank of America customers "whose homes were finally sold or taken in foreclosure between and including January 1, 2008, and December 31, 2011." Plaintiffs who experienced difficulties with the HAMP application process after entry of the 2012 consent judgment might expect, rightfully, that any shortcomings in the administration of the process had been remediated based on Bank of America's own binding representations in a settlement with the federal government.

The majority's rule—focused on what plaintiffs "should have known" *based on news reports or the existence of litigation about* Bank of America's problems administering HAMP—invites the question that follows logically: how are we to treat Bank of America's public denials of fraud and assurances that no such fraud would occur going forward? We addressed the impact of denials of wrongdoing on this equitable calculus in *Misenheimer v. Burris*, in which the plaintiff suspected tortious conduct and asked the defendant—more than three years before the claim was filed—if he was engaging in criminal conversation. 360 N.C. at 621. The defendant responded with a denial leading us to expressly hold that failure to apply the discovery rule in the face of the defendant's deceptive denial had "the unacceptable consequence of rewarding" the defendant's deception. *Id.* at 626.

In short, the majority's approach here perpetuates the problem we sought to curtail in *Misenheimer*. Although the statute of limitations

is generally only tolled until "an event occurs to excite the aggrieved party's suspicion or put [that person] on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud," *Forbis*, 361 N.C. at 525, (cleaned up) Bank of America's signature on the consent judgment is conduct concealing any continuing fraud. Although I would be hesitant to follow the majority down the road of "what would a reasonable person know or have reason to suspect" based on news coverage or just the existence of litigation, to the extent this Court's jurisprudence takes that path, we must then grapple with why a reasonable person could not rely upon a consent judgment signed by Bank of America, an associate Attorney General of the United States, and representatives of forty-nine states for the proposition that fraudulent activity, if it existed, had ceased.

Beyond Bank of America's public and legally binding denials, many people experience frustration when attempting to modify a mortgage even under the best of circumstances, and especially when they face imminent default. But that frustration does not necessarily put them on notice of fraud. The discovery of ongoing fraudulent business practices designed to keep homeowners from a HAMP modification should trigger the accrual of the fraud action. Given the conflicting evidence in the complaint about when these homeowners should reasonably have been on notice of the fraudulent schemes—which Bank of America represented were ameliorated—is a question for a finder of fact at trial. *See Forbis*, 361 N.C. at 523–24; *Feibus*, 301 N.C. at 305.

## II. Conclusion

In sum, I would hold that Bank of America's public affirmations to properly administer the HAMP modification program after entry of the consent judgment equitably toll the statute of limitations for homeowners who lost their homes after Bank of America signed the consent judgment. Therefore, I would affirm the holding of the Court of Appeals reversing the trial court's dismissal of the complaint asserting fraud claims of plaintiffs who lost their homes after Bank of America signed the consent judgment. For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

**TERRY v. PUB. SERV. CO. OF N.C.**

[385 N.C. 797 (2024)]

ANTHONY TERRY
v.
PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INCORPORATED,
AND WILLIAM V. LUCAS

No. 28A23

Filed 22 March 2024

**1. Premises Liability—common law negligence—rental property—corroded gas line—requirement of notice to landlord**

In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's common law negligence claim, because there was no duty for defendant to repair absent actual knowledge or notice given by plaintiff about a dangerous condition on the property. Plaintiff, who had lived in the property for years, knew that there was a hole in the bathroom floor directly above the gas furnace through which water leaked and that the gas company and fire department had come to the home more than once after receiving reports of a gas smell coming from the home, but at no time did plaintiff inform defendant about these issues or request a repair.

**2. Premises Liability—negligence per se—rental property—corroded gas line—housing code violation—knowledge by landlord required**

In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's claim that defendant was negligent per se for violating the housing code, because there was no evidence that defendant knew or should have known that there was a housing code violation, particularly where plaintiff never informed defendant that the bathroom floor directly over the furnace had a large hole through which water leaked or that a smell of natural gas had been detected in the home.

**3. Landlord and Tenant—Residential Rental Agreements Act—corroded gas line—notice requirement—no duty to inspect**

In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted

summary judgment in favor of defendant on plaintiff's claim that defendant violated the Residential Rental Agreements Act (RRAA), because the RRAA does not include a duty for landlords to regularly inspect rental property and there was no evidence that defendant knew or should have known about the hazardous condition or that there was a violation of the housing code, particularly since plaintiff did not inform defendant about the hole in the bathroom floor directly over the furnace through which water leaked or that a smell of natural gas had been detected in the home.

**4. Landlord and Tenant—implied warranty of habitability—corroded gas line—notice requirement**

In an action against a landlord (defendant) by his tenant (plaintiff) who was severely injured in a gas explosion that was caused by a corroded gas line to a furnace, the trial court properly granted summary judgment in favor of defendant on plaintiff's claim for breach of implied warranty of habitability, because there was no evidence that defendant knew or should have known about the need for any repairs to keep the property in a fit and habitable condition, where plaintiff never informed defendant that the bathroom floor directly over the furnace had a large hole through which water leaked or that a smell of natural gas had been detected in the home, and plaintiff did not ask defendant to make any repairs.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 287 N.C. App. 362 (2022), reversing an order entered on 21 September 2021 by Judge Orlando F. Hudson Jr. in Superior Court, Durham County, and remanding the case. Heard in the Supreme Court on 8 November 2023.

*Poyner Spruill LLP, by Steven B. Epstein; and Hendren Redwine & Malone, PLLC, by J. Michael Malone, for plaintiff-appellee.*

*Haywood, Denny & Miller, LLP, by Robert E. Levin, for defendant-appellants.*

*Katharine Woomer-Deters, Isaac W. Sturgill, Celia Pistolis, Rick Glazier, Charles R. Holton, Jesse Hamilton McCoy II, Jennifer*

*Simmons, and Kathryn A. Sabbeth for Blanchard Community Law Clinic, Duke Civil Justice Clinic, Legal Aid of North Carolina, North Carolina Equal Justice Alliance, The North Carolina Justice Center, and Professor Kathryn A. Sabbeth, amici curiae.*

*Harris, Creech, Ward & Blackerby, P.A., by A. Ruthie Sheets; and Jay C. Salsman for the North Carolina Association of Defense Attorneys, amicus curiae.*

BARRINGER, Justice.

In this matter, we consider whether the Court of Appeals erred in reversing and remanding the trial court's entry of summary judgment in favor of defendant on plaintiff's claims of common law negligence, negligence per se, violation of the Residential Rental Agreements Act, and breach of the implied warranty of habitability. Upon careful review, we hold that the Court of Appeals erred. Therefore, we reverse the decision of the Court of Appeals on all claims.

## I. Factual Background

On 15 September 2005, plaintiff's wife entered into a written lease agreement for the rental of a single detached residential property located in Durham, North Carolina, owned by defendant, William Lucas. At the time of the lease, the home had a crawl space where the water heater and furnace were located, just below the home's bathroom.

In January 2017, plaintiff and his wife were away from home when they received a telephone call from plaintiff's brother-in-law. Plaintiff's brother-in-law informed plaintiff that the Public Service Company of North Carolina (PSNC) and the fire department were at plaintiff's home investigating a neighbor's report of smelling natural gas near plaintiff's home. In March 2017, plaintiff smelled natural gas while he was standing in the front yard of his home. Also in March 2017, a neighbor told plaintiff that she smelled natural gas around plaintiff's home. Yet again in March 2017, PSNC and the fire department responded to plaintiff's home in response to another report of the smell of natural gas outside, in the area surrounding plaintiff's home. Plaintiff did not inform defendant of any of the above instances of smelling natural gas, and defendant was not aware of any of the above occurrences.

On 13 April 2017, plaintiff entered the bathroom in his home and turned on the light. Immediately upon switching on the light, there was an explosion. As a result of the explosion, plaintiff suffered serious burns all over his body, requiring extensive medical treatment.

Examination of the property after the explosion revealed that the pipe supplying natural gas to the furnace was severely rusted and corroded. Defendant had not inspected the furnace or any other part of the property since plaintiff and his family occupied the property. Defendant did not inspect the furnace prior to plaintiff occupying the property.

Plaintiff and defendant spoke frequently during the course of plaintiff's lease. Throughout the course of the lease, defendant regularly asked plaintiff if there were any problems with the property. Plaintiff would respond that everything was "fine."

During the course of plaintiff's long tenancy of the property, a hole had developed in the bathroom flooring, above the furnace located in the crawlspace. The hole measured approximately ten to twelve inches long and an inch and a half wide. Plaintiff's expert witness, a metallurgist, opined that water had been leaking from the bathroom above onto the furnace pipe for approximately seven years, causing severe corrosion of the piping. Plaintiff was aware of this hole and did not provide notice to defendant regarding the hole or the water leak that caused the hole. Plaintiff never expressed to defendant that there were any issues with the furnace, the flooring, or unrepaired water leaks.

## II. Procedural History

Plaintiff filed a complaint against defendant and PSNC seeking damages for the personal injuries he sustained from the gas explosion in the home he leased from defendant. Following discovery, plaintiff amended his complaint twice, ultimately asserting four claims against defendant Lucas: common law negligence, negligence per se, violation of the North Carolina Residential Rental Agreements Act (RRAA), and breach of the implied warranty of habitability. All claims against defendant PSNC were dismissed, leaving Lucas as the sole defendant.

The trial court granted defendant's motion for summary judgment, dismissing all of plaintiff's claims. Plaintiff timely appealed to the Court of Appeals. The Court of Appeals issued a majority opinion reversing the trial court's order and remanding the case to the trial court, with Judge Carpenter dissenting. *Terry v. Pub. Serv. Co. of N.C.*, 287 N.C. App. 362 (2022). Defendant filed an appeal with this Court based upon Judge Carpenter's dissent, pursuant to N.C.G.S. § 7A-30(2).

## III. Standard of Review

"We review a trial court's order for summary judgment de novo . . . ." *Robins v. Town of Hillsborough*, 361 N.C. 193, 196 (2007).

> While summary judgment is rarely appropriate in cases involving negligence and contributory negligence, summary judgment is appropriate in such cases when the moving party carries his initial burden of showing the nonexistence of an element essential to the other party's case and the non-moving party then fails to produce or forecast at hearing any ability to produce at trial evidence of such essential element of his claims.

*DiOrio v. Penny*, 331 N.C. 726, 729 (1992) (footnote omitted); *see also Collingwood v. Gen. Elec. Real Est. Equities, Inc.*, 324 N.C. 63, 66 (1989). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023).

## IV. North Carolina Common Law

Prior to the enactment of the RRAA, codified in part by N.C.G.S. §§ 42-38 to -49, North Carolina common law established that, "[o]rdinarily, the landlord is under no duty to make repairs." *Robinson v. Thomas*, 244 N.C. 732, 736 (1956). The common law also established the standard that a tenant must meet to have an actionable claim against his landlord for tortious injury. He must show that there was a dangerous hidden defect on the premises, of which the landlord knew or should have known, and of which the tenant was unaware or could not, through ordinary diligence, discover. *Id.* "If the landlord [was] without knowledge at the time of the letting of any dangerous defect in the premises, [the landlord was] not responsible for any injuries which result from such defect." *Id.* (quoting *Harrill v. Sinclair Refin. Co.*, 225 N.C. 421, 425 (1945)).

Prior to enactment of the relevant statutes, "the doctrine of *caveat emptor* applie[d] to the lessee." *Id.* (quoting *Harrill*, 225 N.C. at 425). Aside from hidden dangers in existence at the time of leasing, of which the landlord knew or should have known, and of which the tenant did not and should not have known—the landlord had no responsibility to provide any level of habitability in the leased space. *See id.* Stated another way, the common law imposed no duty on the landlord to oversee the condition of the property after the tenant occupied the space, and no duty to make necessary repairs that arose. *See id.*

## V. Relevant Statutes

The RRAA, enacted in 1977, codified the implied warranty of habitability. After codification of the RRAA, all common law "not abrogated, repealed, or . . . obsolete" remained "in full force." *Conley v. Emerald Isle Realty, Inc.*, 350 N.C. 293, 296 (1999) (quoting N.C.G.S. § 4-1 (1986)); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318–19 (2012) (explaining that a statute should be construed to alter the common law only when that disposition is clear).

The statutory lattice of the RRAA overlays the common law backdrop. The common law, as stated in *Robinson*, is changed only where the RRAA's departure from common law is clearly expressed. *See* Scalia & Garner at 319 ("[A]ny legislative change of the common law requires 'exactness of expression' and . . . a statute should not 'be extended beyond the necessary and unavoidable meaning of its terms.' " (quoting *Scharfeld v. Richardson*, 133 F.2d 340, 341 (D.C. Cir. 1942))).

The RRAA, in relevant part, reads as follows:

> (a) The landlord shall:
>
> (1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code.
>
> . . . .
>
> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
>
> . . . .
>
> (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

. . . .

> (8) Within a reasonable period of time based upon the severity of the condition, repair or remedy any imminently dangerous condition on the premises after acquiring actual knowledge or receiving notice of the condition.

N.C.G.S. § 42-42 (2023).

The RRAA abrogates the common law in that it requires a landlord to comply with "current applicable building and housing codes." N.C.G.S. § 42-42(a)(1). The RRAA further abrogates the common law in that it requires a landlord to make repairs, whereas under the common law "the landlord is under no duty to make repairs." *Robinson*, 244 N.C. at 736. The RRAA, having instituted the landlord's duty to repair, also implements a notice requirement and retains the knowledge requirement found in the common law. *See id.* (holding that a landlord is not liable for injuries a tenant sustains on the leased property "if he did not believe or suspect that there was any physical condition involving danger" (quoting *Harrill*, 225 N.C. at 425)).

The RRAA, subsection 42-42(a)(8), requires the landlord receive notice or obtain actual knowledge of "any imminently dangerous condition on the premises" before being statutorily required to repair or remedy the condition "[w]ithin a reasonable period of time." N.C.G.S. § 42-42(a)(8). Under subsection (a)(8), the landlord is statutorily required to make the necessary repairs when he acquires actual knowledge of the need for the repair—regardless of whether the tenant provides notice. *Id.* Subsection (a)(4) requires an even higher standard of notice—written notice. N.C.G.S. § 42-42(a)(4). Except for emergency situations, which do not afford time for memorialization, subsection (a)(4) requires a tenant to provide written notice of needed repairs to the landlord before the landlord may be found in violation of the RRAA. *Id.*

This Court has previously had the opportunity to review the RRAA and its relationship with the common law. In *DiOrio*, 331 N.C. 726, we recognized the layered landscape of the statutory overlay of the RRAA atop the common law groundwork. In *DiOrio*, a residential tenant brought an action against her landlords to recover for injuries sustained when she fell down the stairs of her leased home. *Id.* at 727. The fall was caused by carpet on the stairs extending beyond the solid underpinning

of the actual stairs beneath. *Id.* at 726–27. In bringing the claim, the plaintiff relied on subsection 42-42(a)(2). *Id.* at 729.[1]

Construing the RRAA, this Court noted that the duty to repair imposed by subsection 42-42(a)(2) "only arises once the tenant notifies the landlord of the need for repairs." *Id.* at 730 (citing N.C.G.S. § 42-42(a)(4) (1984)). As here, the *DiOrio* plaintiff never notified the defendants, the landlords, of a need for repair of the stairs, nor was there evidence that the defendants had any knowledge, actual or implied, that the staircase was dangerous. *Id.* at 729; *see* N.C.G.S. § 42-42(a)(8) (requiring a landlord to repair or remedy, within a reasonable time period, any imminently dangerous condition "after acquiring actual knowledge or receiving notice of the condition," including unsafe flooring or steps).

This Court affirmed the Court of Appeals' holding on the basis that the "plaintiff . . . failed to produce any evidence showing that defendants had actual or implied knowledge" of the problem with the stairs. *DiOrio*, 331 N.C. at 730. This Court also held "that plaintiff had sufficient knowledge of the staircase's narrowness, uneven risers and lack of handrail to place the burden on plaintiff to either correct the problem or inform the defendants of the need for repair." *Id.*

## VI. Analysis

Under the common law, a landlord has no duty to inspect a leased property and no duty to make repairs to a leased property. *Robinson*, 244 N.C. at 736. The RRAA expressly abrogates the common law in that it requires landlords to make repairs after receiving notice or acquiring actual knowledge, depending on the nature of the necessary repair or remedy. N.C.G.S. § 42-42(a)(2), (4), (8). Accordingly, no duty to inspect exists and no duty to repair arises prior to the tenant providing notice to the landlord or the landlord acquiring actual knowledge of the needed repair. The RRAA also requires the landlord to meet certain standards, outlined in the Housing Code, to provide a habitable property. N.C.G.S. § 42-42(a)(1), (2).

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1. In *DiOrio*, the Court of Appeals affirmed summary judgment for the defendants on the basis of the plaintiff's contributory negligence because the plaintiff "knowingly expos[ed] herself to a risk of which she had long-term prior notice and which she could have avoided by notifying the landlord." *DiOrio*, 331 N.C. at 728 (citing *DiOrio v. Penny*, 103 N.C. App. 407 (1991)). On appeal to this Court, we did "not disagree as to the Court of Appeals' conclusion regarding plaintiff's contributory negligence. However, we [did] not need to reach [that] question, as we proceed[ed] first to the plaintiff's allegations and projection of evidence regarding defendants' negligence." *Id.* at 728–29.

### A. Common Law Negligence

**[1]** This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of defendant regarding plaintiff's claim of negligence. We hold that the Court of Appeals erred. Accordingly, we reverse the Court of Appeals on this issue.

The Court of Appeals dissent noted that an inspection of plaintiff's "bathroom may have revealed the gas pipe's condition because in the light most favorable to [plaintiff], it was visible through a hole in the floor, but [d]efendant had no reason and no duty to conduct an inspection." *Terry*, 287 N.C. App. at 380 (Carpenter, J., dissenting). The dissenting opinion points out that the Court of Appeals majority "invent[s] a duty to inspect . . . an endeavor better suited for the Legislature." *Id.* We agree.

As exemplified by *DiOrio*, section 42-42 softens—but does not completely abrogate—the common law concept of *caveat emptor* regarding repairs and imminently dangerous conditions on leased residential premises. All common law "not abrogated, repealed, or . . . obsolete" remains "in full force." *Conley*, 350 N.C. at 296 (quoting N.C.G.S. § 4-1 (1986)). "[T]he statute requires that a landlord must *have knowledge*, . . . *or be notified*, of a hazard's existence *before being held liable in tort*." *DiOrio*, 331 N.C. at 729 (emphases added) (citing N.C.G.S. § 42-42(a)(4) (1984)).

This Court has explained that a tenant, as an occupier of land, stands in the same position as the landowner with respect to standards of care and duties owed to others. *Nelson v. Freeland*, 349 N.C. 615, 617 n.1 (1998). This is because the tenant, as the occupier, is "in a much better position to know about the condition" of the property. *Robinson*, 244 N.C. at 737. Accordingly, the tenant bears the burden to "inform the [landlord] of the need for repair." *DiOrio*, 331 N.C. at 730. The RRAA applies this common law concept to tenants generally. By codifying the notice requirement, the RRAA further highlights the interplay between common and statutory law. *See* N.C.G.S. § 42-42; *DiOrio*, 331 N.C. 726; *Robinson*, 244 N.C. 732. No duty to repair arises until the notice or knowledge requirements of subsections (a)(4) and (a)(8) are met.[2] N.C.G.S. § 42-42(a)(4), (8).

Statutes are to be read harmoniously in a way that renders them internally compatible, not contradictory. *E.g.*, *Town of Pinebluff v. Moore*

2. If a landlord has a duty to maintain, in good and safe working order, certain components as designated in subsection (a)(4), nowhere in this opinion does this Court say that such a duty only arises upon written notice.

*Cnty.*, 374 N.C. 254, 257 (2020); *Bd. of Adjustment of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427 (1993); *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371 (1956). Subsection (a)(2) of the RRAA refers to "*all* repairs." N.C.G.S. § 42-42(a)(2) (emphasis added). When read harmoniously, "*all* repairs" encompasses the specific repairs of subsections (a)(4) and (a)(8). Under subsection (a)(4), besides emergencies, the landlord's duty to repair arises upon receipt of written notice from the tenant. Under subsection (a)(8) the landlord's duty arises upon the landlord receiving notice from the tenant or acquiring actual knowledge.

Here, plaintiff, as the tenant and occupier of the leased property, had "long-term prior notice," before the 13 April 2017 gas explosion, that there was an issue of some sort with the gas line and with the flooring above the furnace. *See DiOrio*, 331 N.C. at 728. The record contains evidence that there was a hole in the bathroom floor, adjacent to the commode, measuring approximately ten to twelve inches long and an inch and a half wide, directly above the furnace. This hole developed over time, while plaintiff resided in the property. Plaintiff was aware of the hole. Expert testimony indicated that water leaked through this hole onto the furnace piping for approximately seven years, leading to the corrosion and deterioration of the furnace piping.

In January 2017, the neighbor living directly adjacent to plaintiff smelled gas coming from plaintiff's home. The neighbor was so concerned that she called the gas company. Because plaintiff was away from home, the neighbor also called plaintiff's brother-in-law in January 2017 to tell him that she was concerned about the smell of gas. Plaintiff's brother-in-law told plaintiff's wife, who told plaintiff, about the neighbor's concerns and that the fire department and gas company were at plaintiff's home. Plaintiff testified that he was aware that the gas company and fire department had come to the home in January 2017 after receiving reports of the smell of gas coming from the home. Plaintiff was at home in March 2017 when the fire department and gas company came to the house again after an additional report from a neighbor who smelled gas coming from the home. On yet another occasion, in March 2017, plaintiff "got a pretty good whiff" of natural gas while standing in the front yard of his home. Plaintiff was warned by a neighbor on "a couple of occasions" in March 2017 that the neighbor was smelling gas coming from the house.

Plaintiff did not present any evidence that he or anyone else had ever informed defendant of the hole in the bathroom floor or requested a repair. Plaintiff never told defendant about any of the occasions,

between January and the April explosion, that the fire department or the gas company had come to the house to investigate reports of a gas leak. The record presents no evidence that defendant knew there was a problem with the flooring or that there was a suspected gas leak.

Without a showing of notice or defendant's knowledge, plaintiff cannot maintain an action for negligence because defendant's duty under N.C.G.S. § 42-42 had not yet arisen. The "pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that [defendant] is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). Plaintiff failed to "produce or forecast at hearing any ability to produce at trial evidence" that he notified defendant or that defendant knew of the gas leak. *See DiOrio*, 331 N.C. at 729.

A successful negligence claim requires a plaintiff to prove that the plaintiff was owed a duty by defendant and that defendant breached that duty. *See Cummings v. Carroll*, 379 N.C. 347, 362 (2021). In this circumstance, defendant had no common law duty and the RRAA did not create a duty. Thus, as the movant, defendant fulfilled his "initial burden of showing the nonexistence of an element essential to" plaintiff's claim.[3] *DiOrio*, 331 N.C. at 729. Accordingly, we hold that the Court of Appeals erred in reversing summary judgment in favor of defendant on plaintiff's negligence claim.

### B. Negligence Per Se

**[2]** This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of defendant regarding plaintiff's claim that defendant was negligent per se. We hold that the Court of Appeals erred. Accordingly, we reverse the Court of Appeals on this issue.

Subsection 42-42(a)(1) provides that the landlord shall "[c]omply with the current applicable building and housing codes." N.C.G.S. § 42-42(a)(1). Similarly, in *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412 (1990), this Court analyzed the duty to comply with applicable building codes. The plaintiff in *Lamm* brought claims against the defendants, including a negligence per se claim, seeking damages after she slipped

3. Here, defendant raised the affirmative defense of contributory negligence in his pleadings. We decline to address defendant's arguments to this Court on contributory negligence. "[W]e do not need to reach this question, as we proceed first to the plaintiff's allegations and projection of evidence regarding defendants' negligence." *DiOrio*, 331 N.C. at 729.

and fell as she descended a set of stairs outside an office building owned by two of the defendants. *Id.* at 413. The alleged violation was a lack of a handrail and disparity in step height. The disparity in step height led to a deeper drop between the last step and the ground as compared to the previous steps. *Id.* at 414. The plaintiff argued that the defendants were negligent per se because the building violated two sections of the applicable building code. *Id.* at 415.

Reversing the Court of Appeals, this Court held that the plaintiff had "not shown that defendants [were] negligent *per se* for a violation of the [building c]ode because plaintiff made no showing that . . . the [defendants] . . . knew or should have known of the violation of the [building c]ode." *Id.* This Court further held that "the owner of a building may not be found negligent *per se* for a violation of the Code unless: (1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Id.*

Applying the sound reasoning set forth in *Lamm*, we hold that a landlord "may not be found negligent *per se* for a violation of the [applicable housing code] unless: (1) the owner knew or should have known of the [housing code] violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage."[4] *Id.*

Here, plaintiff argues that he presented evidence sufficient for a jury to conclude that defendant knew or should have known that the leased property was in violation of the housing code. However, plaintiff presented no evidence that defendant knew there was natural gas leaking from the furnace. Plaintiff presented no evidence that defendant knew there was a problem with the flooring. Plaintiff presented no evidence that he notified defendant of any of these issues so that defendant should have known there was a violation of the housing code.

The record reveals that defendant had no knowledge of and received no notice that there was an issue with the furnace or the flooring, affording him no opportunity to take reasonable steps to remedy a violation. The purpose of the housing code is to "cause the repair and rehabilitation

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4. We acknowledge the Court's holding in *Lamm*—that the trial court had erred by granting summary judgment in favor of the defendants because the plaintiff had presented sufficient evidence to make out a prima facie case of defendants' common law negligence. The *Lamm* Court went on to analyze the relationship of the plaintiff and the defendant in the context of invitee and owner. The invitee, licensee, trespasser trichotomy does not apply in the instant case.

. . . of such housing," Durham, N.C., Ord. No. 14271, § 2, 6-4-2012, Sec. 10-231 (2012), not to serve as a strict liability statute against landlords.

For the reasons stated above, we hold that the Court of Appeals erred in reversing summary judgment in favor of defendant on plaintiff's claim that defendant was negligent per se.

### C. Violation of the RRAA

**[3]** This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of defendant regarding plaintiff's claim that defendant violated the RRAA. We hold that the Court of Appeals erred. Accordingly, we reverse the Court of Appeals on this issue.

As discussed above in section VI(A) and (B) of this opinion, section 42-42 is to be read as a whole, with each subsection in harmony with the others. Specifically, subsection (a)(2) is to be read in harmony with subsection (a)(1), referencing the housing codes, and with subsections (a)(4) and (a)(8), referencing repairs. "Whatever is necessary" is language broad enough to encompass the requirements of each of these subsections when read harmoniously. *See* N.C.G.S. § 42-42(a)(2). It is not a codified requirement for a landlord to stop at nothing to comply—such as regular inspections to find violations. "Whatever is necessary" leaves room for the multitude of requirements detailed within the RRAA and the building and housing codes, incorporated into a landlord's responsibility by subsection (a)(1).

For example, subsections (a)(5) and (a)(7) require a landlord to provide smoke detectors and carbon monoxide alarms; subsection (a)(6) requires a landlord to notify the tenant (if the landlord has actual knowledge) of water contamination levels exceeding an established limit. Providing smoke detectors, providing carbon monoxide alarms, and notifying tenants of water contamination are not repairs—but rather stipulations of *what is necessary* to comply with the statute.

The Durham housing code requires a landlord to comply with various standards such as providing clean equipment and ensuring adequate ventilation for fuel-burning appliances. *See* Ord. No. 14271, § 2, 6-4-2012, Sec. 10-234(a)(2)(c)–(d) (2012). "[*W*]*hatever is necessary* to put and keep the premises in a fit and habitable condition" may require something other than repair. *See* N.C.G.S. § 42-42(a)(2) (emphasis added). "Whatever is necessary" may be an alteration or something else. *See id.*

As analyzed in section VI(A) of this opinion, plaintiff has presented no evidence that he notified defendant of any issues with the flooring,

the heating system, or the natural gas utilities, or that defendant had any actual knowledge of any such issues. As analyzed in section VI(B) of this opinion, and as required under *Lamm*, plaintiff has presented no evidence that defendant had the requisite knowledge or should have known that he was in violation of the Durham housing code. *See Lamm*, 327 N.C. at 415. Therefore, summary judgment in favor of defendant was not error. Accordingly, we reverse the decision of the Court of Appeals on this issue.

### D. Breach of Implied Warranty of Habitability

**[4]** This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of defendant regarding plaintiff's claim that defendant breached the implied warranty of habitability. We hold that the Court of Appeals erred. Accordingly, we reverse the Court of Appeals on this issue.

In reversing the trial court's order, the Court of Appeals relies on *Surratt v. Newton*, 99 N.C. App. 396 (1990). Misreading *Surratt*, the Court of Appeals made the implausible leap that because only subsection (a)(4) requires written notice, subsection (a)(2) "places an affirmative obligation on landlords to 'do whatever is necessary to put and keep the premises in a fit and habitable condition.' " *Terry*, 287 N.C. App. at 375 (majority opinion) (quoting N.C.G.S. § 42-42(a)(2)). While we agree that written notice is required only in the circumstances of repair contemplated in subsection (a)(4), our agreement stops there.

As an initial matter, in no way does *Surratt* hold that there is an "affirmative obligation on landlords to 'do whatever is necessary to put and keep the premises in a fit and habitable condition' " without knowledge or notice. *Compare id.*, *with Surratt*, 99 N.C. App. at 405–06. The salient issue before the *Surratt* court was whether the plaintiff presented sufficient evidence of notice to the landlord such that a jury must determine whether the landlord had a reasonable opportunity to repair. Finding that the tenant provided sufficient notice, albeit oral notice, the *Surratt* court held that the plaintiff's claim was rightfully presented to the jury. *Surratt*, 99 N.C. App. at 406.

While not binding precedent upon this Court, *Surratt* is instructive. A close reading of *Surratt* reveals that the statute requires that a landlord must receive notice of necessary repairs and have reasonable opportunity to repair before the landlord is liable for applicable housing code violations. As analyzed in subsections VI(A), (B), and (C) of this opinion, the record reveals that plaintiff presented no evidence that he provided defendant with notice of a problem with the flooring or the

furnace, so as to render defendant in violation of N.C.G.S. § 42-42 or the housing code.

We agree with the Court of Appeals dissenting opinion that when repair is necessary to keep a premises in a fit and habitable condition, this "does not obviate the requirement that a tenant must give notice to the landlord of the repair that is needed." *Terry*, 287 N.C. App. at 384 (Carpenter, J., dissenting). Here, plaintiff has presented no evidence that he provided the landlord with any notice of any needed repairs. Thus, summary judgment in favor of defendant was not error. Accordingly, we reverse the decision of the Court of Appeals on this issue.

## VII. Conclusion

We reverse the decision of the Court of Appeals on all of plaintiff's claims. The trial court's order granting summary judgment in favor of defendant is reinstated. The matter is dismissed.

REVERSED.

Justice RIGGS dissenting.

The majority endorses the trial court's grant of summary judgment, establishing that a landlord has no duty, absent a written request, to provide regular maintenance of potentially dangerous housing components to keep rental premises in good and safe working order. However, I read the Residential Rental Agreements Act (RRAA), codified as N.C.G.S. §§ 42-38 to 49, as legislatively creating a duty for landlords to "[m]aintain in good and safe working order . . . all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances." N.C.G.S. § 42-42(a)(4) (2023). This duty is *in addition* to the duty to "promptly repair" the same systems and does not require written notice by the tenant. *See id.* Because the record demonstrates genuine issues about whether this landlord was negligent in the duty to maintain in "good and safe" working order the gas-fired furnace and associated gas piping, I would affirm the Court of Appeals' holding as to a duty created by the RRAA.[1] I would entrust to a jury the questions of whether this landlord negligently breached the duty and whether that breach, if found, was the proximate cause of Mr. Terry's life-altering burns. For that reason, I respectfully dissent.

1. Because I would hold this matter should proceed to trial based on the statutory imposition of a duty by the RRAA, I do not reach the issues addressed in the majority on common law negligence, negligence per se, or breach of the implied warranty of habitability.

"Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972). In negligence cases, summary judgment "should rarely be granted." *Moore v. Crumpton*, 306 N.C. 618, 624 (1982). It is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." N.C.G.S. § 1A-1, Rule 56(c) (2023). We consider these materials in the light most favorable to the non-movant, drawing all inferences in their favor. *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

The General Assembly passed the RRAA to codify the rights, obligations, and remedies under rental agreements for dwelling units in North Carolina. N.C.G.S. § 42-38 (2023). Section 42-42 identifies the obligations of the landlord, and subsection (a) delineates eight interrelated elements that constitute the landlord's duty to provide tenants with fit premises. N.C.G.S. § 42-42(a)(1) to (8). The first three subsections apply generally to building and housing code compliance and the need to keep the premises fit and habitable. N.C.G.S. § 42-42(a)(1)–(2). The remaining subsections provide specific requirements: subsection (3) focuses on common areas; subsections (5), (5a), and (7) focus on smoke alarms and carbon monoxide sensors; and subsection (6) addresses water quality. N.C.G.S. § 42-42(a)(3), (5)–(7).

Subsection (a)(4) targets the specific issue of operating mechanical systems that degrade over time and require maintenance, and the General Assembly designed a specific solution to address this problem. The solution requires two elements: first, the landlord shall maintain in good and safe working order, *and* second, the landlord shall promptly repair. N.C.G.S. § 42-42(a)(4). This reading of the statute gives effect to every word that the General Assembly used. *Nance v. S. Ry.*, 149 N.C. 366, 372 (1908) (recognizing that this Court must interpret a statute as it is written, without adding or omitting words).

The word "maintain" is not defined in the RRAA, but we afford words that are undefined in statutes their plain and definite meaning. *Spruill v. Lake Phelps Volunteer Fire Dep't., Inc.*, 351 N.C. 318, 322 (2000). Indeed, the ordinary definition of the verb "maintain" is to keep something in operating condition. *Maintain*, *The American Heritage College Dictionary* (3d ed. 1993) ("To keep in an existing state; preserve or retain; . . . [t]o keep in a condition of good repair or efficiency."). Under the plain language of this subsection, the landlord has a duty to preserve or retain the condition of electrical, plumbing, sanitary,

heating, ventilating, air conditioning, and other facilities and appliances. N.C.G.S. § 42-42(a)(4). In short, the statute creates a duty for the landlord to maintain the components identified in subsection (a)(4).

The plain language of subsection (a)(4) does not require the tenant to notify the landlord in writing for maintenance—and that makes sense. Maintenance is a task that homeowners engage in regularly to avoid having to make repairs. The last portion of subsection (a)(4) reads "provided that notification of needed *repairs* is made to the landlord in writing by the tenant, except in emergency situations." N.C.G.S. § 42-42(a)(4) (emphasis added). Common sense tells us that in a landlord–tenant situation, the tenant would generally be the one most likely to be aware of a repair and would need to communicate that to the landlord, but maintenance is an entirely different obligation. In specifically requiring written notice for repairs, the legislature intentionally excluded maintenance from the requirement, and we cannot impute that requirement to the duty to maintain. *See Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 482 (1979) (citing *Walla Walla City v. Walla Walla Water Co.*, 172 U.S. 1, 22 (1898)) (acknowledging that under the doctrine of *expressio unius est exclusio alterius*, the mention of specific exceptions implies the exclusion of others). We assume that if the General Assembly intended to require written notice by the tenant for regular maintenance, it would have expressly required written notice for maintenance in addition to repairs.

The majority holds that the landlord had no duty to provide preventative maintenance for the gas-fired furnace and its associated piping which may have revealed concerns before the explosion and fire that led to Mr. Terry's injuries because Mr. Terry did not provide notice that a repair was required. However, this interpretation of subsection 42-42(a) of the RRAA, does not give effect to every word of the statute. The majority glosses over the first clause of subsection (a)(4), which by its plain language creates a duty for landlords to *maintain* in good and safe working order "all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances." N.C.G.S. § 42-42(a)(4). The foundational principle of statutory construction is that "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990).

To the extent this Court finds it ambiguous whether the written notice requirement also relates back to maintenance, not just repairs, the application of canons of construction only reinforce the reading of

the plain language in this dissent. "[T]his Court does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188 (2004). N.C.G.S. § 42-42(a)(4) imposes a duty to maintain, in addition to the duty to repair, the equipment and systems identified in subsection (a)(4). The statutory language—"provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations"—only imputes a requirement of written notice for repairs, not for maintenance. N.C.G.S. § 42-42(a)(4); *see Lunsford v. Mills*, 367 N.C. 618, 623 (2014) ("[I]t is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.").

The majority relies on *DiOrio v. Penny*, 331 N.C. 726 (1992), for the proposition that a "landlord must have knowledge, . . . or be notified, of a hazard's existence before being held liable in tort." *See id.* at 729. But *DiOrio* addressed the question of a landlord's duty to repair carpeting on a staircase, a housing component not listed amongst the enumerated components found in N.C.G.S. § 42-42(a)(4). *Id. DiOrio* does not consider the landlord's duty to maintain "electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord." *See DiOrio*, 331 N.C. 726; N.C.G.S. § 42-42(a)(4). *DiOrio*'s holding that a tenant must request repair of a hazardous condition created by carpeting on a staircase is inapposite because this case is centrally about the landlord's duty to *maintain* the specific equipment and systems identified in N.C.G.S. § 42-42(a)(4), not simply repair a defect.

This duty to maintain in N.C.G.S. § 42-42(a)(4) does not extend to concealed components. Building codes, with which landlords shall comply per subsection (a)(1), mandate access for equipment such as a furnace that requires maintenance. *See, e.g.*, N.C. State Bldg. Code: Fuel Gas Code § 611.8 (2018) (requiring access to gas-fired furnaces for removing the burner; replacing motors, controls, filters and other working parts; and for inspection, adjustment, and lubrication of parts requiring maintenance). The furnace and associated piping were located in a four-feet-tall crawlspace underneath the home and accessible from the exterior of the home. And the crawlspace provided access to both the gas-fired furnace and associated gas piping for maintenance. That is to say, there appears to be no dispute in this case that the furnace here was in an accessible crawlspace that the landlord had a legal right to access for maintenance purposes, so this case does not implicate questions about concealed, inaccessible elements.

This statutory duty to maintain, and indeed, the legislature's decision to abrogate the common law to allow it to ensure safe rental housing, does not create the "sky is falling" situation that the dissenting judge at the Court of Appeals catastrophized. *Terry v. Pub. Serv. Co. of N.C.*, 287 N.C. App. 362, 381 (2022) (Carpenter, J., dissenting). This case only presents the question of the duty to maintain, in "good and safe working order," N.C.G.S. § 42-42(a)(4), a gas-fired furnace and associated gas piping, which the landlord, in his own sworn deposition testimony, recognized as equipment requiring maintenance and which the lease allowed him access to maintain. This case simply does not require us to resolve how often maintenance must be performed or answer other questions not presented on the facts here. I would constrain our analysis to the facts presented in this case and avoid speculation on the wide array of hypotheticals presented by the dissenting judge at the Court of Appeals.

Mr. Terry has proffered sufficient evidence at this stage of the litigation to present to a jury the question of whether the landlord was negligent in the duty to maintain in good and safe working order the gas-fired furnace and associated gas piping. In the interrogatories, the landlord admitted to being responsible for management, maintenance, and inspection of the property. In the lease, the landlord specifically reserved the right to enter and inspect the premises at any and all reasonable times to "maintain said premises in a clean, orderly, and law abiding manner." The deposition testimony indicates that the gas-fired furnace and associated gas piping were located in a crawlspace that was four feet in height, accessible from the exterior of the home, and that the crawlspace was kept unlocked. The landlord admitted in his interrogatories that he did not inspect or maintain the gas-fired furnace and connecting gas piping. Mr. Terry provided expert testimony to establish that the deterioration of the gas pipe took place over years, likely more than seven. The landlord acknowledged in his deposition testimony that heating units typically require maintenance and that the units degrade over time. Further, the landlord conceded that in another one of his six rental properties, he had a problem with a gas-fired furnace, which he resolved by shutting off the gas and replacing the furnace with an electric furnace. Taken in the light most favorable to Mr. Terry, these facts may have provided notice, even though not required, that the type of furnace in this case, at the age it was, required attention that it did not receive in order to keep the system in good working order. Collectively, this evidence constitutes, I believe, evidence sufficient to establish material issues of fact that must be resolved by a fact finder.

The North Carolina General Assembly chose to abrogate the common law *caveat emptor* rule and create a duty for landlords to "[m]aintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances." N.C.G.S. § 42-42(a)(4). Further, Mr. Terry's proffered evidence, considered in the light most favorable to him, is sufficient to establish disputed material issues of fact. For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

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FARRON JEROME UPCHURCH
v.
HARP BUILDERS, INC. AND VALENTINE JOSEPH CLEARY

No. 176PA22

Filed 22 March 2024

**Statutes of Limitation and Repose—compulsory counterclaim—relation back to filing of complaint—permitted by Rules of Civil Procedure**

In a case arising from a motor vehicle accident, the Rules of Civil Procedure did not preclude the relation back of defendant's counterclaim to the date that the complaint was filed, and therefore defendant's counterclaim—which was filed one day after both the filing of plaintiff's complaint and the expiration of the three-year statute of limitations in N.C.G.S. § 1-52(16)—was not time-barred. Since, pursuant to Rule 3, the filing of a compulsory counterclaim does not amount to the commencement of a civil action, counterclaims relate back to the date an action is filed, and the Supreme Court overruled a prior Court of Appeals decision that concluded otherwise.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 283 N.C. App. 321 (2022), affirming an order entered on 22 April 2021 by Judge Phyllis Gorham in Superior Court, New Hanover County, granting plaintiff's motion for summary judgment on defendant's counterclaim and dismissing defendant's counterclaim with prejudice. Heard in the Supreme Court on 8 November 2023.

*Ennis, Baynard, Morton, Medlin & Brown, PLLC, by Maynard M. Brown, for plaintiff-appellee.*

*Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Brian J. Kromke, for defendant-appellant Valentine Joseph Cleary.*

ALLEN, Justice.

The Court of Appeals ruled that the statute of limitations bars defendant Valentine Joseph Cleary from pursuing his counterclaim for negligence against plaintiff Farron Jerome Upchurch because defendant filed his counterclaim one day after the three-year limitations period expired. Based on this Court's precedent and pertinent statutory provisions, we hold that defendant's counterclaim must be regarded for statute-of-limitations purposes as having been filed on the same date that plaintiff commenced his lawsuit. We therefore reverse and remand.

A two-automobile accident involving plaintiff and defendant occurred on 19 December 2015. On 19 December 2018, plaintiff filed a lawsuit against defendant in the Superior Court, New Hanover County, over injuries he allegedly sustained in the accident. Plaintiff's complaint alleged that the accident resulted from defendant's negligence. One day later, on 20 December 2018, defendant filed an answer denying liability for plaintiff's injuries and asserting a counterclaim against plaintiff for defendant's injuries on the theory that plaintiff's own negligence caused the accident.

On 27 February 2020, plaintiff filed a response denying defendant's allegations of negligence and asserting that defendant's contributory negligence and gross negligence barred defendant from pursuing his counterclaim. On 7 December 2020, plaintiff filed an amended response to defendant's counterclaim, asserting for the first time that the counterclaim should be dismissed under N.C.G.S. § 1-52(16) because defendant filed it outside the statute's three-year limit for personal injury claims.

On 18 December 2020, plaintiff filed a motion for judgment on the pleadings or alternatively for summary judgment. The motion asked the trial court to dismiss defendant's counterclaim in accordance with N.C.G.S. § 1-52(16). The trial court denied the motion after concluding that Rule 15(a) of the North Carolina Rules of Civil Procedure required plaintiff to seek leave of court to amend his response to the counterclaim. On 19 January 2021, plaintiff filed a motion requesting the court's permission to do just that. The trial court granted the motion,

and plaintiff filed his amended response with the statute-of-limitations defense on 26 February 2021. On 4 March 2021, again citing N.C.G.S. § 1-52(16), plaintiff filed a second motion for judgment on the pleadings or alternatively for summary judgment. On 22 April 2021, the trial court entered an order granting summary judgment in favor of plaintiff on defendant's counterclaim and dismissing it with prejudice. Defendant appealed to the Court of Appeals.[1]

On appeal, "[t]he parties seemingly agree[d] that the cause of action in the instant case began to accrue on the day of the accident, 19 December 2015, and claims must have been filed by 19 December 2018 to be within the three-year statute of limitations delineated by [N.C.G.S.] § 1-52(16)." *Upchurch v. Harp Builders, Inc.*, 283 N.C. App. 321, 323 (2022). Nonetheless, "[d]efendant argue[d] that his counterclaim filed on 20 December 2018 should be deemed to relate back to the filing of the original complaint by [p]laintiff on 19 December 2018, and thus should be considered timely filed within the three-year statute of limitations." *Id.*

The Court of Appeals unanimously affirmed the trial court's summary judgment order dismissing defendant's counterclaim. *Id.* at 324–25. In reaching its decision, the appellate court relied on *PharmaResearch Corp. v. Mash*, 163 N.C. App. 419, *disc. rev. denied*, 358 N.C. 733 (2004), wherein an earlier panel of the Court of Appeals had "concluded that 'counterclaims do not "relate back" to the date the plaintiff's action was filed[,]' and that the counterclaims [of the defendant in *PharmaResearch*] were barred by the applicable statute of limitations." *Upchurch*, 283 N.C. App. at 323 (first alteration in original) (quoting *PharmaResearch*, 163 N.C. App. at 427).

Defendant subsequently filed a petition for discretionary review with this Court pursuant to N.C.G.S. § 7A-31. We allowed the petition.

"Summary judgment is proper only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' " *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, No. 227A22, slip op. at 6 (N.C. Dec. 15, 2023) (quoting N.C.G.S. § 1A-1, Rule 56(c) (2021)). "We review de novo an appeal of a summary judgment order. When reviewing a matter de novo, this Court considers the matter anew and freely substitutes its own judgment for that of the lower courts." *Id.* (internal quotation marks and citations omitted).

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1. On 3 June 2021, plaintiff filed a voluntary dismissal with prejudice.

With respect to plaintiff's statute-of-limitations defense, no material facts are in dispute. The question before this Court is solely a legal one: whether N.C.G.S. § 1-52(16) bars defendant's counterclaim because defendant filed it more than three years after the parties' automobile accident.

Before proceeding, we note that defendant's counterclaim constitutes a "compulsory counterclaim" under Rule 13 of the Rules of Civil Procedure in that it (1) existed when defendant served his answer on plaintiff; (2) arose from the same events that gave rise to plaintiff's claim against defendant; and (3) did not require the presence of third parties over whom the trial court lacked jurisdiction. N.C. R. Civ. P. 13(a). Unlike permissive counterclaims, compulsory counterclaims "must be asserted by [the] defendant in a pending action or be forever foreclosed" unless one of the exceptions in Rule 13(a) applies. G. Gray Wilson, *North Carolina Civil Procedure*, § 13-2, at 13-5 (4th ed. 2020). *See generally* N.C. R. Civ. P. 13(b) (defining a permissive counterclaim as a counterclaim "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim").

In *Brumble v. Brown*, 71 N.C. 513 (1874), this Court held that a three-year statute of limitations did not bar a defendant's counterclaim filed more than three years after the events from which it arose:

> [W]e ascertain that three years . . . had not elapsed at the date of the action, but more than three years had elapsed when the counter-claim was pleaded . . . .
>
> We think the law is clear that a . . . counter-claim[ ] refers to the commencement of the action, . . . [a]nd if not barred by the statute [of limitations] at that time, it does not become so afterwards during the pending of the action.

*Brumble*, 71 N.C. at 516 (citations omitted).

Here, plaintiff filed his lawsuit one day before the expiration of the three-year limitations period specified in N.C.G.S. § 1-52(16). Consequently, if *Brumble* remains good law, defendant's compulsory counterclaim must be considered timely filed, even though defendant filed it more than three years after the automobile accident that led to this litigation.

In *PharmaResearch*, the Court of Appeals concluded that *Brumble* no longer accurately states the law regarding the relation back of compulsory counterclaims. 163 N.C. App. at 427. The appellate court observed that *Brumble* predates the General Assembly's enactment

of the Rules of Civil Procedure by "almost a century" and argued that *Brumble* cannot be reconciled with some of the provisions in the Rules.[2] *Id.* at 426–27.

This Court has previously encountered a conflict between our precedent and the Rules of Civil Procedure. In *Burcl v. North Carolina Baptist Hospital, Inc.*, 306 N.C. 214 (1982), we noted that Rule 15—on amended pleadings—had "changed our approach" to determining whether an amendment to a complaint relates back to the filing of the complaint for statute-of-limitations purposes. 306 N.C. at 224. Prior to Rule 15, the common law prevented such an amendment from relating back if it "stated a new cause of action, even on the same facts originally alleged." *Id.* at 221. With the legislature's enactment of Rule 15, however, whether an amendment to a complaint relates back to the original complaint "depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives 'notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.' " *Id.* at 224 (quoting N.C. R. Civ. P. 15(c)).

As *Burcl* acknowledges, the Rules of Civil Procedure generally prevail when they conflict with pre-Rules decisions from this Court. Nonetheless, we do not agree with *PharmaResearch* that the Rules have superseded *Brumble* on the relation back of compulsory counterclaims.

Crucially, *PharmaResearch* ignores that N.C.G.S. § 1-52(16) and other statutes of limitations found in Chapter 1, Article 5 of the General Statutes apply to "the commencement of actions." N.C.G.S. § 1-46 (2021); *see also id.* § 1-15(a) ("Civil actions can only be commenced within the periods prescribed in [Chapter 1 of the General Statutes, titled "Civil Procedure"], after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute."). Thus, on its face, N.C.G.S. § 1-52(16) does not preclude a compulsory counterclaim filed outside its three-year limitations period unless a defendant may be said to have commenced a civil action by filing the counterclaim.

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2. In holding that the Rules of Civil Procedure effectively overruled *Brumble*, the Court of Appeals impermissibly departed from its own precedent. It had previously ruled in a decision issued after the enactment of the Rules that *Brumble* remains good law as to compulsory counterclaims. *In re Foreclosure of Gardner*, 20 N.C. App. 610, 618 (1974). The *Gardner* decision was binding on the Court of Appeals in *PharmaResearch*. *See In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Rule 3 of the Rules of Civil Procedure specifies that "[a] civil action is commenced by filing *a complaint* with the court."[3] N.C. R. Civ. P. 3(a) (emphasis added). Ordinarily, as in this case, a defendant asserts a compulsory counterclaim in her answer to the complaint. Although the Rules classify both complaints and answers as pleadings, they repeatedly distinguish between the two. *E.g.*, *id.* at R. 7(a) ("There shall be a complaint and an answer . . . ."); *id.* at R. 12(a)(1) ("A defendant shall serve his answer within 30 days after service of the summons and complaint upon him."). In this case, because defendant asserted his compulsory counterclaim in an answer, the plain language of Rule 3 indicates that his filing did not commence a civil action.[4]

Nothing in Rule 13's counterclaim provisions contradicts this understanding. *See In re Foreclosure of Gardner*, 20 N.C. App. 610, 618 (1974) (noting that the requirement to file and serve a counterclaim "does not make a new or separate litigation out of a counterclaim . . . which arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim"). Rule 13 refers only once to an "action" being "commenced," and it is clear from the context that the reference is to a civil action commenced against—not by—the party having the compulsory counterclaim. Specifically, Rule 13(a)(1) excuses a defendant from alleging a compulsory counterclaim if "*[a]t the time the action was commenced* the claim was the subject of another pending action." (emphasis added). The term "action" in the phrase "[a]t the time the action was commenced" obviously means the lawsuit in which the defendant would have to file her counterclaim if that claim were not the subject of a prior lawsuit. In short, Rule 13 nowhere characterizes the filing of a counterclaim as the commencement of a civil action. *Id.*

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3. Rule 3 also allows for the commencement of a civil action by the issuance of a summons under certain conditions. A party may commence a civil action by the issuance of a summons upon "mak[ing] application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days." N.C. R. Civ. P. 3(a)(1). A court then "makes an order stating the nature and purpose of the action and granting the requested permission." *Id.* at R. 3(a)(2). Finally, the summons and court order must be served in accordance with Rule 4. *Id.* at R. 3(a). Filing a complaint is, therefore, still a necessary condition for commencing a civil action in this manner. *See id.* ("*When the complaint is filed* it shall be served in accordance with the provisions of Rule 4 . . . ." (emphasis added)).

4. We recognize, of course, that certain kinds of civil proceedings can be initiated by the filing of petitions. *See*, *e.g.*, N.C.G.S § 7B-401(a) (2021) (establishing that a juvenile abuse, neglect, or dependency action is commenced by filing a petition in a clerk's office or by acceptance of the petition by a magistrate); *id.* § 122C-261(a) (2021) (providing for involuntary civil commitment proceedings upon affidavit and petition to a clerk or magistrate). This case does not involve such a proceeding.

In *PharmaResearch*, the Court of Appeals rested its holding largely on what it perceived as a significant distinction between Rule 13 and Rule 15. 163 N.C. App. at 426–27. As noted above, Rule 15 expressly allows an amended pleading to relate back to the filing of the original pleading so long as the original pleading "give[s] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." *Id.* at R. 15(c). Remarking that Rule 13 lacks a similar provision, the Court of Appeals reasoned: "Had the General Assembly intended for counterclaims to 'relate back' to the date of filing of plaintiff's complaint, it could have so provided." *PharmaResearch*, 163 N.C. App. at 426.

We are not persuaded. In our view, *Burcl* cuts squarely against the rationale of *PharmaResearch*. The outcome in *Burcl* was based on the General Assembly's adoption of a standard in Rule 15 that differed from the pre-Rules standard for analyzing whether an amendment relates back to the original pleading. In *PharmaResearch*, the Court of Appeals turned *Burcl* on its head by essentially treating the complete absence of any reference to the relation back of compulsory counterclaims in Rule 13 as evidence of legislative intent to overrule this Court's pre-Rules precedent on the subject. Had the General Assembly wished to change the law on the relation back of compulsory counterclaims, it could have articulated a different approach in Rule 13, just as it altered the law on the relation back of amendments to pleadings by enacting Rule 15. *See State v. S. Ry. Co.*, 145 N.C. 495, 542 (1907) ("The Legislature is presumed to know the existing law and to legislate with reference to it.").

During oral argument, plaintiff's counsel directed our attention to N.C.G.S. § 1-2, which defines an "action" as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." According to plaintiff's counsel, this definition is broad enough to encompass compulsory counterclaims, and thus the filing of a compulsory counterclaim amounts to the commencement of a civil action, at least insofar as statutes of limitations are concerned.

We disagree. The Rules of Civil Procedure recognize an assortment of pleadings, including complaints, answers, replies to counterclaims, and answers to crossclaims. N.C. R. Civ. P. 7(a). Nonetheless, Rule 3 unambiguously states that "[a] civil action is commenced by filing a complaint," *id.* at R. 3(a), and we deem it controlling here. *See Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598 (1993) ("One canon of construction is that when one statute deals with a particular

subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling.").

The Rules of Civil Procedure do not treat the filing of compulsory counterclaims as procedurally equivalent to the commencement of civil actions. Consequently, the Rules do not preclude the relation back of such counterclaims. The Court of Appeals therefore erred in *PharmaResearch* by not following *Brumble*, and we overrule *PharmaResearch* to the extent it conflicts with this opinion.

Furthermore, as this case illustrates, the relation back of compulsory counterclaims serves the interests of justice and judicial economy. By not filing and serving his lawsuit until the last day of the three-year limitations period established by N.C.G.S. § 1-52(16), plaintiff made it impossible for defendant to file his compulsory counterclaim within the limitations period. At this point, we cannot know which party is in the right. It may be that defendant has the superior claim but was willing to forgo litigation for magnanimous reasons. Were this Court to hold that N.C.G.S. § 1-52(16) forecloses defendant's compulsory counterclaim, we would encourage plaintiffs in future cases to wait until the last moment to file suit as a means of defeating even meritorious compulsory counterclaims. We would also create a perverse incentive for some who would rather not sue to file suit anyway to avoid the risk of finding themselves in defendant's position.

For purposes of the statute of limitations in N.C.G.S. § 1-52(16), the filing of a compulsory counterclaim relates back to the filing of the complaint. We therefore hold that N.C.G.S. § 1-52(16) did not bar defendant's compulsory counterclaim against plaintiff. The decision of the Court of Appeals is hereby reversed, and this case is remanded to that court for remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

FRANKIE DELANO WASHINGTON AND FRANKIE DELANO WASHINGTON, JR.
v.
TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL,
JOHN PETER, ANDRE T. CALDWELL, MOSES IRVING,
ANTHONY MARSH, EDWARD SARVIS, BEVERLY COUNCIL,
STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC,
AND THE STATE OF NORTH CAROLINA

No. 148PA14-2

Filed 22 March 2024

**Constitutional Law—North Carolina—right to a speedy trial—convictions set aside—adequacy of remedy**

Where plaintiff's criminal convictions were vacated as a remedy for the State having violated plaintiff's constitutional right to a speedy trial, plaintiff was not entitled to additional relief in the form of money damages, which he sought in a private action pursuant to *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992), because *Corum* claims are reserved solely for instances in which a plaintiff has no other forum in which to seek redress for a constitutional violation. Where plaintiff had an opportunity to present and have his constitutional claim heard, and was given an adequate state remedy, the trial court properly granted summary judgment against plaintiff in his action against the State and the officials involved in his criminal prosecution. The Supreme Court modified and affirmed the Court of Appeals' decision where, although the latter court correctly upheld the trial court's order, its reliance on a federal case rather than *Corum* to reach its conclusion was expressly disavowed.

Justice EARLS dissenting.

Justice RIGGS 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, 267 N.C. App. 370 (2019), affirming an order entered on 11 May 2018 by Judge C. Winston Gilchrist in Superior Court, Durham County. Heard in the Supreme Court on 8 November 2023.

*Ekstrand & Ekstrand LLP, by Robert C. Ekstrand and Stefanie Smith, for plaintiff-appellant.*[1]

*Joshua H. Stein, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for defendant-appellees Tracey Cline and the State of North Carolina.*

*Daniel K. Siegel and Kristi L. Graunke for ACLU of North Carolina Legal Foundation; and Tin, Fulton, Walker & Owen, PLLC, by S. Luke Largess, and Christopher J. Heaney for North Carolina Advocates for Justice, amici curiae.*

DIETZ, Justice.

Where there is a right, there is a remedy. This is a foundational principle of every common law legal system, including ours. We have long called it a "time-honored maxim." *See Von Glahn v. Harris*, 73 N.C. 323, 332 (1875). It is even enshrined in the North Carolina Constitution. *See* N.C. Const. art. I, § 18.

To protect this principle—to ensure that every right does indeed have a remedy in our court system—this Court created what are known as "*Corum* claims." *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). *Corum* claims are constitutional claims for damages directly against the State. These claims are extraordinary and defy many principles of this Court's jurisprudence, not least the principle that money damages against the State are barred unless the State has authorized them. Nevertheless, we held in *Corum* that where there is a right, there must be a remedy. *Id.* at 782. Thus, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.*

The question, then, is what constitutes an "adequate remedy." For decades since *Corum*, we have recognized that for a claim "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339–40 (2009). Applying this principle, we repeatedly recognized *Corum* claims where the plaintiff had no other forum in which to raise the

1. Plaintiff Frankie Delano Washington passed away during this appeal and the Court allowed a motion to substitute his son as his personal representative.

constitutional violation and receive a remedy. But this Court has never recognized a *Corum* claim where the plaintiff had the opportunity to raise a constitutional violation in court, did so and received a remedy, and then sought even more remedies in a second proceeding. Indeed, we have expressly rejected this approach. *See Copper v. Denlinger*, 363 N.C. 784, 788–89 (2010).

Yet this is what plaintiff asks this Court to do today. A jury convicted plaintiff of serious felony offenses including burglary, kidnapping, robbery, and attempted sex offense. During that criminal proceeding, plaintiff argued that the State violated his constitutional right to a speedy trial. He lost that argument at trial but won on appeal. As a remedy for the State's violation of his speedy trial rights, the Court of Appeals set aside plaintiff's criminal convictions.

In this action, plaintiff asserts that vacating his convictions was not enough. He also wants money damages from the State as a second remedy for the constitutional violation. As explained below, this request goes too far beyond the "critical limitations" set in *Corum*. 330 N.C. at 784. Plaintiff already received a powerful remedy for the State's violation of his rights—he had his criminal convictions permanently set aside. That remedy distinguishes this case from every successful *Corum* case in our jurisprudence, where the plaintiff had no opportunity to go to court and obtain a meaningful remedy at all. Instead, this case mirrors other, similar cases in which a plaintiff had an available remedy for a constitutional violation but still wanted greater relief. This scenario, we have held, does not permit a *Corum* claim.

In short, plaintiff had an adequate state law remedy, and a separate *Corum* claim is unavailable. Thus, the Court of Appeals properly upheld the trial court's entry of summary judgment.

**Facts and Procedural History**

In 2002, law enforcement officers arrested plaintiff Frankie Delano Washington for a violent home invasion. Nearly five years later, plaintiff went to trial and a jury convicted him of multiple serious felonies including first-degree burglary, second-degree kidnapping, robbery with a dangerous weapon, and attempted first-degree sex offense.

In the years between plaintiff's arrest and his conviction at trial, plaintiff tried repeatedly to move the criminal process forward, for example, by seeking to expedite the State Bureau of Investigation's analysis of the evidence. Ultimately, three years after his arrest, plaintiff moved to dismiss the charges for violation of his constitutional right to

a speedy trial. The trial court denied the motion, plaintiff's case went to trial, and, as noted above, the jury convicted plaintiff of multiple charges.

Plaintiff appealed his criminal convictions to the Court of Appeals and raised the speedy trial issue. He prevailed on that issue, and the Court of Appeals set aside his convictions on the ground that he had been deprived of his right to a speedy trial guaranteed by both the state and federal constitutions. *State v. Washington*, 192 N.C. App. 277, 297–98 (2008).

Several years later, plaintiff and his son brought this action against the State and various state and local officials. Plaintiff alleged that the State knew he was not the perpetrator of the crimes for which he was charged. For example, plaintiff alleges that the State withheld evidence showing that another suspect committed numerous similar home invasions and sexual assaults in the same geographic area around the time of plaintiff's arrest. That suspect matched the description of the perpetrator of the crimes with which plaintiff was charged. Plaintiff also alleged that officials manufactured false evidence against him and ignored obviously exculpatory evidence.

Based on these allegations, plaintiff pursued a number of claims against officials involved in his prosecution. Among plaintiff's many claims, he asserted a common law claim against the State for damages caused by the deprivation of his state constitutional right to a speedy trial.

The parties later filed cross-motions for summary judgment, and the trial court entered summary judgment against plaintiff on his direct constitutional claim against the State. Plaintiff appealed that ruling to the Court of Appeals.

On appeal, the Court of Appeals affirmed the trial court's entry of summary judgment, holding that "no private cause of action for injunctive relief or damages lies in connection with the deprivation of the right to a speedy trial as guaranteed by Article I, section 18 of the North Carolina Constitution." *Washington v. Cline*, 267 N.C. App. 370, 375 (2019). Plaintiff then filed a notice of appeal based on a constitutional question and also petitioned this Court for discretionary review. We dismissed the appeal of right but allowed the petition for discretionary review.

## Analysis

The North Carolina Constitution guarantees that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18.

"This provision has ancient roots in English and American law." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 603 (2021). Its core concept is recited in some of the most impactful decisions in American jurisprudence. Take, for example, this passage from *Marbury v. Madison*: "It is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded. . . . for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." 5 U.S. (1 Cranch) 137, 163 (1803).

This Court, too, has invoked the principle in landmark constitutional cases, holding, for example, that when "the provisions of a Constitution, as does ours, forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618 (1955) (cleaned up).

This Court's foundational expression of "where there is a right, there is a remedy" in the constitutional context is found in *Corum v. University of North Carolina*, 330 N.C. 761 (1992). In *Corum*, a university professor brought suit against various arms of the State for violating his constitutional right to free speech. *Id.* at 766. At the time, there was no cause of action available for this type of state constitutional violation. *Id.* at 783. Recognizing that there must be a remedy for this right, the Court established what are now commonly known as "*Corum* claims," reasoning that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782.

Although *Corum* referred to the absence of an *adequate* state remedy, it never specified what remedies could be considered adequate. To be fair, though, it did not need to; the plaintiff in *Corum* had "no other remedy." *Id.* at 783.

But *Corum* did provide some guidance. The Court held that, when examining a *Corum* claim, "the judiciary must recognize two critical limitations." *Id.* at 784. "First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power." *Id.* "Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong." *Id.*

From these limitations, we know that an adequate remedy does not mean a complete remedy—that is, the remedy that is necessary to make the plaintiff whole again. If a complete remedy were required, it would not be possible to "bow to" alternative remedies or to choose the "least intrusive" remedy available. *Id.* Only a complete remedy would suffice. Instead, *Corum*'s discussion of these "critical limitations" shows that an adequate remedy is one that meaningfully addresses the constitutional violation, even if the plaintiff might prefer a different form of relief. *Id.* at 784.

Other cases following *Corum* confirm that an adequate remedy is a meaningful one, though not necessarily the one the plaintiff might prefer. For example, in *Craig v. New Hanover County Board of Education*, the plaintiff sued his county board of education for failing to protect him from a sexual assault at school. 363 N.C. at 335. He brought both common law claims and constitutional ones. *Id.* This Court held that his common law claims, which were barred by sovereign immunity, were not adequate remedies. *Id.* at 338. We explained that "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* at 339–40. Thus, the Court permitted a *Corum* claim because, without it, the plaintiff would "be left with *no remedy* for his alleged constitutional injuries." *Id.* at 340 (emphasis added).

By contrast, in *Copper v. Denlinger*, the plaintiff sued his county school board and other school officials seeking compensatory and punitive damages for allegedly suspending him without due process over "gang affiliated" conduct. 363 N.C. at 785–86. We rejected plaintiff's *Corum* claim in *Copper*, explaining that there was an administrative appeal process that could lead to the suspension being reversed. *Id.* at 788–89. Thus, we reasoned, "under our holdings in both *Corum* and *Craig*, an adequate remedy exists at state law to redress the alleged injury, and this direct constitutional claim is barred." *Id.* at 789.

Importantly, the "adequate remedy" in *Copper* was not the one the plaintiff sought. *Id.* at 786. He wanted relief including "compensatory and punitive damages" for the violation of his due process rights, not merely to have his school suspension set aside. *Id.* This Court nevertheless concluded that the administrative appeal process itself offered an adequate remedy under *Corum*. *Id.* at 789.

The lesson from these cases—and one that is consistent across all *Corum* decisions—is that an "adequate remedy" exists when the plaintiff has access to court to raise the constitutional violation, and the court

can provide some form of relief for that violation, even if plaintiff does not view that relief as complete. By contrast, when the plaintiff has a cognizable state constitutional claim and cannot access the courts to obtain any form of relief, *Corum* is available. *Compare Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 415 (2021) (*Corum* claim available because constitutional violation "cannot be redressed through other means"), *and Bunch v. Britton*, 253 N.C. App. 659, 669 (2017) (*Corum* claim available because absolute bar of governmental immunity left "no remedy at common law" for the violation), *with Copper*, 363 N.C. at 789 (*Corum* claim not available because there was remedy in administrative appeal); *Taylor v. Wake County*, 258 N.C. App. 178, 189–90 (2018) (*Corum* claim not available because plaintiff had tort claims in the Industrial Commission, despite "limited" damages available on those claims); *and Wilcox v. City of Asheville*, 222 N.C. App. 285, 300 (2012) (*Corum* claim not available because plaintiff could sue police officers in their individual capacities).

Simply put, *Corum* is the embodiment of "where there is a right, there is a remedy." It applies when one's rights are violated, and the law offers either no remedy or a remedy that is meaningless. *Craig*, 363 N.C. at 340. In that circumstance, *Corum* creates a common law cause of action.

But that is the limit of *Corum*. It is not a state law equivalent of 42 U.S.C. § 1983. It does not guarantee a cause of action for money damages in every constitutional case where money damages otherwise are unavailable. It offers a court-created claim only in "extraordinary" circumstances where the law does not already provide other "established claims and remedies." *Corum*, 330 N.C. at 784. Like the plaintiff in *Copper*, many litigants who allege violations of their constitutional rights have access to established claims and remedies that are meaningful, even if not necessarily complete or the relief they want. These litigants cannot bring *Corum* claims. We knew this when we established the *Corum* doctrine and expressly embraced it when we outlined *Corum*'s "critical limitations." *Id.*

That brings us to this case. Plaintiff here argues that the State violated his constitutional right to a speedy criminal trial and that he has no other adequate remedy for the constitutional violation beyond this *Corum* claim for money damages. Plaintiff's argument cannot be squared with the precedent discussed above.

First, plaintiff has an alternative remedy. When criminal defendants believe they are being deprived of their right to a speedy trial, the

Criminal Procedure Act expressly provides a mechanism to obtain court review and a remedy for the violation. *See* N.C.G.S. § 15A-954(a)(3) (2023). The Act provides that, "on motion of the defendant," the trial court "must dismiss" criminal charges if the defendant "has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina." *Id.*

Second, this Court crafted the relief for a speedy trial violation specifically to ensure it was adequate to remedy the harm. Decades ago we held that the "right to a speedy trial is different from other constitutional rights" because of the difficulty of assessing when it is violated and what impact it has on the accused's defense. *State v. McKoy*, 294 N.C. 134, 140 (1978). We therefore held that "dismissal of the charges is the only possible remedy for denial of the right to a speedy trial." *Id.*

Dismissal of the charges is, of course, an incredibly meaningful remedy. Indeed, the Supreme Court of the United States has referred to dismissal for a speedy trial violation as an "unsatisfactorily severe remedy" because "it means that a defendant who may be guilty of a serious crime will go free, without having been tried." *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Or, as in this case, it means a criminal defendant *convicted* of very serious crimes will go free.[2]

As a result, and consistent with the "critical limitation" established in *Corum* that the judiciary "must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power," we reject the use of *Corum* claims in speedy trial cases because the law already provides an adequate remedy for that alleged constitutional violation. 330 N.C. at 784.

We close with one final point. The Court of Appeals decision in this case reached the correct outcome and we affirm it. But the Court of Appeals relied on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* is a federal decision applicable only to federal constitutional claims against federal government agents. *Id.* at 397. The *Bivens* doctrine has some similarities to *Corum*, but it is not controlling in matters of our state constitution and state jurisprudence. Thus, while the reasoning of *Bivens* cases—in particular, those examining whether there are sufficient alternative remedies—may imbue them with some persuasive authority in a *Corum* case,

2. As noted above, plaintiff alleges that various officials—primarily District Attorney Tracey Cline—manufactured evidence against him, pursued criminal charges, and asserted his guilt, despite knowing he was not the perpetrator of the alleged crimes. Our decision today in no way discounts plaintiff's allegations.

the Court of Appeals should have started its analysis with *Corum*. It did not do so—in fact, it never cited *Corum* or any of its state law progeny in the decision. To the extent that this could be interpreted as holding that *Corum* is somehow coextensive with *Bivens*, we expressly disavow that notion. Like *Bivens* claims, *Corum* claims are extraordinary and subject to considerable limitations. But they are creatures of state law, and their analysis should begin with our state law doctrine.

**Conclusion**

Because there is an adequate alternative remedy for the alleged constitutional violation in this case, plaintiff's *Corum* claim is barred. We therefore affirm the decision of the Court of Appeals, which in turn affirmed the entry of summary judgment against plaintiff on that claim.

MODIFIED AND AFFIRMED.

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

Justice EARLS dissenting.

In May 2002, police arrested and charged Frankie Delano Washington as a suspect in a home invasion. Mr. Washington's trial, however, did not start until February 2007—almost five years later. That years-long delay was not Mr. Washington's fault. It was the State's. *See State v. Washington*, 192 N.C. App. 277, 298 (2008). As he waited for trial—the shadow of the charges hanging over his head—Mr. Washington tried again and again (and again) to move his case along. As the years passed, he lodged a flurry of motions, asking the trial court to reduce his bond, to compel evidentiary testing, and, finally, to dismiss his charges.

But the State stalled. For three years, it withheld key evidence from forensic testing. When the trial court ordered the evidence tested, the State never alerted the labs. And even when the case was finally scheduled for trial, the State thrice asked to continue it.

Small wonder, then, that the Court of Appeals vacated Mr. Washington's conviction on speedy trial grounds, chiding that "if the State had exercised even the slightest care," the delay could have been avoided. *Id.* at 297. Relying on Article I, Section 18 of the North Carolina State Constitution—the Open Courts Clause—the Court found "overwhelming evidence" that the State's "repeated neglect and

underutilization of court resources" caused the five-year delay and thus violated Mr. Washington's constitutional right to a speedy trial. *Id.* at 284.

Once outside the prison walls, Mr. Washington sought accountability from the State and District Attorney Tracy Cline (DA Cline), the lead prosecutor in his case. To that end, he brought a civil suit for damages and injunctive relief, seeking redress for the harms inflicted by the State and beyond the reach of his criminal appeal. *See Washington v. Cline*, 267 N.C. App. 370 (2019). Mr. Washington—invoking this Court's landmark ruling in *Corum*—sued directly under the State Constitution and its guarantee of a speedy trial. *See State v. Patton*, 260 N.C. 359, 363–64 (1963).

But today, the majority extinguishes his claim and bars him from redressing the panoply of constitutional harms inflicted by the State. According to the majority, the dismissal of Mr. Washington's charges was an adequate remedy for his speedy trial violation. In other words, dismissal cured his constitutional injury—he is not entitled to more.

I disagree. The protections afforded by the speedy-trial right ripple beyond the criminal courtroom. And so too do the harms from the right's violation. When the State drags out a criminal case, it impairs the integrity of those proceedings and the reliability of the result. But the harms of that constitutional violation are far broader. The State's delay, among other things, jeopardizes the defendant's ability to provide for himself and his family, exposes him to health and safety risks, severs him from his community, hobbles his liberty, and robs him and his loved ones of opportunities to flourish.

Mr. Washington's case is a prime example. Dismissing his charges freed him from prison and voided the tainted proceedings that put him there. But it did not—indeed could not—touch the constitutional harms in the world beyond the prison gates. No reasonable person would believe that mere release from custody and removal of a conviction is adequate redress for the years-long deprivation of their freedom. "Sorry we violated your rights, you can go home" is not a satisfactory remedy for the denial of this foundational right, especially when the charges were shaky and ill-examined from the start. That is precisely what *Corum* seeks to remedy. *See Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). When a plaintiff suffers "a colorable constitutional injury that c[annot] be redressed through other means," *Corum* provides relief. *Craig v. New Hanover Cnty Bd. of Educ.*, 363 N.C. 334, 342 (2009). Because vacating Mr. Washington's conviction was a half-measure, and

because Mr. Washington lacks other avenues to fully redress his constitutional injuries, he may bring a *Corum* claim.

I start with the majority's view of *Corum* and the constitutional rights it protects. I then examine the constitutional guarantee of a speedy trial. After charting the contours of that right, I explain how its violation can inflict injuries beyond the criminal process and unreachable by criminal remedies. That is true of Mr. Washington. I examine his claims and how the State's constitutional breach harmed him in more ways than his criminal appeal could redress. And because his constitutional harms cannot be cured by criminal courts using criminal remedies, he may seek civil relief under *Corum*. Dismissing his charges was a partial fix—it cannot extinguish his right to full and fair redress for a constitutional violation. In holding the opposite, the majority denies Mr. Washington the relief our Constitution affords and our precedent demands. Respectfully, I dissent.

## I. *Corum*'s vision of constitutional rights and remedies.

On its face, this case asks what counts as an "adequate remedy" under *Corum*. But in truth, Mr. Washington's claim—like *Corum* itself—taps into deeper principles about constitutional rights and the judiciary's role in protecting them.

*Corum* made the point most clearly, mooring this Court's power to craft remedies to "the nature of constitutional government." *Corum*, 330 N.C. at 788. From the first, North Carolina's Constitution has opened with a Declaration of Rights—a catalogue of "individual and personal rights entitled to protection against state action." *Id.* at 782. Those fundamental guarantees—chiseled into constitutional stone—embody "the will of the people in this State." *In re Martin*, 295 N.C. 291, 299 (1978). They are "the supreme law of the State," and thus secured from impingement by "state officials and shifting political majorities." *Corum*, 330 N.C. at 786–87. The "fundamental purpose" of those rights is "to provide citizens with protection from the State's encroachment." *Id.* at 782. So at its inception—as today—the Declaration ensures that the "violation of constitutional rights is *never* permitted by anyone who might be invested under the Constitution with the powers of the State." *Craig*, 363 N.C. at 339 (emphasis added) (quoting *Corum*, 330 N.C. at 783).

From that, *Corum* derived a corresponding truth: A right requires a remedy. And not just any remedy, but one that breathes life into the right itself. That is, a remedy worthy of a constitutional right must "protect th[e] right[ ] from encroachment by the State" and "correct the State's violation" of it. *Corum*, 330 N.C. at 787. Put differently, an adequate

remedy provides a salve to a plaintiff's injuries and packs enough sting to deter future violations. *See* The Federalist No. 15, at 95 (Alexander Hamilton) (Cooke ed., 1961) ("It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolution or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.").

Understandably, then, *Corum* rejected a paint-by-numbers approach to rights and remedies. Depending on "the right violated and the facts of the particular case," "[v]arious rights" may "require greater or lesser relief to rectify" their violation. *Corum*, 330 N.C. at 784. In other words, "[t]he nature of the right and the extent of the violation dictate the appropriate nature and extent of the corresponding remedy." *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 436 (2022) (citing *Corum*, 330 N.C. at 784). And so a grave breach of constitutional guarantees "demands a remedy of equivalent magnitude." *Id.*

Extending that logic, *Corum* tied constitutional remedies to the "purpose for the Declaration of Rights" and the "function and traditional role of the courts in North Carolina's constitutional democracy." *Corum*, 330 N.C. at 787. Because the judiciary "is the ultimate interpreter of our State Constitution," it "is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens." *Id.* at 783. That duty, however, is nothing new—the courts' "obligation to protect the fundamental rights" of citizens is "as old as the State." *Id.* And the power to vindicate rights carries with it the power to enforce them. That duty, too, "belongs to the courts." *See Hoke Cnty.*, 382 N.C. at 438. And the judiciary accomplishes that task by crafting relief and disbursing it in proper cases.

Thus, this Court's power to fashion remedies flows from and is coterminous with its constitutionally mandated duty to "protect the state constitutional rights of the citizens." *Corum*, 330 N.C. at 783; *see also Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 642 (2004) ("[W]hen the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it."). *Corum* thus drew from a deeper strand of constitutional "spirit," and fortified this Court's "long-standing emphasis on ensuring redress for every constitutional injury." *See Craig*, 363 N.C. at 342. And at its heart, *Corum*'s promise is simple but profound: "[I]n the absence of an

adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782.

In that vein, a plaintiff bringing a *Corum* claim "must allege that no adequate state remedy exists to provide relief for the injury." *Copper v. Denlinger*, 363 N.C. 784, 788 (2010). In fashioning relief, *Corum* flagged two restraints on this Court's remedial powers. When existing remedies do the job, we should bow to them. *See Corum*, 330 N.C. at 784. And of the remedies that would "right the wrong," we should choose the "least intrusive" one available. *Id.* Both rules rest on similar intuitions. When the law affords a fitting remedy for constitutional harms, fashioning an extra one is duplicative. And by needlessly reinventing the wheel, courts may spark friction with the other branches. *See In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 100 (1991). So "in the interests of the future harmony of the branches" and in the "spirit of mutual cooperation," the judiciary should deploy its remedial authority with responsibility and pragmatism. *Id.* at 100–01.

The majority, however, converts *Corum*'s words of caution into its central teaching. According to the majority, a remedy is "adequate"—and thus *Corum* unavailable—if a plaintiff has "access to court to raise the constitutional violation, and the court can provide *some* form of relief for that violation." (Emphasis added). What counts as "some relief," we are not told. But it lies between a "meaningless" remedy and a "complete" one. The majority imports those bookends from *Corum*'s self-imposed limits. If citizens are entitled to complete relief, the majority reasons, "it would not be possible to 'bow' to alternative remedies or to choose the 'least intrusive' remedy available." To the majority, then, *Corum*'s pragmatic advice sets the ceiling on constitutional remedies and the judiciary's power to grant them.

I think that analysis has it backwards—it overstates the limits set by *Corum* and elevates form over substance, thus diluting this Court's duty to "guard and protect" constitutional guarantees. *Corum*, 330 N.C. at 785. Properly read, *Corum* does not require the judiciary to defer to existing remedies merely because they exist. And it does not mandate that we select the "least intrusive" remedy merely because it is the least intrusive. Instead, *Corum* guides *how* we fulfill our duty to mend constitutional wrongs, in a way that promotes responsibility, pragmatism, and inter-branch harmony. In other words, *Corum*'s prudential restraints do not—and cannot—swallow citizens' constitutional protections. And they cannot override our duty to "ensure that the violation of constitutional rights is *never* permitted by anyone who might be invested under

the Constitution with the powers of the State." *Craig*, 363 N.C. at 342 (cleaned up).

Instead, as *Corum* itself made clear, we start by examining the constitutional injury and the relief needed to cure it. That inquiry and our answer will depend on "the right violated and the facts of the particular case." *Corum*, 330 N.C. at 784. "Various rights" in various contexts may "require greater or lesser relief to rectify" their violation. *Id.* *Corum*'s limits apply on the back end, not at the threshold—that is, after this Court examines the right denied and the redress due. Put differently, *Corum*'s restraints guide which remedy we select from the menu of satisfactory relief. If existing remedies vindicate the right, we should bow to them. And if various forms of relief would do the job, we should select the "least intrusive" course.

But we accede to those alternatives when—and only when—they suffice to "right the wrong." *Id.* If available mechanisms are too insipid to "correct the State's violation of the plaintiff's particular constitutional right at issue," they fall short of constitutionally adequate redress. *See id.* at 785. And in that case, this Court may—indeed must—"fashion a common law remedy." *Id.*; *accord In re Alamance Cnty. Ct. Facilities*, 329 N.C. at 101 (explaining that this Court should defer to "established procedural methods" like "statutory remedies" so long as they "do not stand in the way of obtaining what is reasonably necessary for the proper administration of justice"); *Hickory v. Catawba Cnty.*, 206 N.C. 165, 174 (1934) (explaining that indictment of commissioners did not bar courts from granting mandamus relief because a valid remedy must be "one competent to afford relief on the particular subject-matter of [a party's] complaint" and "[p]unishment of the defendants would not provide the relief to which the plaintiffs are entitled").

To bolster that point, *Corum* examined our decision in *Sale*. In that case, the State deprived a plaintiff "of his private property for public use." *See Corum*, 330 N.C. at 785 (quoting *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618 (1955)). But the plaintiff could not air his constitutional grievance through existing channels of statutory, contract, or tort claims. *See id.* In response, this Court allowed his constitutional challenge "to proceed under the common law." *Craig*, 363 N.C. at 341. That was so because, when existing mechanisms are insufficient, the "common law, which provides a remedy for every wrong will furnish the appropriate action for the adequate redress of such grievance." *Sale*, 242 N.C. at 618 (cleaned up). Even more, the available relief must align with and vitalize the constitutional right. "[N]othing short of actual payment, or its equivalent, constitutes just compensation," we

explained—"entry of a judgment is not sufficient." *Corum*, 330 N.C. at 785 (quoting *Sale*, 242 N.C. at 618). We thus allowed the plaintiff to seek damages because it was the least intrusive remedy that "would correct the State's violation of the plaintiff's particular constitutional right at issue." *Id.*

Put another way, this Court did not start its analysis by examining the convenience of the existing options. If that were so, an "entry of a judgment" would be the obvious, far less burdensome choice. Instead, to safeguard the "fundamental law of this State, based on natural justice and equity," *Sale*, 242 N.C. at 618, we endorsed damages because that relief "would correct the State's violation" of the plaintiff's rights, and "we were unable to fashion" a "less intrusive" remedy to right the wrong, *Corum*, 330 N.C. at 785.

In broader perspective, too, the majority's view of remedies clashes with *Corum*'s reasoning and the principles animating it. If this Court must bend the knee to existing remedies, we, in effect, outsource our duty to interpret and enforce constitutional protections. And if we start by charting the "least intrusive" course, then we skew our Constitution's meaning to the lowest common denominator. The status quo and convenience are poor measures of constitutional worth. And a regime built on those foundations is a fragile one indeed. *Corum* recognized that point, explaining that even long-standing doctrines like sovereign immunity "cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights." *Id.* at 785. To borrow Corum's language, our constitutional protections are mere "fanciful gesture[s]" if they must yield to legal formalism. *Id.* at 786.

In that vein, I would anchor the analysis of an adequate remedy to the underlying right, the purposes animating it, and "the facts of the particular case." *Id.* at 784. Though this Court has offered sparse guidance on when a remedy is adequate, other states have tackled the question more directly—often citing *Corum*'s articulation of rights and remedies. Many courts—drawing on the Second Restatement of Torts—ask whether a remedy is "consistent with the purpose of and necessary to enforce" the constitutional right at issue, in view of the provision's "language and history." *Mack v. Williams*, 522 P.3d 434, 444–45, 448 (Nev. 2022); see id. at 451–52 (allowing damages remedy for violation of Nevada's search-and-seizure provision because it "remains essential to effectuate and advance the goals of" that constitutional right); *Katzberg v. Regents of the Univ. of Calif.*, 58 P.3d 339 (Cal. 2002); *Brown v. State*, 674 N.E.2d 1129, 1139 (N.Y. 1996) (allowing damages remedy for state constitutional violations because monetary relief is "consistent with the

purposes underlying the duties imposed by these provisions and is necessary and appropriate to ensure the full realization of the rights they state"); *see also Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017); *Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002); *Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921 (Md. 1983); *Shields v. Gerhart*, 658 A.2d 924 (Vt. 1995).

That precedent in mind, I would hold that an adequate remedy exists when a plaintiff may vindicate his constitutional claim in court and, if successful, obtain relief that would both "right the wrong[s]," *Corum*, 330 N.C. at 784, and restrain future "encroachment by the State," *id.* at 787. On that view, an adequate remedy has one foot in the past and the other in the future. Looking backwards, a remedy should redress the constitutional harms inflicted by the State's breach, thus vindicating the "purposes underlying" the right and "the duties imposed by" it. *See Brown*, 674 N.E.2d at 1139. And looking forwards, it should realize the foundational purpose of our Constitution: To protect "rights from encroachment by the State," and to secure them from infringement by "state officials and shifting political majorities." *Corum*, 330 N.C. at 787.

Thus, to keep the State in check and the right intact, an adequate remedy must meaningfully deter future government illegality. *See Mack*, 522 P.3d at 448–49 (explaining that "a damages remedy furthers the purpose of [Nevada's] search-and-seizure provision to the extent it acts as a deterrent to government illegality"). In my view, that formulation is faithful to *Corum*'s vision, the "fundamental right[s]" it protects, and this Court's duty to its citizens. *Corum*, 330 N.C. at 783; *Hoke Cnty.*, 382 N.C. at 438 ("The duty to ensure . . . redress belongs to the courts.").

It also fits with our precedent. As the majority acknowledges, many of our *Corum* cases have dealt with patently inadequate remedies. We have held, for instance, that a claim barred by immunity is not "adequate by any realistic measure." *Craig*, 363 N.C. at 339. To supplant *Corum* relief, existing mechanisms must provide, at a minimum, the "possibility of relief under the circumstances." *Id.* at 340. So when a plaintiff lacks the "opportunity to enter the courthouse doors and present his claim," he lacks an adequate remedy. *Id.* So too when "state law does not provide for the type of remedy sought by the plaintiff." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 413 (2021) (cleaned up). In *Deminski*, for instance, the plaintiff sought compensatory and punitive damages, a permanent injunction, and attorneys' fees to remedy a school board's deliberate indifference to ongoing student harassment. *Id.* at 410. Because the "remedy sought . . . c[ould not] be redressed through other means," we held that "no other adequate state law remedy exist[ed]" for the plaintiff's colorable constitutional claim. *Id.* at 415. And even when

a remedy exists in theory, it is not adequate if it "does not apply to the facts alleged by the plaintiff." *Craig*, 363 N.C. at 342. So a "statutory remedy to recover damages"—even if the "ordinarily exclusive" mode of redress—does not satisfy *Corum* if the "statutory cause of action" expires before a plaintiff may invoke it. *Id.* at 341 (citing *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241 (1963)). In each of those cases, the plaintiffs lacked an adequate remedy because they had no opportunity to "have the merits of [their] case heard and [their] injury redressed if successful on those merits." *See id.*

By contrast, in the lone case where an existing remedy was "adequate," that remedy closely fit—and thus fully vindicated—the constitutional right at play. *See Copper*, 363 N.C. at 788. In *Copper*, Mr. Douglas—a public school student—alleged that the Durham School Board violated his "state constitutional right to procedural due process." *Id.* at 788. He sued under *Corum*, asserting two procedural deprivations: That he was denied a "hearing before his long-term suspension from school," and that he "was never given" the chance to appeal the disciplinary measure. *Id.* at 788–89. Put another way, Mr. Douglas's constitutional injury was the deprivation of school access *without proper procedure*. We held that Mr. Douglas could not bring a *Corum* claim because existing mechanisms would "redress [his] alleged constitutional injury." *Id.* at 788. More specifically, we noted "two separate statutes" allowing students to appeal disciplinary decisions—including suspensions—to their school board and then the superior court. *Id.*

So while Mr. Douglas alleged a denial of proper procedure, existing channels "provide[d] a means of redressing such an injury" and curing the constitutional harm. *Id.* Nothing suggested that Mr. Douglas "was somehow barred from the doors of either the courthouse or the Board." *Id.* at 789. In other words, he "always had the statutory right to appeal." *Id.* But he never did so. Mr. Douglas neglected to take "any affirmative steps" to challenge his suspension, even with "representation from not one, but two, attorneys." *Id.* He never claimed that "it would have been futile to attempt to appeal his suspension" through the channels in place. *Id.* And he never argued that existing statutory remedies were "inadequate or would fail to redress the alleged constitutional injury." *Id.* at 790. In short, Mr. Douglas could not bring a *Corum* claim to allege the denial of procedural due process when he "failed to avail [himself] of the due process offered under state law." *Id.* at 791.

*Copper* charted the contours of an adequate remedy. In that case, this Court withheld *Corum* relief because multiple statutes afforded Mr. Douglas the very procedure he sought. In other words, there was a close

fit between the asserted harms and the available remedies. Fashioning extra relief was unnecessary and duplicative because existing statutes patched the alleged constitutional gaps. This Court thus bowed to those remedies because they "provide[d] a means of redressing" Mr. Douglas's constitutional harm—not because they merely existed. *Id.* at 788. *Copper*, then, hardly supports the idea that an adequate remedy need only provide "*some* form of relief." The lesson from that case is far more modest: When a plaintiff enjoys "a statutory right to appeal" that would "provide a means of redressing" an alleged deprivation of procedural due process, a separate *Corum* claim is redundant and unavailable. *Id.* at 788–89. That is especially true when the plaintiff does not dispute the sufficiency of existing mechanisms and has "failed to avail [himself] of the due process offered" by current law. *Id.* at 791.

Applied here, *Copper*'s conception of an adequate remedy underscores why Mr. Washington lacked one. In *Copper*, separate statutes furnished the plaintiff with the very procedure he claimed he was denied. Those remedies were thus adequate because they allowed him to raise his claim and, if successful, fully cure his injury. Not so for Mr. Washington. A criminal appeal on speedy trial grounds involves limited claims, limited issues, and limited remedies. For that reason, Mr. Washington could only raise one facet of his constitutional violation and redress one facet of his injuries. Unlike in *Copper*, there was a yawning gap between his constitutional harms and the relief available. And so unlike in *Copper*, Mr. Washington had no forum to vindicate the full scope of his injuries and, if successful, to redress them.

Which raises a more fundamental difference between Mr. Washington's case and our precedent. In the majority's view, Mr. Washington is attempting to double dip on his remedies. Because he had the "opportunity to raise a constitutional violation in court," "did so," and "received a remedy," the majority frames his civil suit as a bid to snag "even more remedies in a second proceeding." But unlike other *Corum* claimants, Mr. Washington could not obtain relief in a single proceeding. In challenging his criminal conviction, Mr. Washington could *only* challenge his criminal conviction. He could not air the full spectrum of harms inflicted by the State's speedy trial violation or seek noncriminal forms of relief. Indeed, had he asked for damages in his criminal appeal, the courts would have jettisoned those claims at the threshold. *See* N.C.G.S. § 1-8 (2023) ("Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other."); *see also Shore v. Edmisten*, 290 N.C. 628, 637 (1976) ("[T]he criminal trial itself may not be conducted to decide the question

of how much damage or loss has been suffered."). Mr. Washington thus lacked a mechanism to fully vindicate his speedy trial right and meaningfully redress the scope of the State's violation. For that reason, it is simplistic and distortive to frame his *Corum* claim as a grasping effort to nab a "second remedy" in a "second proceeding."

Most regrettably, recasting Mr. Washington as an opportunistic, double-dipping litigant cheapens *Corum*'s constitutional vision and this Court's duty to its citizens. This case is not about what Mr. Washington "wants," as the majority puts it. It is about the relief he is *owed* for the State's breach of his fundamental protections. Properly viewed, Mr. Washington does not seek multiple remedies for a single harm. He seeks redress for nine years' worth of harms stemming from the violation of his rights. *Corum* itself disclaimed the majority's artificial and rigid view of constitutional remedies, cautioning that the facts of the case and the nature of violation will "require greater or lesser relief to rectify" the harm. *See Corum*, 330 N.C. at 784. And to ignore the reality of Mr. Washington's case and the limited relief available in his criminal appeal injects rigidity where *Corum* prescribes flexibility.

Dismissing Mr. Washington's charges was an important first step. But it did not redress the varied harms stemming from the State's constitutional violation. For that reason, dismissal alone did not sufficiently vindicate his speedy trial right and the values underlying it. And for the same reason, Mr. Washington may bring a *Corum* claim to redress the constitutional injuries left untouched by his criminal appeal.

## II. The harms of a speedy trial violation reach beyond and are not redressable by criminal process.

I next examine the "purposes underlying" the speedy trial right and "the duties imposed" on the State. *See Brown*, 89 N.Y.2d at 189. For North Carolinians, the right to swift justice is doubly protected. At the federal level, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const., amend. VI. Our state constitution extends similar protections in more sweeping language, guaranteeing that, "All courts shall be open . . . and right and justice shall be administered without favor, denial, or *delay*." N.C. Const., art. I, § 18 (emphasis added); *see State v. McKoy*, 294 N.C. 134, 140 (1978). Both constitutional provisions sprang from the same historical roots. The right to "swift justice" lies "at the very foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). It was inscribed in Magna Carta and etched into our state and federal constitutions. *See id.* at 223–26. Today, the guarantee

of a speedy trial remains "one of the most basic rights preserved by our Constitution," *id.* at 226, and is "secured by the fundamental law of this State," *McKoy*, 294 N.C. at 140.

On its face, the right to a speedy trial seems crafted for and cabined by criminal proceedings. But that guarantee is of broader constitutional berth. The U.S. Supreme Court has recognized as much. *See Barker v. Wingo*, 407 U.S. 514, 519 (1972). This Court has, too. *See State v. Hollars*, 266 N.C. 45, 50–51 (1965); *see also State v. Johnson*, 275 N.C. 264 (1969). And because the right extends beyond the criminal process, so must the remedy for its violation. Dismissing Mr. Washington's charges—on its own—resolves a narrow slice of the State's harms. It does not mend the constitutional injuries or ward off future constitutional violations. And it thus fails "to effectuate and advance the goals of" the speedy trial guarantee. *See Mack*, 522 P.3d at 452.

The right to a speedy trial is "generically different" from other constitutional protections for criminal defendants. *Barker*, 407 U.S. at 519. It ensures that the defendant is "treated according to decent and fair procedures." *Id.* at 519–20. And it limits "the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Marion*, 404 U.S. 307, 320 (1971) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)). Extended delays, for example, may prevent witnesses from accurately recalling events. *Barker*, 407 U.S. at 532. And in the lag between arrest and trial, witnesses may die or disappear. *Id.* For that reason, "persons who are detained between arrest and trial are more likely to receive prison sentences than those who obtain pretrial release." *Id.* at 533 n.35. That procedural imbalance "skews the fairness of the entire system." *Id.* at 532. And so, of the available *criminal* remedies, we have held that "dismissal of the charges is the only possible remedy" when the State withholds a speedy trial. *McKoy*, 294 N.C. at 140. That said, "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *Marion*, 404 U.S. at 320. What, then, are these evils?

When a defendant is left lingering in jail awaiting trial, that time is "dead time." *Barker*, 407 U.S. at 533. It means job loss and a "drain [on] his financial resources." *Id.* at 537 (White, J., concurring) (quoting Marion, 404 U.S. at 320). Evidence bears that out. People "detained in jail while awaiting the resolution of their criminal cases" lose "almost $30,000 in foregone earnings and social benefits" over the "course of the working-age life cycle." Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention*, Brookings Papers on Econ. Activity, at 251, 251, 253 (2021). Pretrial criminal involvement also dissuades employers

from conducting interviews, making it substantially harder for defendants awaiting trial to find jobs. *See* Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings* 13 (Brennan Ctr. for Just. 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [hereinafter Craigie, *Conviction, Imprisonment, and Lost Earnings*]. While a defendant's case is delayed, that time "means time out of the workforce," slashing the likelihood of gainful employment. *Id.* Further, "child support payments, credit card debt, rent, and other living expenses" accrue during pretrial detention and increase due to late charges or unpaid interest. Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America* 15 (Vera Inst. of Just., Feb. 2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [hereinafter Subramanian, *Incarceration's Front Door*]. And if a defendant is convicted, their economic prospects face even steeper hurdles. Formerly imprisoned people "earn nearly half a million dollars less over their careers than they might have otherwise." Craigie, *Conviction, Imprisonment, and Lost Earnings* at 6–7.

More broadly, the harms of a speedy trial violation ripple through families and communities. *Id.* at 7. Over half of pretrial detainees have children under 18. *See* Dobbie & Yang at 253. Children with parents in prison report higher rates of mental health and behavioral problems. *See* Sara Wakefield, *Incarceration, Families, and Communities: Recent Developments and Enduring Challenges*, 51 Crime & Just. 399, 404–05 (2022). Those trends extend into the teenage years. *See id.* at 405. Adolescents with incarcerated parents report higher rates of teenage aggression and external behavioral problems, such as depression and anxiety. *Id.* Economically, too, a speedy trial violation can alter children's life trajectory. Studies suggest that pretrial detention has intergenerational spillover effects—counties with "high levels of pretrial detention when children are young (age 7-12) exhibit significantly lower levels of intergenerational mobility for children" when they reach adulthood. *See* Dobbie & Yang at 254; *see also id.* at 283–88.

Pretrial detention also affects a broader set of family members, including partners, parents, and siblings. *See* Wakefield at 407. Incarceration of a partner increases material insecurity, homelessness, and financial strain. *Id.* at 407–08. Secondary expenses also mount, including costly visits to prisons and the toll of lengthy separations. *See id.* at 408. Families feel the brunt of that strain. Lost earnings, for instance, add up when one parent's imprisonment forces the other parent to quit their job and provide childcare. *See* Dobbie & Yang at 260.

Other costs soon follow. A family's money is shunted into commissary accounts, phone and video calls, court costs, criminal justice debt, and the cost of an attorney. *See* Craigie, *Conviction, Imprisonment, and Lost Earnings* at 7; *see also* Dobbie & Yang at 252. Even when the parent is released from incarceration, the reentry period can pose an "acute stressor when families try to reunite with little access to supportive services." *See* Wakefield at 408.

The right to swift justice also lessens the "overcrowding and generally deplorable" conditions of jails. *Barker*, 407 U.S. at 519–20. Incarceration "jeopardizes health and well-being" because people who need health care while in prison may not receive any treatment and may be forced to adopt survival behaviors that are not marketable in the workplace. Craigie, *Conviction, Imprisonment, and Lost Earnings* at 13. As the COVID-19 pandemic laid bare, there is "greater prevalence of contagious diseases in jails" that increases lethal outcomes for detainees, especially those with chronic health problems. Subramanian, *Incarceration's Front Door* at 17.

The speedy trial right has a communal facet, too. As the U.S. Supreme Court has noted, delay leaves the defendant "unable to lead a normal life because of community suspicion and his own anxiety." *Barker*, 407 U.S. at 527. It also subjects him to "public obloquy" and "seriously interferes with [his] liberty." *Id.* at 537 (White, J., concurring) (quoting *Marion*, 404 U.S. at 320). This "cloud of anxiety, suspicion, and . . . hostility," *id.* at 533, fuels the cycle of incarceration, "making jail a gateway to deeper and more lasting involvement" in the criminal justice system, Subramanian, *Incarceration's Front Door* at 5.

In short, the right to a speedy trial guarantees fair criminal proceedings and protects against prejudice. But it reaches beyond the criminal process to forestall injuries that exist far apart from procedural fairness. As such, when the State violates that right and delays a defendant's day in court, it inflicts harms that the criminal process simply cannot remedy.

### III. Dismissing Mr. Washington's charges did not redress the full scope of his constitutional harms.

This case exemplifies the sprawling harms that flow from a speedy trial violation. Mr. Washington's complaint details the injuries inflicted outside the criminal process and beyond the reach of any criminal remedy. In recounting his harms, we treat the allegations in his complaint as true and view the facts in his favor.

After his arrest, Mr. Washington spent more than 366 days in the Durham County Jail because he could not afford the $1 million bond. During that time, Mr. Washington lost his job as an auto mechanic. His ten-year-old son was also victimized. When Mr. Washington was arrested, his son was left "home alone" and not found until a day later. *Washington*, 192 N.C. at 277. Mr. Washington's "sudden separation" from his son stretched for the duration of his confinement. *Id.*

After a year in detention and four motions asking for bond reduction, Mr. Washington was forced to pay $37,500 just to secure release. Even when freed from formal detention, Mr. Washington's liberty was straitjacketed by the conditions in his pretrial release order. He remained subject to those restraints on his liberty as the State delayed his trial, refused to test critical evidence, and ignored other suspects.

When his trial finally started—almost five years after his arrest—the delay preceding it "significantly impaired Mr. Washington's defense." Many witnesses struggled to remember "events that occurred nearly five years" before and could not "recall details pertinent to the defense." Police witnesses, in particular, "recalled no details" from the arrest or investigation, reciting statements from old reports without remembering enough facts to respond to cross-examination. Across all categories of witnesses, the common refrain was "I don't recall." And Mr. Washington's inability to meaningfully cross-examine witnesses was devastating, as the "prosecution relied at trial solely on the witnesses' long-faded memories."

Because of the State's years-long delay, Mr. Washington lost "direct evidence of [his] actual innocence," and the "ability to challenge pretrial identification evidence." That stale evidence, in turn, created "a substantially greater likelihood that the in-court identifications would result in misidentification of [Mr. Washington] as the perpetrator of the offenses." And given the witnesses' muddled memories, Mr. Washington could not meaningfully probe their description of events, challenge their credibility, or "otherwise expose the multiple dimensions of their identifications' unreliability." Mr. Washington was then convicted and sentenced to consecutive multi-year terms of imprisonment. *See Washington*, 192 N.C. App. at 281.

Even after the Court of Appeals overturned his conviction, Mr. Washington's injuries persisted. Incensed by public criticism, DA Cline continued to make "numerous false, conclusory assertions of [Mr. Washington's] guilt to representatives of the media." In fact, she "insisted that a local newspaper publish all of" her comments despite

the newspaper warning her of the risks of publicizing "false statements." Her "multiple false, stigmatizing assertions relating to" Mr. Washington cropped up in "written correspondence with representatives of the news media" and were "re-published and amplified" by DA Cline in interviews.

In short, since his arrest in 2002, Mr. Washington felt the full weight of the State's systemic failures. He was deprived of his liberty, sustained "irreparable harm to his reputation," and suffered "severe, disabling emotional, mental, and physical harm." While handling his case, the State and its agents marked Mr. Washington "as an infamous violent criminal who committed racially motivated crimes." In effect, the State turned Mr. Washington "into a public pariah, subjecting him to extreme and sustained public obloquy." Both he and his family endured "public scorn, taunts, and insults." And the State's attacks on his character were reprinted by "local media" and amplified by "national publications that reproduced those local reports." Even after the dismissal of charges, Mr. Washington will never escape the stains of the "false allegations that Defendants advanced and repeatedly publicized." And because of the State's long-running denial of his speedy trial rights, Mr. Washington struggled with "severe and chronic depression, anxiety, and other diagnosable conditions."

Economically, too, Mr. Washington bore the costs of the State's actions. He lost his job as well as opportunities for "education, training, earnings, and earning capacity." And those economic losses were even more staggering because Mr. Washington "was required to incur exorbitant costs associated with securing bail, retaining professional assistance in connection with the criminal proceedings against him, and other expenses in connection with defending against the unlawful criminal proceedings." Mr. Washington's family suffered as well. Because of the State's constitutional violation, Mr. Washington's son, for instance, was deprived of his father's care, support, and guidance.

### IV. Because dismissing Mr. Washington's charges did not—and could not—cure his constitutional harms, it is not an adequate remedy.

The majority holds that dismissing Mr. Washington's charges "meaningfully" remedies nine years' worth of constitutional injuries. In other words, releasing him from prison and removing his faulty conviction is "good enough"—anything more is a windfall. I disagree.

As a criminal remedy, dismissal addresses just one facet of Mr. Washington's injuries: The integrity of his conviction. If Mr. Washington challenged his conviction alone—as he successfully did in his criminal

appeal—then the majority would be correct; the scope of the State's speedy trial violation is cured. The Court of Appeals recognized as much, explaining that "in the context of his *criminal* prosecution, [Mr. Washington] has already received the only acceptable remedy for the violation of the speedy trial right." *Washington*, 267 N.C. App. at 373 (emphasis added).

But that is not the case before us. Mr. Washington has filed "a civil lawsuit, not a criminal prosecution." *Id.* And he does not seek "to overturn his criminal convictions, but to redress harms he allegedly suffered as a result of the denial of his right to a speedy trial." *Id.* In other words, Mr. Washington invokes *Corum* to redress all the major evils inherent in violating his constitutional guarantees—evils that exist vastly apart from the prejudice that the State injected in his criminal conviction. Though dismissal is a "meaningful remedy" for his *criminal* prosecution, it does nothing for the injuries that stand apart from procedural unfairness.

To the majority, however, that distinction makes no difference. Under its ruling, Mr. Washington is now barred from receiving compensation for all the past and future economic losses he suffered. He is barred from receiving compensation for the physical injuries he suffered and the emotional trauma he endured. He no longer has a means to redress the liberty and privacy he was stripped of. He cannot be compensated for the education, training, and earnings he lost, nor for the time missed with his son. And Mr. Washington cannot even repair the damage to his reputation from the criminal proceedings and DA Cline's mudslinging.

In my view, however, a criminal procedural remedy for a criminal procedural violation does not foreclose civil relief for civilly cognizable harms. Again, *Corum* prescribed a flexible, fact-specific analysis of rights and their corresponding remedies: "[v]arious rights that are protected by our Declaration of Rights may require greater or less relief to rectify the violation of such rights, *depending upon the right violated and the facts of the particular case*." *Corum*, 330 N.C. at 784 (emphasis added). Of course, a different case with a different claimant might warrant different relief. The redress due to Mr. Washington, for instance, is quite different than the redress due a defendant who successfully raised a speedy trial claim, secured prompt release, and suffered minimal hardships. But categorically extinguishing civil relief, as the majority does today, is a sprawling step that ignores the disjuncture between criminal cases and civil suits, and the relief available through each.

Indeed, this Court has also recognized the divide between criminal and civil remedies, and the discrete interests vindicated through

those channels. Most relevant here, we have allowed civil redress for violations of a defendant's right to a speedy trial. In *Simeon v. Hardin*, 339 N.C. 358 (1994), a group of defendants awaiting trial brought a civil action against the Durham County district attorney for breaching their speedy trial rights. According to the defendants, prosecutors declined to schedule their cases "for trial for the tactical purposes of keeping [them] in jail, delaying a trial at which [they were] likely to be acquitted," and "pressuring [them] into entering a guilty plea." *Id.* at 378. The defendants also linked the alleged constitutional violations to concrete harms. By denying the defendants a speedy trial, prosecutors exacted "pretrial punishment," worked to "surprise criminal defense counsel," and "impair[ed] the quality of criminal defendants' legal representation." *Id.* The violations also "force[d] criminal defendants released on bail to miss work and come to court repeatedly," *id.* at 364, as well as to "incur[ ] unnecessary witness-related expenses," *id.* at 378.

This Court allowed the defendants to seek civil remedies for their constitutional claims. *Id.* at 379. We explained that "the issues raised by [the defendants] could not be authoritatively settled in their individual criminal cases and the relief sought could not be adequately provided by the criminal court." *Id.* at 368. True, the civil cases overlapped with criminal proceedings. But we reasoned that "the civil action in this case does not involve the same issues as [the defendants'] individual criminal prosecution." *Id.* at 367. For that reason, the civil claims were "collateral to the underlying criminal charges against [them] and the issues which normally arise during a criminal prosecution." *Id.* And the relief sought—declaratory and injunctive relief—is "more adequately addressed in a civil action." *Id.* at 368. Simeon thus makes clear that the criminal process simply does not provide adequate relief to redress injuries inherent in violations of the speedy trial right. That is true for Mr. Washington, just as it was for Mr. Simeon.

## V. Conclusion

The majority starts and ends with a familiar legal refrain: For every right, there is a remedy. That is true. But the deeper issue is whether a remedy is enough to sustain a right. As *Corum* recognized, rights and remedies are symbiotic—one without the other is nothing at all. And when one wilts, the other does too.

For that reason, a constitutional violation demands a correlatively robust remedy—one that secures the right "from encroachment by the State," and vindicates its purpose and underlying values. This Court, after all, has "the responsibility to protect the state constitutional rights

of the citizens." *Corum*, 330 N.C. at 783. And when we leave a constitutional violation insufficiently redressed, we cheapen the underlying right and disserve the citizens it protects.

With those principles in mind, I would hold that dismissing Mr. Washington's charges was not an adequate remedy for his speedy trial violation. Standing alone, that remedy redressed only a sliver of the harms inflicted by the State. Though dismissal corrected his defective conviction, it did not—and could never—remedy the full scope of his constitutional injuries. To vindicate his speedy trial right—and to secure that protection for others, too—Mr. Washington should be allowed to seek the civil relief needed to "right the wrong." *See id.* at 784. *Corum* gives him that chance, and I would allow his claim to continue. By divesting Mr. Washington of the remedy he is due, the majority erodes the right itself. I respectfully dissent.

Justice RIGGS joins in this dissenting opinion.

**BOUVIER v. PORTER**

[385 N.C. 851 (2024)]

LOUIS M. BOUVIER, JR., KAREN ANDREA NIEHANS, SAMUEL R. NIEHANS, AND JOSEPH D. GOLDEN

v.

WILLIAM CLARK PORTER, IV, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC, STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, AND THE PAT MCCRORY COMMITTEE LEGAL DEFENSE FUND

From N.C. Court of Appeals
20-441

From Guilford
17CVS3273

No. 403PA21

ORDER

Defendants-petitioners Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund have filed a motion respectfully requesting my recusal in this matter. Though filed in the ordinary course, the motion itself occupies a peculiar procedural posture. I already recused myself from this matter while a judge at the Court of Appeals. Moreover, in obeisance to Canons C(1)(a) and (b) of the North Carolina Code of Judicial Conduct given my recent proximity to this case and relationship with plaintiffs/parties in this matter, I informed this Court in advance of defendants-petitioners' motion (and before the disposition of any other matter in this case following my investiture as Associate Justice) that I have recused myself in this case to protect and maintain the dignity of this Court. And while defendants-petitioners were informed by the Court of my recusal following the filing of their motion, they have nonetheless elected to pursue the motion notwithstanding my prior decision to recuse myself from this matter.

A standing order of this Court provides that when a motion is

> filed with the Court under Rule 37 of the North Carolina Rules of Appellate Procedure seeking the recusal or disqualification of a Justice from participation in the deliberation and decision of a matter pending before the Court, the Court shall assign the motion to the Justice who is the subject of the motion for their determination. That determination shall be final.

*Order Concerning Recusal Motions*, 379 N.C. 693 (2021). Consistent with the sole discretion afforded to me by that order, and having already recused from this matter, defendants-petitioners' motion is dismissed as moot. *Cf.*, *e.g.*, *Simeon v. Hardin*, 339 N.C. 358, 370 (1994) ("Whenever during the course of litigation it develops that the relief sought has been granted . . . the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." (citation omitted)). I am and remain recused from this matter for all other purposes notwithstanding entry of this order.

This the 4th day of March 2024.

/s/ Riggs, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

**BREWER v. RENT-A-CENTER**

[385 N.C. 853 (2024)]

ROBERT BREWER, EMPLOYEE

v.

RENT-A-CENTER, EMPLOYER,
TRAVELERS INSURANCE CO.
(SEDGWICK CLAIMS SERVICES,
THIRD-PARTY ADMINISTRATOR), CARRIER

From N.C. Court of Appeals
22-296

From N.C. Industrial
Commission
W94420

No. 139PA23

ORDER

Plaintiff's consent motion to dismiss appeal is allowed. The decision of the Court of Appeals in *Brewer v. Rent-A-Ctr.*, 288 N.C. App. 491 (2023) is vacated. *See State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 289, 221 S.E.2d 322, 324–25 (1976) (vacating a decision of the Court of Appeals because the case became moot while on appeal) ("When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so. While we express no opinion as to its correctness, *the better practice in this circumstance is to vacate the decision of the Court of Appeals*." (internal citation omitted) (emphasis added)).

By order of the Court in Conference, this the 1st day of February 2024.

/s/ Allen, J.
For the Court

Justices Earls and Riggs concur in the dismissal of the appeal but dissent with respect to vacatur for the reasons explained in Justices Earls and Morgan's dissents in *Walker v. Wake Cnty. Sheriff's Dep't*, 385 N.C. 300, 303–09 (2023).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

**BYRD v. SAPPER**

[385 N.C. 854 (2024)]

HENRY CLIFFORD BYRD, SR.

v.

SUPERINTENDENT JOHN SAPPER

No. 412P13-9

ORDER

Pursuant to an administrative order entered by this Court on 23 December 2021, and having reviewed and considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiff's motion to disqualify the undersigned is denied.

This the 30th day of January 2024.

/s/ Riggs, J.

Allison J. Riggs
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of January 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

**IN RE Z.A.**

[385 N.C. 855 (2024)]

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| IN THE MATTER OF<br><br>Z.A. AND M.P.,<br>MINOR CHILDREN | From N.C. Court of Appeals<br>P23-424<br><br>From Orange<br>21JT3 21JT4 |

No. 201P23

ORDER

The petition for writ of certiorari filed by petitioner Orange County Department of Social Services is allowed for the following limited purpose. The 2 August 2023 order of the Court of Appeals granting respondent-mother's petition for writ of supersedeas is hereby vacated. *See Craver v. Craver*, 298 N.C. 231, 238 (1979) ("When an appeal of the order to which the stay of supersedeas is directed is not perfected, the stay must be dissolved.").

The temporary stay ordered by this Court 16 August 2023 is dissolved. The petition for writ of supersedeas filed by the Orange County Department of Social Services and the petition for writ of certiorari filed by the guardian ad litem are dismissed as moot.

By order of the Court in Conference, this the 20th day of March 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

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, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

No. 425A21-3

ORDER

Beyond question, an "unbiased, impartial decision-maker is essential to due process." *Crump v. Bd. of Educ. of the Hickory Admin. Sch. Unit*, 326 N.C. 603, 615 (1990) (citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)). Though "bias" has "many connotations in general usage," it has a "few specific denotations in legal terminology." *Id.* In *Crump*, this Court explored how the law identifies "bias," explaining that:

> Bias has been defined as a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction, or as

> a sort of emotion constituting untrustworthy partiality. Some sort of commitment is necessary for disqualification due to bias, even though it is less than an irrevocable one. Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination.

*Id.* (cleaned up).

Applying those concepts here is particularly unusual, as this Court has already decided the issues now before us. *See Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 383 (2023) (Earls, J., dissenting) (explaining that this Court already "unequivocally rejected" the arguments Legislative-Intervenors seek to relitigate in this appeal). Four members of the current Court have already expressed their opinions about how this case should be decided. *See Hoke Cnty. Bd. of Educ. v. State* (*Leandro IV*), 382 N.C. 386, 469–71 (2022). Indeed,

> [t]he Legislative-Intervenors previously have raised the same jurisdictional arguments they now seek to raise in their bypass petition. There, as here, they disputed the trial court's authority to order a statewide remedy because, in their view, that court never found a statewide constitutional violation. We found those assertions untimely, distortive, and meritless.

*Hoke Cnty. Bd. of Educ.*, 385 N.C. at 383–84 (cleaned up) (Earls, J., dissenting).

And the last time this case was before us, Legislative-Intervenors sought my recusal on the same grounds they do now. I addressed their arguments and denied their request. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 694 (2022) (Earls, J.) (order examining Legislative-Intervenors' motion and explaining why recusal was not warranted under Canon 3(C)(1)(b) of the North Carolina Code of Judicial Conduct). Therefore, the facts, precedent, and reasoning which explained my decision to hear *Leandro IV* apply with equal force to rehearing the same issues here.

Legislative-Intervenors have nonetheless suggested again that I cannot hear this case. Their motion is based on the trial court's *sua sponte* action to invite participation by the Penn-Intervenors on remedial proceedings related to statewide claims eleven years after I withdrew from any representation of that party on an entirely different claim. In the interest of transparent and reasoned decision-making, I examine and

now respond to Legislative-Intervenors' motion. To do so, I explain the legal standard for recusal, chart the relevant procedural history of this case, and assess the Legislative-Intervenors' arguments. After carefully considering Canon 3(C)(1)(b) and precedent applying it, I again conclude that recusal is unwarranted here because I never represented Penn-Intervenors "in the matter in controversy currently pending before this Court." *Id.* at 695.

Almost twenty years ago, I was one of several attorneys to sign two complaints on behalf of Penn-Intervenors—a group of public-school students, their parents, and the Charlotte Branch of the NAACP. In essence, Penn-Intervenors sued the Charlotte-Mecklenburg School District (CMS) as part of the *Leandro* litigation. Specifically, they challenged how CMS assigned students to schools, arguing that the district divvied students up by wealth and created "many 'high poverty' and low-performing schools."

Because Penn-Intervenors are parties to the appeal before us, Legislative-Intervenors cite the 2005 complaints as grounds for my recusal. But though I joined my colleagues in signing Penn-Intervenors' complaints against an individual school district in 2005, that suit is not before us. Moreover, I did not personally participate in that case, appear in court for Penn-Intervenors, or make any important decisions about the litigation. In these circumstances, Canon 3(C)(1)(b) does not require recusal. And I am confident that my work with an organization that represented Penn-Intervenors in a distinct matter almost twenty years ago will not impair my ability to impartially decide this appeal.

That conclusion holds whether one takes the view, as the prior majority of the Court did, that this litigation properly involves statewide claims or whether one agrees with Legislative-Intervenors that this case only involves Hoke County. Legislative-Intervenors' request for my recusal is directly undercut by their contention that this suit only implicates one county. Logically, they cannot be right that this is a statewide case for purposes of disqualifying me but only a Hoke County case for purposes of the Court's jurisdiction.

## I. The Legal Standard for Recusal Under Canon 3(C)(1)(b)

North Carolina's Code of Judicial Conduct instructs judges to recuse themselves when they "served as [a] lawyer in the matter in controversy." N.C. Code of Jud. Conduct, Canon 3(C)(1)(b). Under that canon, a judge should withdraw from a case if "substantial evidence" shows that she is "unable to rule impartially" because of a "personal bias, prejudice or interest." *State v. Scott*, 343 N.C. 313, 325 (1996) (quoting *State*

*v. Fie*, 320 N.C. 626, 627 (1987)). The "standard is whether grounds for disqualification actually exist." *Lange v. Lange*, 357 N.C. 645, 649 (2003) (cleaned up). To that end, this Court has instructed judges to base recusal decisions on concrete facts, not "inferred perception[s]." *Id.*

In applying Canon 3, our courts have found that a judge's mere connection to a litigant or issue does not mandate recusal. *See, e.g.*, *State v. Pemberton*, 221 N.C. App. 671, 729 S.E.2d 128 (2012) (unpublished) (judge was not disqualified from a case even though he was the district attorney while his office investigated the defendant); *State v. Mitchell*, 220 N.C. App. 161, 723 S.E.2d 584 (2012) (unpublished) (slip op. at 8-9) (judge's "prior representation of a party adverse to defendant" four years earlier in an unrelated matter did not bar him from hearing her criminal case).

By contrast, a judge may not hear a case if he "initiated the criminal process against" the defendant. *See Fie*, 320 N.C. at 628. In *Fie*, for instance, a judge wrote a district attorney "requesting that the grand jury be asked to consider" specific charges against two defendants. *Id.* at 626. The judge "based his letter on testimony he had heard" in a separate trial "over which he had presided." *Id.* The district attorney acted on the judge's suggestion, charged the defendants with several crimes, and secured indictments from a grand jury. *Id.* For their trial, the defendants were assigned to the very judge who solicited their charges. *Id.* But the judge did not recuse. *See id.*

We said that was error. *Id.* at 628. Because the judge "initiated the criminal process against" the defendants, he was directly and personally involved in their case. *Id.* His letter to the district attorney created the "reasonable perception" that the Judge believed the defendants "were guilty of the crimes with which they were charged." *See id.* at 628. Because of the judge's direct involvement with the defendants' criminal case and his demonstrated "preconception of the validity of the charges against" them, this Court held that recusal was proper. *Id.* at 628–29.

In applying Canon 3(C)(1)(b), I draw guidance from that precedent. Though a judge should recuse when she has served "as [a] lawyer in the matter in controversy," courts construing that canon have disclaimed recusal based on a judge's "remote connection" to a case or litigant. *Pemberton*, slip op. at 5 (quoting N.C. Code of Jud. Conduct, Canon 3(C)(1)(b)). Even when a judge once represented an adverse party, Canon 3(C)(1)(b) does not automatically bar her from later hearing a distinct matter. Instead, recusal turns on the nature of a judge's prior representation, the time elapsed, and the parallels between the

judge's past work and the matter now before her. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 Geo. J. Legal Ethics 55, 83 (2000) (providing criteria for recusal decisions when a "judge is presiding over the case of a prior client").

## II. Background and Procedural History

The legal framework in focus, I again explain the procedural history of this case and my connection to Penn-Intervenors.

### A. Penn-Intervenors' 2005 Claim Against CMS

In 2005, I worked as an attorney at UNC's Center for Civil Rights. There, I joined my colleagues in signing two complaints on behalf of Penn-Intervenors against the school district where they lived. Those complaints sought a "limited intervention" in the *Leandro* litigation. Intervening Complaint, at 3, *Hoke Cnty. Bd. of Educ. v. Charlotte-Mecklenburg Bd. of Educ.*, No. 95CVS1158 (Wake Cnty. Super. Ct. Feb. 9, 2005). And Penn-Intervenors focused on a limited issue—their suit centered on changes to CMS's "student assignment patterns during the past five years." *Id.* at 3.

The trial court allowed Penn-Intervenors to intervene on just one claim: That CMS's policies had failed "to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools." *See* Order re: Motion to Intervene, at 4, Hoke County Bd. of Educ., et al., v. State of North Carolina et al., No. 95 CVS 1158, Wake Co. Superior Ct., (Aug. 19, 2005).[1] To focus Penn-Intervenors' role in the litigation, the trial court severed their claim from the "pending matters that are on-going in the remedial phase of this case." *Id.* at 5. To that end, the court ordered that the suit against CMS "be pursued separately from the other claims pending in this action." *Id.* at 10. It also mandated that "pre-trial discovery and trial, if necessary, will go forward separately on the intervening claim." *Id.* And to underscore Penn-Intervenors' limited involvement, the court emphasized that the suit against CMS would not "interfere with the remedial process and proceedings of this case in other school systems throughout the State." *Id.*

I did not personally work on the case—before or after the trial court allowed the limited intervention against an individual school district.

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1. The trial court's 2005 Order re: Motion to Intervene is appended to my previous Order denying Legislative-Intervenor's Motion and Suggestion of Removal. *See Hoke Cnty. Bd. of Educ.*, 382 N.C. at 695 n.2 & 700-08.

And when I left the Center for Civil Rights in 2007, I ended my already minimal ties to Penn-Intervenors' suit against CMS. In the seventeen years since, I have not rekindled those connections or worked on Penn-Intervenors' claim against their school district.

### B. Penn-Intervenors' 2018 Participation in Statewide Remedial Proceedings

This case stems from separate statewide litigation that Penn-Intervenors joined in 2018. That year, the trial court in the *Leandro* suit decided that the State had not complied with this Court's decisions. It scheduled proceedings to craft a remedy for that statewide constitutional violation. And at its own behest, the court invited Penn-Intervenors to participate in the statewide suit. Penn-Intervenors accepted the court's invitation and joined the 7 March 2018 Consent Order Appointing Consultant.

Since then, Penn-Intervenors have remained involved in the statewide remedial proceedings. That litigation against the State produced the Comprehensive Remedial Plan we examined in *Leandro IV*. And in this case, we consider the trial court's 17 April 2023 order calculating the State's funding obligations under that remedial plan. In other words, this appeal stems from Penn-Intervenors' role in the statewide proceedings that started in 2018. The 2005 claim against CMS is not—and has never been—before us.

## III. Discussion

Legislative-Intervenors make two arguments for recusal. First, they contend that "recusal is still warranted in this appeal" for the same reasons they raised in *Leandro IV*. There, as here, Legislative-Intervenors urged me to withdraw because I signed Penn-Intervenors' complaints almost two decades ago.

But here, as there, Legislative-Intervenors omit key "factual and legal context that is relevant to the application of Canon 3(C)(1)(b) under these circumstances." *Hoke Cnty. Bd. of Educ.*, 382 N.C. at 695. Most critically, the motion lumps Penn-Intervenors' 2005 suit against CMS into the 2018 litigation against the State. But as explained above, those matters are distinct—factually, temporally, procedurally, and legally.

Those distinctions bear on Canon 3(C)(1)(b) and the need for recusal. My employer organization *only* represented Penn-Intervenors in their 2005 suit against CMS. That claim was "severed from the underlying case" and is not at issue in this appeal. *Id.* at 696. Instead, this case deals only with the litigation against the State. Penn-Intervenors joined the statewide proceedings in 2018—over a decade after I left

the organization representing them against CMS. The statewide litigation produced the statewide remedial orders at issue in *Leandro IV* and before us now. Because my involvement with Penn-Intervenors ended long before they embarked on *this* appeal involving the State, I never represented Penn-Intervenors "in the matter in controversy" before this Court. *See* N.C. Code of Jud. Conduct, Canon 3(C)(1)(b).

I underscore, too, how little involvement I had in Penn-Intervenors' 2005 claim against CMS. I did not personally work on that suit. I do not remember "ever appearing in court" for Penn-Intervenors. *Hoke Cnty. Bd. of Educ.*, 382 N.C. at 696. I "did not receive any direct compensation for the pro bono representation." *Id.* at 698. And I did not participate in "any critical decisions on behalf of the parties that shaped the course of the litigation." *Id.* at 699 (cleaned up).

Second, Legislative-Intervenors urge me to disqualify because "this new appeal" raises issues that *Leandro IV* did not. In this case, we agreed to reconsider the trial court's subject matter jurisdiction to issue its 17 April 2023 order. In disputing jurisdiction, the parties challenge Penn-Intervenors' standing to seek statewide relief. So according to Legislative-Intervenors, "Penn-Intervenors' pleadings"—including those I signed in 2005—"are now before this Court."

That is wrong. Penn-Intervenors' standing to seek *statewide* relief is a question raised by the *statewide* litigation. And again, Penn-Intervenors joined the suit against the State in 2018—eleven years after I ended any professional ties. In other words, this appeal, like *Leandro IV*, flows from a statewide action seeking statewide relief, not Penn-Intervenors' 2005 claim against the Charlotte-Mecklenburg Board of Education concerning the alleged failure of CMS to provide sufficient resources to its central city and high-poverty schools.

Since we decided *Leandro IV* less than two years ago, nothing about the parties or issues has changed to mandate my recusal in this case but not the earlier one involving the same issues. Here—as there—Penn-Intervenors' 2005 claim against CMS was a different suit based on different facts that raised different legal questions than this appeal. And so here—as there—Canon 3(C)(1)(b) does not require my recusal, as I have not represented Penn-Intervenors "in the matter in controversy" before us.

For these reasons, I conclude that recusal is not warranted. Consistent with the Code of Judicial Conduct and precedent applying it, I am confident in my ability to "rule impartially" and without "personal

bias, prejudice or interest." *Scott*, 343 N.C. at 325 (quoting *Fie*, 320 N.C. at 627). Legislative-Intervenors' motion is denied.

This the 31st day of January 2024.

/s/ Earls, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of January 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

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, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

No. 425A21-3

ORDER

Through counsel, plaintiffs moved the undersigned and this Court to consider whether recusal is required in a motion filed November 21, 2023. The motion contains an argument identical in substance, and similar in terms of structure and verbiage, to a motion filed herein by the same plaintiffs' counsel on July 15, 2022. The previous motion was denied in a special order entered on August 19, 2022.

Plaintiffs' counsel has not alleged that there has been a change in circumstances, the law, the Code of Judicial Conduct, or the administrative

orders of this Court since denial of the previous motion that would warrant a different outcome here. Nor has plaintiffs' counsel alleged that the jurisdictional issue now squarely before the Court in any way implicates participation by the undersigned due to prior service as an attorney, personal knowledge of disputed facts, or fiduciary relationship or financial interest.

The undersigned is of the opinion that the substance of this motion was previously addressed. However, members of this Court should strive to fortify public trust, and unilateral action in this matter could undermine public confidence. Erring on the side of prudence, and because it appears the filing may violate Rule 34(a) of the Rules of Appellate Procedure, the undersigned refers this motion to the Court for resolution.

This the 5th day of February, 2024.

s/Berger, J.

Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

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CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

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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, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

No. 425A21-3

ORDER

Plaintiffs' motion and suggestion of recusal was referred to the Court by a special order entered by Justice Berger on 5 February 2024. In entering the special order, Justice Berger acted pursuant to this Court's order of 23 December 2021 ("Recusal Procedure Order"), which establishes a procedure for the disposition of motions seeking the recusal or disqualification of a Justice from a matter pending before the Court. 379 N.C. 693 (2021). Under the Recusal Procedure Order, a Justice may either (1) rule on the recusal or disqualification motion or (2) refer the motion to the Court. *Id*. This is the second case in which Justice Berger

has referred a motion to the Court for disposition. *See also Holmes v. Moore*, 384 N.C. 191, 191 (2023) (dismissing unanimously a disqualification motion referred to the Court by Justice Berger). The motion in the other case requested Justice Berger's disqualification on grounds similar to those raised here.

Plaintiffs' pending motion essentially restates an earlier motion filed by plaintiffs in this case that sought Justice Berger's recusal based on his familial relationship to intervenor-defendant Senator Philip E. Berger, who is a party to this litigation solely in his official capacity as President Pro Tempore of the Senate. Justice Berger denied plaintiffs' first recusal motion in a special order entered on 19 August 2022. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692, 692 (2022). The order cites legal authorities including N.C.G.S. § 1-72.2, which provides that the President Pro Tempore of the Senate and the Speaker of the House of Representatives act as "agents of the State" and not in their individual capacities when they intervene in lawsuits challenging state laws. *Id.*; *see also NAACP v. Moore*, 380 N.C. 263, 264 (2022) (explaining that Justice Berger was not required to recuse when Senator Berger was sued purely in his official capacity because "a reasonable person would understand that a suit against a government official in his or her official capacity is not a suit against the individual."). Senator Berger thus remains an intervenor-defendant in this case simply by virtue of his continued service as President Pro Tempore of the Senate. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 731 (2022) (substituting the Acting State Controller for the retiring State Controller in appellate proceedings).

Because it offers no new grounds for recusal, plaintiffs' pending recusal motion amounts to an impermissible challenge to Justice Berger's denial of their first motion. Under the Recusal Procedure Order, when a Justice rules on a recusal or disqualification motion, "[t]hat determination shall be final." 379 N.C. at 693. The motion is therefore dismissed.

By order of the Court in Conference, this the 16th day of February 2024.

/s/ Allen, J.
For the Court

Justice Berger did not participate in the consideration of this motion.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice RIGGS dissenting.

Impartiality—maintained in fact as well as for appearances—is central to the functioning of our state's courts. *N.C. Nat. Bank v. Gillespie*, 291 N.C. 303, 311 (1976). And this Court has historically observed this objective principle in *every* case, great or small. *See*, *e.g.*, *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 103 (1984) ("It is axiomatic, of course, that it is the lawful right of every litigant to expect utter impartiality and neutrality in the judge who tries his case . . . . This right can neither be denied nor abridged.")).

Recently, in the face of recusal motions in a number of politically-charged cases, this Court decided, pursuant to an administrative order entered by this Court on 23 December 2021 after extensive briefing from multiple parties and amici, that when a motion is "filed with the Court under Rule 37 of the North Carolina Rules of Appellate Procedure seeking the recusal or disqualification of a Justice from participation in the deliberation and decision of a matter pending before the Court, the Court shall assign the motion to the Justice who is the subject of the motion for their determination. That determination shall be final." *Order Concerning Recusal Motions*, 379 N.C. 693 (2021). The order provided that, in the alternative, the subject Justice may refer the motion to the full court, but this Court neither required that nor suggested that there was anything improper about a subject Justice exercising the right to decide on recusal motions targeting him or her. *Id.*

In this instance, Justice Berger has opted for the alternative approach, referring the motion to the entire Court because "members of this Court should strive to fortify public trust, and unilateral action in this matter could undermine public confidence." *Referral Order*, No. 425A21-3 (Berger, J.) (N.C. Feb. 5, 2024). In my view, this unnecessary commentary itself undermines public confidence in the Court. This Court decided in 2021 that it was appropriate for an individual Justice to decide, with finality, motions requesting his or her recusal. To suggest

that following that procedure, expressly approved by this Court, "could undermine public confidence,"—particularly when, mere days earlier, Justice Earls issued a detailed opinion explaining her decision to deny a recusal motion filed by Senator Philip E. Berger, Sr., and the other legislative defendants targeting her in this same case—can only serve to fuel public attacks on a Justice who followed the proscribed administrative rules for addressing recusal motions. Since the entry of that 2021 administrative order, Justice Berger took unilateral action on recusal motions in at least three matters. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692 (Berger, J.) (2022); *Harper v. Hall*, 380 N.C. 272 (Berger, J.) (2022); *N.C. NAACP v. Moore*, 380 N.C. 263 (Berger, J.) (2022). Why would it "undermine public confidence" here and not in those cases?

In his order, Justice Berger also expresses the opinion that "the substance of this motion has already been decided" and further suggests the filing is sanctionable. *Referral Order*, No. 425A21-3 (Berger, J.) (N.C. Feb. 5, 2024). Signaling to one's colleagues what action should be taken and how one would vote, before then referring the motion to one's colleagues, makes the decision to refer to the entire Court seem performative rather than substantive. And Justice Berger has clearly found a receptive audience in the majority, which dismisses the recusal motion without even purporting to independently decide the question presented.

Regardless, because this matter was referred to the entire Court by Justice Berger's own choice, my conscience requires addressing the merits of the motion—as a constitutional officer, I cannot ignore the merits of a motion presented to me. Beyond the generalities common to all cases, it seems uncontroversial that impartiality concerns weigh particularly heavy in those disputes where our State's highest court—our Supreme Court—seeks to apply its highest legal authority—the North Carolina Constitution—to review the actions of a co-equal branch state government—the General Assembly. In fact, worries of undue judicial interference help form one of the very bases of our jurisprudence concerning review of legislative acts. *See State v. Revis*, 193 N.C. 192, 195 (1927) ("[C]ourts do not undertake to say what the law ought to be; they only declare what it is. . . . It can make no difference whether the judges, as individuals, think ill or well of the manner in which the Legislature has dealt with a given subject."); *cf. Corum v. Univ. of North Carolina*, 330 N.C. 761, 784 (1992) ("[I]n exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong."). Little wonder, then, that the glare

of public scrutiny is particularly focused on this Court when it deliberates on a case implicating the constitutional rights of *every child in the State*.[1]

Just as a case of almost universal constitutional magnitude invites closer inspection and graver concern for impartiality, so, too, does the nature of the relationship at issue in this recusal motion. Few bonds are closer and more enduring than that between a loving parent and child. "The tender ties of love and sympathy existing between . . . parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart." *Cashion v. Western Union Telegraph Co.*, 123 N.C. 267, 274 (1898). So strong are those familial ties that the law itself defaults to those connections to do the greatest justice in myriad circumstances. *See*, *e.g.*, N.C.G.S. § 29-15 (2023) (providing for a child's inheritance by intestacy); N.C.G.S. § 7B-906.2(b) (2023) (generally requiring family reunification as a primary or secondary permanent plan in abuse, neglect, and dependency cases); *Peterson v. Rogers*, 337 N.C. 397, 400-05 (1994) (recognizing a presumption at law favoring parents over other relations in child custody disputes).

In a feat of inescapable common sense, our canons of judicial conduct recognize this reality, and provide that judges should not decide cases where their parents or children are parties. *See* N.C. Code of Judicial Conduct, Canon 3.C.(1)(d) (providing that the participation of a judge's child or parent as a litigant, lawyer, or interested party is an "instance[ ]" wherein "the judge's impartiality may reasonably be questioned" such that recusal is warranted). Decisions from other jurisdictions reaffirm this straightforward notion. *See*, *e.g.*, *Comm'n on Judicial Performance v. Bowen*, 123 So.3d 381, 384 (Miss. 2013) (holding a trial judge's failure to recuse from asbestos litigation was judicial misconduct where his parents had previously sued and settled asbestos exposure claims against the defendants "because a reasonable person, knowing all the circumstances, would have doubts regarding [the

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1. *See*, *e.g.*, T. Keung Hui, *NC Supreme Court schedules Leandro school funding case. Here's when it will be heard.*, The News & Observer (Dec. 21, 2023), https://www.newsobserver.com/news/local/education/article283389133.html; *Long-running North Carolina education case will return before the state Supreme Court in February*, The Coastland Times (Dec. 30, 2023), https://www.thecoastlandtimes.com/2023/12/30/long-running-north-carolina-education-case-will-return-before-the-state-supreme-court-in-february/; *Berger submits Leandro recusal request to full Supreme Court*, The Carolina Journal (Feb. 5, 2024), https://www.carolinajournal.com/berger-submits-leandro-recusal-request-to-full-supreme-court/; Greg Childress, *North Carolina Supreme Court hearing scheduled for Leandro school funding case*, NC Newsline (Dec. 22, 2023, 5:00 PM), https://ncnewsline.com/briefs/north-carolina-supreme-court-hearing-scheduled-for-leandro-school-funding-case/.

judge's] impartiality in the case"); *In re Griego*, 181 P.3d 690, 694 (N.M. 2008) (disciplining a judge who gave family members favorable dispositions in traffic court because impartiality concerns "required [the judge] to recuse himself in cases involving family members").

I recognize that these concerns might not arise in every case where the State, writ-large, is hauled into court by an individual's suit challenging governmental action. *See N.C. NAACP*, 380 N.C. at 263 (Berger, J.) (declining to recuse from a suit against the State because "my father's name appears in the caption only as a matter of procedure" as a necessary defendant). But that is not the circumstance we have here; the Legislative-Intervenors, including Senator Philip E. Berger, Sr., maintain in this appeal—rightly or wrongly—that they have not historically been defendants in this litigation. Justice Berger (and two justices voting in the majority to dismiss this motion) has previously agreed with this conception of the case. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 506 (Berger, J., with Newby, C.J., and Barringer, J., dissenting) ("[T]he General Assembly was never joined as a necessary party[.]"). *But see Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 635 (2004) ("[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education . . . ."). In their own view, Legislative-Intervenors—again, the lead Senator being the father of Justice Berger—have affirmatively inserted themselves into this lawsuit. Whatever the rationale for avoiding recusal, it cannot be because this is simply a "suit against a government official in his or her official capacity." *N.C. NAACP*, 380 N.C. at 264 (Berger, J.). Indeed, one could reasonably conclude that Legislative-Intervenor's injection of themselves into this litigation in pursuit of positive relief *heightens*, rather than diminishes, the appearance of impropriety here.

Other disquieting facts appear on the face of the record and undercut assertions that this is a suit in which Senator Berger appears in his "official capacity" only as a matter of procedure rather than as the result of a substantive policy choice with personal consequences. In addition to the mere fact of the parent-child relationship, our canons identify impropriety where a parent of the judge "[is] known to have an interest that could be substantially affected by the outcome of the proceeding." N.C. Code of Judicial Conduct, Canon 3.C.(1)(d)(iii). Here, Justice Berger's father, as one of the named Legislative-Intervenors and leader of the majority party in the Senate, has repeatedly tied his policy objectives to the maintenance of a multi-billion-dollar surplus. *See, e.g.*, Colin Campbell, *If GOP gets its way, budget surplus will lead to more tax cuts*, WUNC (Feb. 27, 2023, 4:56 PM), https://www.wunc.org/

politics/2023-02-27/if-gop-gets-its-way-budget-surplus-will-lead-to-more-tax-cuts. Indeed, he is presently campaigning on it individually and as leader of his caucus. *Budget*, Phil Berger: North Carolina Senate, https://www.philberger.org/budget (last accessed Feb. 6, 2024). Any opinion from this Court reversing or setting aside the trial court's order drawing down funds against that surplus necessarily bears upon Senator Berger's ability to deliver on his policy objectives and the campaign promises he has made to voters in seeking to maintain his elected office. Put bluntly, a son's vote to deliver his father a campaign "win" *in an election year* substantially affects the latter's personal and financial interests.[2]

Nor am I convinced that this motion is inappropriate because circumstances have not changed.[3] In the fifteen months since our last decision in this case, the American public has taken a magnifying glass to the conduct of our country's most powerful jurists. *See Friends of the Court*, ProPublica, https://www.propublica.org/series/supreme-court-scotus (last accessed Feb. 5, 2023). One U.S. Supreme Court justice took to the op-ed pages of a paper of record to address these concerns. Samuel Alito, *Justice Samuel Alito: ProPublica Misleads Its Readers*, The Wall Street Journal (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda?mod=opinion_lead_pos5. And the country's highest court saw fit to adopt a formal code of conduct for the first time in its history. Code of Conduct for Justices of the Supreme Court of the United States (Nov. 13, 2023).[4] Now, more than ever, it is vital that our courts "not

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2. That Justice Berger was himself popularly elected does little to dispel any appearance of impropriety. *See N.C. NAACP*, 380 N.C. at 264 (Berger, J.) ("More than 2.7 million North Carolinians, knowing or at least having information available to them concerning my fathers service in the Legislature, elected me to consider and resolve significant constitutional questions."). Voters also expect elected judges and justices to recuse themselves when their connection with litigants causes their impartiality to be reasonably questioned. N. C. Code of Judicial Conduct, Canon 3.C.(1)(d); *see also N.C. Nat. Bank*, 291 N.C. at 311 ("[E]very man should know that he has had a fair and impartial trial, or, at least, that he should have no just ground for the suspicion that he has not had such a trial." (cleaned up)).

3. I note that nothing in our appellate rules requires a party to assert different facts than those previously raised in a recusal motion in an earlier appeal when pursuing a recusal motion in a *new* appeal from a different trial court order, particularly when that prior motion was denied without expressing a substantive rationale. *See Order, Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 692 (2022) (Berger, J.).

4. Not coincidentally, that code of conduct also identifies parent/child relationships between judges and litigants as circumstances "in which the Justice's impartiality might reasonably be questioned" such that recusal is proper due to "doubt that the Justice could fairly discharge his or her duties." *Id.*, Canon 3.B.(2).

only be impartial in the controversies submitted to them but shall give *assurances* that they *are* impartial, free . . . from any bias or prejudice . . . , [and thus] shall also *appear* to be impartial." *Ponder v. Davis*, 233 N.C. 699, 705 (1951) (cleaned up) (emphasis added).

In sum, given the legal significance of this case and the undeniably and uniquely close relationship between Legislative-Intervenor Senator Philip E. Berger, Sr.—who seeks to have this Court overturn its previous ruling forcing the State to comply with the State Constitution—and the subject justice, Associate Justice Philip E. Berger, Jr.—the author of the dissent decrying this Court's decision to require the legislative branch (including his father) to fully fund public education, *Hoke Cnty.*, 382 N.C. at 477 (Berger, J., with Newby, C.J., and Barringer, J., dissenting)—I would vote to allow this motion to ensure that the fundamentally necessary appearance of impartiality can be maintained in this case. *N.C. Nat. Bank*, 291 N.C. at 311. As difficult as it may be, "judges must bear the primary responsibility for requiring appropriate judicial behavior. . . . The same is true for justices." Code of Conduct for Justices of the Supreme Court of the United States, cmt. 13–14 (cleaned up). Common sense dictates that some bonds are simply too close, and some circumstances simply too pointed, for any judicial order of this Court—short of allowing plaintiffs' motion—to exorcise the specter of doubt lingering in the minds of the public in this case. Recusal is the sole sacrament, and I would solemnly invoke it here. I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

V.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

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, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

No. 425A21-3

ORDER

The parties' Consent Motion to Extend Time Limit for Oral Argument is denied; however, the Court on its own motion extends the appellants' argument by ten minutes and the appellees' argument by ten minutes for a total argument time of forty minutes per side.

By order of the Court in Conference, this the 16th day of February 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

**LINKER v. LINKER**

[385 N.C. 876 (2024)]

LAURA LEIGH LINKER

v.

TIMOTHY LYON LINKER

v.

NANCY LYON BOLING, INTERVENOR

From N.C. Court of Appeals
23-328

From Guilford
14CVD359

No. 345P23

ORDER

The Court construes the Petition for Writ of Mandamus as a Motion for Temporary Stay and allows the stay of the 21 November 2023 decision of the Court of Appeals of North Carolina in *Linker v. Linker, et al.*, COA23-328, and of the hearing calendared for 26 January 2023 in District Court, Guilford County, pending the Court's ruling on petitioner's Petition for Discretionary Review.

By order of the Court in Conference, this 9th day of January 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of January 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

**LINKER v. LINKER**

[385 N.C. 877 (2024)]

LAURA LEIGH LINKER

v.

TIMOTHY LYON LINKER

v.

NANCY LYON BOLING, INTERVENOR

From N.C. Court of Appeals
23-328

From Guilford
14CVD359

No. 345P23

ORDER

On 21 December 2023 plaintiff filed a Petition for Writ of Mandamus. On 9 January 2024, the Court entered an order construing the Petition for Writ of Mandamus as a Motion for Temporary Stay, and allowed the stay of the 21 November 2023 decision of the Court of Appeals.

The Court denies the Petition for Discretionary Review and now dissolves the Motion for Temporary Stay.

By order of the Court in Conference, this the 6th day of February 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of February 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

**MITCHELL v. UNC BOG**

[385 N.C. 878 (2024)]

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|---|---|
| ALVIN MITCHELL<br><br>v.<br><br>THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS | From N.C. Court of Appeals<br>21-639<br><br>From Forsyth<br>19CVS3758 |

No. 121A23

ORDER

The petition for discretionary review as to additional issues filed by petitioner on 9 May 2023 is allowed as to the first issue only.

By order of the Court in Conference, this the 20th day of March 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.

From N.C. Court of Appeals
22-708

v.

From Wake
21CVS7683

KYRIE JAMAL MEBANE AND ALISHA MEBANE

No. 106P23

ORDER

Plaintiff's petition for discretionary review is decided as follows: The Court allows plaintiff's petition for discretionary review for the limited purpose of vacating the opinion of the Court of Appeals and remanding this case to the Court Appeals for further consideration in light of this Court's decision in N*orth Carolina Farm Bureau Mutual Insurance Co. v. Hebert*, No. 281A22 (N.C. March 22, 2024).

By order of the Court in Conference, this the 20th day of March 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

**SILWAL v. ASHKAR LENOIR, INC.**

[385 N.C. 880 (2024)]

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|---|---|
| SANU SILWAL, GITA DEVI SILWAL AND GS2017 RE, LLC | From N.C. Court of Appeals 23-589 |
| v. | From Caldwell 22CVD1171 |
| AKSHAR LENOIR, INC. | |

No. 53P24

ORDER

The Court allows defendant's Motion for Temporary Stay, upon condition that defendant reinstate and comply with the terms of the appeal bond entered 4 January 2023. *See* N.C.G.S. § 1-269 (2023).

By order of the Court in Conference, this the 7th day of March 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of March 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

22 MARCH 2024

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| 1P24 | In the Matter of T.P. | 1. Respondent-Mother's Motion for Temporary Stay (COA23-469)<br><br>2. Respondent-Mother's Petition for Writ of Supersedeas<br><br>3. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **01/04/2024** Dissolved **02/06/2024**<br><br>2. Denied **02/06/2024**<br><br>3. Denied **02/06/2024** |
| 3P23-5 | State v. Joseph Edwards Teague, III | Def's Pro Se Motion to Rehear Via Ex Parte Hearing Before the Full Court | Dismissed |
| 3P24 | In the Matter of E.P. | 1. Respondent-Father's Motion for Temporary Stay (COA22-873)<br><br>2. Respondent-Father's Petition for Writ of Supersedeas<br><br>3. Respondent-Father's PDR Under N.C.G.S. § 7A-31 | 1. Denied **01/03/2024**<br><br>2.<br><br>3. |
| 4P24 | Crystal Michelle Jordan v. Gingko Fieldbrook Townhomes d/b/a Fieldbrook Townhomes | 1. Plt's Pro Se Motion for Stay Pending Appeal (COAP24-4)<br><br>2. Plt's Pro Se Motion in the Alternative to Strike Setting New Trial<br><br>3. Plt's Pro Se Petition for Writ of Certiorari | 1. Dismissed **01/05/2024**<br><br>2. Dismissed **01/05/2024**<br><br>3. Dismissed **01/05/2024** |
| 5P24 | State v. C.K.D. | 1. State's Motion for Temporary Stay (COA23-204)<br><br>2. State's Petition for Writ of Supersedeas<br><br>3. State's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **01/08/2024**<br><br>2.<br><br>3. |
| 6P24 | State v. William Jocoby Singletary | Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-175) | Denied |
| 7P24 | In the Matter of I.G., P.G., S.G., B.G., L.G. | 1. Respondent-Mother's Motion for Temporary Stay (COA23-445)<br><br>2. Respondent-Mother's Petition for Writ of Supersedeas<br><br>3. Respondent-Mother's Motion for Temporary Stay<br><br>4. Respondent-Mother's Petition for Writ of Supersedeas<br><br>5. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 | 1. Dismissed as moot **01/09/2024**<br><br>2. Denied **01/09/2024**<br><br>3. Dismissed as moot **01/22/2024**<br><br>4. Denied **01/22/2024**<br><br>5. Denied **01/22/2024** |

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

22 MARCH 2024

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|---|---|---|---|
| 10P24 | State v. Ronald Wayne Macon, Jr. | Def's PDR Under N.C.G.S. § 7A-31 (COA23-357) | Allowed |
| 12P24 | State v. Steven Zachary Alva | 1. Def's Pro Se Motion for Temporary Stay (COA22-1062)<br>2. Def's Pro Se Petition for Writ of Supersedeas<br>3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA<br>4. Def's Pro Se Petition for Writ of Habeas Corpus | 1. Dismissed as moot **01/12/2024**<br>2. Dismissed as moot **01/12/2024**<br>3. Denied **01/12/2024**<br>4. Denied **01/12/2024** |
| 16P24 | Halley Anne Berry Marie Washington v. Doctors, Nurses, Staff | 1. Plt's Pro Se Motion for Temporary Stay<br>2. Plt's Pro Se Petition for Writ of Supersedeas<br>3. Plt's Pro Se Petition for Writ of Habeas Corpus | 1. Dismissed **01/23/2024**<br>2. Dismissed **01/23/2024**<br>3. Dismissed **01/23/2024** |
| 17P24 | State v. Dino Lamont Thompson | 1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-1036)<br>2. Def's Pro Se Motion to Appoint Counsel | 1. Denied<br>2. Dismissed as moot |
| 20P24 | State v. Terahn Larry Blue | Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-450) | Denied |
| 21P24 | State v. Robbie Eugene Shumate | 1. Def's Pro Se Motion for Review (COA23-256)<br>2. Def's Pro Se Motion for Extension of Time to File PDR | 1. Dismissed<br>2. Dismissed |
| 24P23-2 | SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das | Def's Pro Se Motion for Reconsideration of Denied Certiorari | Dismissed<br>**Dietz, J., recused** |
| 25P23-2 | Kalishwar Das v. SCGVIII Lakepointe, LLC in c/o Mr. John F. Morgan, Jr. | Plt's Pro Se Motion for Reconsideration of Denied Certiorari | Dismissed<br>**Dietz, J., recused** |

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

22 MARCH 2024

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| 27P24 | Elite Home Health Care, Inc., and Elite Too Home Health Care, Inc. v. N.C. Department of Health and Human Services, Division of Medical Assistance, Division of Health Benefits | Petitioners' PDR Under N.C.G.S. § 7A-31 (COA23-122) | Denied |
| 29A24 | Smith Debnam Narron Drake Saintsing & Myers, LLP v. Paul Muntjan | 1. Plt's Motion for Temporary Stay (COA23-324)<br>2. Plt's Petition for Writ of Supersedeas<br>3. Plt's Notice of Appeal Based Upon a Dissent | 1. Dismissed as moot **02/01/2024**<br>2. Allowed **02/01/2024**<br>3. --- |
| 30P24 | In re Shamika Dominique Crudup | 1. Def's Pro Se Motion for Petition for Rehearing<br>2. Def's Pro Se Motion for En Banc and Unethical Misconduct Cases 23CR396996, 23CR404306, and 23CR404316 | 1. Dismissed<br>2. Dismissed |
| 31A24 | State v. Scott Everett Ford | 1. Def's Motion for Temporary Stay (COA23-374)<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's Notice of Appeal Based Upon a Dissent<br>4. Def's PDR as to Additional Issues | 1. Dismissed as moot **02/07/2024**<br>2. Allowed **02/07/2024**<br>3. ---<br>4. |
| 37P24 | State v. Marion Tavares Ellerbe | Def's Pro Se Motion for PDR (COA23-60) | Dismissed |
| 38A24 | State of North Carolina, *ex rel.* Joshua H. Stein, Attorney General v. MV Realty PBC, LLC, MV Realty of North Carolina, LLC, MV Brokerage of North Carolina, LLC, Amanda Zachman, Antony Mitchell, David Manchester, and Darryl Cook | 1. Defs' Motion for Temporary Stay<br>2. Defs' Petition for Writ of Supersedeas<br>3. Defs' Petition for Writ of Certiorari to Review Order of Business Court | 1. Allowed **03/07/2024**<br>2.<br>3. |

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

22 MARCH 2024

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| 39A24 | Chauncey Peele v. Melba Hodges Peele | Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-614) | Dismissed |
| 46P24 | State v. Cornell Dwayne Haugabook, Jr. | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **02/23/2024** |
| 47P17-2 | State v. Avery Joe Lail, Jr. | Def's Pro Se Motion for Notice of Appeal (COAP23-582) | Dismissed |
| 49A24 | State v. James Fredrick Bowman | 1. State's Motion for Temporary Stay (COA23-82)<br>2. State's Petition for Writ of Supersedeas<br>3. State's Notice of Appeal Based Upon a Dissent | 1. Allowed **02/26/2024**<br>2. Allowed **03/14/2024**<br>3. --- |
| 53P24 | Sanu Silwal, Gita Devi Silwal and GS2017 RE, LLC v. Akshar Lenoir, Inc. | 1. Def's Motion for Temporary Stay (COA23-589)<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's PDR Under N.C.G.S. § 7A-31 | 1. Special Order **03/07/2024**<br>2.<br>3. |
| 54P24 | Stephen Matthew Lassiter, Employee v. Robeson County Sheriff's Department, Alleged-Employer, Synergy Coverage Solutions, Alleged-Carrier, and Truesdell Corporation, Alleged-Employer, The Phoenix Insurance Co., Alleged-Carrier | 1. Defs' (Truesdell Corporation and The Phoenix Insurance Company) Motion for Temporary Stay (COA23-267)<br>2. Defs' (Truesdell Corporation and The Phoenix Insurance Company) Petition for Writ of Supersedeas<br>3. Defs' (Truesdell Corporation and The Phoenix Insurance Company) PDR Under N.C.G.S. § 7A-31 | 1. Allowed **03/11/2024**<br>2.<br>3. |
| 56P24 | State v. Eric Ramond Chambers | 1. State's Motion for Temporary Stay (COA22-1063)<br>2. State's Petition for Writ of Supersedeas | 1. Allowed **03/07/2024**<br>2. |
| 57P24 | State v. Chad Coffey | 1. State's Motion for Temporary Stay (COA22-883)<br>2. State's Petition for Writ of Supersedeas | 1. Allowed **03/08/2024**<br>2. |

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

22 MARCH 2024

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| 64P24 | State v. Damarlo Jamon Perry | 1. State's Motion for Temporary Stay (COA23-375)<br>2. State's Petition for Writ of Supersedeas<br>3. State's Motion to Amend Petition for Writ of Supersedeas and Motion for Temporary Stay | 1. Allowed **03/15/2024**<br>2.<br>3. Allowed **03/15/2024** |
| 73P23-3 | State v. Tyrone Sequine Reynolds | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **12/20/2023** |
| 89PA22 | Fearrington, et al. v. City of Greenville | Plts' Motion to Supplement Record on Appeal (COA20-877) | Denied **02/06/2024**<br>**Dietz, J., recused** |
| 102P19-6 | State v. Christopher Lee Neal | 1. Def's Pros Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-142)<br>2. Def's Pro Se Motion for Writ of Error *Coram Nobis* | 1. Denied<br>2. Denied |
| 104P23-2 | State v. Markus Odon McCormick | 1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-690)<br>2. Def's Pro Se PDR Under N.C.G.S. § 7A-31<br>3. Def's Pro Se Motion for Appropriate Relief<br>4. Def's Pro Se Motion to Amend or Correct Record on Appeal<br>5. Def's Pro Se Motion to Compel Appellate Counsel to Surrender Complete Case File<br>6. Def's Pro Se Motion to Add Issues Presented in Appeal Involving Substantial Constitutional Questions<br>7. Def's Pro Se Petition for Writ of Habeas Corpus<br>8. Def's Pro Se Motion for Speedy Appeal<br>9. Def's Pro Se Motion to Dismiss Indictments on Grounds of Lack of Subject Matter Jurisdiction | 1. Dismissed *ex mero motu*<br>2. Denied<br>3. Dismissed<br>4. Dismissed as moot<br>5. Dismissed as moot<br>6. Dismissed as moot<br>7. Denied **09/26/2023**<br>8. Dismissed as moot<br>9. Dismissed |

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

22 MARCH 2024

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| 106P23 | North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Kyrie Jamal Mebane and Alisha Mebane | 1. Plt's PDR Under N.C.G.S. § 7A-31 (COA22-708)<br>2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 | 1. Special Order<br>2. Dismissed as moot |
| 109P23 | State v. Keylan Johnson | 1. Def's Motion for Temporary Stay (COA22-363)<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **04/26/2023** Dissolved<br>2. Denied<br>3. Denied |
| 109PA22-2 | Dustin Michael McKinney, George Jermey McKinney, and James Robert Tate, Plaintiffs, State of North Carolina, Intervenor v. Gary Scott Goins and the Gaston County Board of Education, Defendants | 1. Def's (Gaston County Board of Education) Notice of Appeal Based Upon a Dissent (COA22-261)<br>2. Def's (Gaston County Board of Education) Notice of Appeal Based Upon a Constitutional Question<br>3. Def's (Gaston County Board of Education) Notice of Appeal Based Upon a Dissent<br>4. Def's (Gaston County Board of Education) Notice of Appeal Based Upon a Constitutional Question | 1. ---<br>2. Dismissed *ex mero motu*<br>3. Dismissed as moot<br>4. Dismissed as moot<br>**Riggs, J., recused** |
| 112P22-2 | State v. Grant P. Dalton | Def's Pro Se Motion for PDR (COAP23-626) | Denied **01/16/2024** |
| 121A23 | Alvin Mitchell v. The University of North Carolina Board of Governors | 1. Petitioner's Notice of Appeal Based Upon a Dissent (COA21-639)<br>2. Petitioner's Notice of Appeal Based Upon a Constitutional Question<br>3. Petitioner's PDR as to Additional Issues<br>4. John Locke Foundation's Motion for Leave to File Amicus Brief in Support of Petition for Discretionary Review<br>5. Respondent's Motion to Dismiss Appeal | 1. ---<br>2. ---<br>3. Special Order<br>4. Allowed<br>5. Allowed |
| 131P16-29 | State v. Somchai Noonsab | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **01/29/2024** |
| 131P16-30 | State v. Somchai Noonsab | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **03/18/2024** |

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

22 MARCH 2024

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|---|---|---|---|
| 139PA23 | Brewer, Employee v. Rent-A-Center, et al. | 1. Defs' Motion for Temporary Stay (COA22-296)<br>2. Defs' Petition for Writ of Supersedeas<br>3. Defs' PDR Under N.C.G.S. § 7A-31<br>4. Plt's Motion for Reconsideration of Temporary Stay<br>5. Plt's Conditional PDR Under N.C.G.S. § 7A-31<br>6. Parties' Joint Motion to Withdraw Appeal | 1. Allowed **06/08/2023**<br>2. Allowed **12/13/2023**<br>3. Allowed **12/13/2023**<br>4. Special Order **06/19/2023**<br>5. Allowed **12/13/2023**<br>6. Special Order **02/01/2024** |
| 155PA22 | State v. Travis Lamont Davenport | Def's Motion to Postpone Oral Argument (COA20-628) | Allowed **12/20/2023**<br>**Dietz, J., recused** |
| 163P23-2 | Jasmine E. Golden v. Amazon | Plt's Pro Se Motion for PDR (COAP23-105) | Dismissed |
| 165P23-2 | State v. Drew C. Hartley | Def's Pro Se Motion for Petition for Mandamus/Certiorari | Dismissed |
| 169A09-2 | State v. Kahlil Jacobs | 1. Def's Pro Se Motion for PDR (COA08-564)<br>2. Def's Pro Se Motion for PDR | 1. Dismissed<br>2. Dismissed |
| 169P23-2 | State v. Christopher L. Minor | Def's Pro Se Motion for Extension of Time to File Notice of Appeal | Dismissed |
| 173PA23 | Southland National Insurance Corporation v. Lindberg | 1. Defs' Motion for Temporary Stay (COA22-1049)<br>2. Defs' Petition for Writ of Supersedeas<br>3. Defs' PDR Under N.C.G.S. § 7A-31<br>4. Universal Life Insurance Company's Conditional Motion for Leave to File Amicus Brief<br>5. Plts' Motion to Expedite Petition for Writ of Supersedeas and PDR<br>6. Universal Life Insurance Company's Motion to Withdraw Request to File Amicus Curiae Brief | 1. Allowed **07/13/2023**<br>2. Allowed **12/13/2023**<br>3. Special Order **12/13/2023**<br>4. Dismissed as moot **12/13/2023**<br>5. Dismissed as moot **12/13/2023**<br>6. Allowed **12/13/2023** |

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

22 MARCH 2024

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| | | 7. Plts' Motion for Clarification<br><br>8. Defs' Motion to Strike | 7. Dismissed<br><br>8. Dismissed as moot |
| 177P23 | Richard C. Semelka, M.D. v. The University of North Carolina, a body politic and corporate institution of the State of North Carolina; The University of North Carolina at Chapel Hill, a constituent institution of the University of North Carolina; Carol L. Folt, sued in her individual and official capacities, James Warren Dean, Jr., sued in his individual and official Capacities; William L. Roper, sued in his individual and official capacities; Arvil Wesley Burks, Jr., sued in his official and individual Capacities; and Matthew A. Mauro, sued in his individual and official capacities | Plt's PDR Under N.C.G.S. § 7A-31 (COA22-831) | Denied<br><br>**Dietz, J., recused** |
| 183P23-2 | Weijun Luo v. Ursula R. Neal, Adam C. Neal, Sr. | Plt's Pro Se Motion for Reconsideration | Dismissed |
| 187P23 | John Reints v. WB Towing Inc. | Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-1031) | Denied<br><br>**Riggs, J., recused** |
| 194A23 | In the Matter of A.H. | Respondent-Father's Motion to Amend Record on Appeal (COA22-683) | Allowed **02/16/2024**<br><br>**Riggs, J., recused** |
| 195P23 | State v. Steven Jarrel McCarty | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-388)<br><br>2. Def's PDR Under N.C.G.S. § 7A-31 | 1. Dismissed *ex mero motu*<br><br>2. Denied |

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| 197P23 | Celeste Evelyn Smith v. Piedmont Triad Anesthesia, P.A. Celeste Evelyn Smith v. Novant Health, Inc. and Medical Park Hospital, Inc., d/b/a Novant Health Medical Park Hospital; Hawthorne OB/GYN Associates, P.A.; and Anthony L. Masciello, MD | Plt's PDR Under N.C.G.S. § 7A-31 (COA22-464) | Denied |
| 199P23 | State v. Scott St. John Painter | Def's PDR Under N.C.G.S. § 7A-31 (COA22-864) | Denied |
| 200P07-13 | State v. Kenneth E. Robinson | Def's Pro Se Motion for Permission to Apply to Trial Court for Writ of Error *Coram Nobis* | Dismissed |
| 200P23 | State v. Derrick Brandon Stokes | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-898)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. Def's Petition for Writ of Certiorari to Review Order of the COA<br>4. State's Motion to Dismiss Appeal | 1. —<br>2. Denied<br>3. Denied<br>4. Allowed |
| 201P23 | In the Matter of Z.A. and M.P. | 1. Petitioner's Motion for Temporary Stay (COAP23-424)<br>2. Petitioner's Petition for Writ of Supersedeas<br>3. Petitioner's Petition for Writ of Certiorari to Review Order of District Court, Orange County<br>4. Guardian ad Litem's Petition for Writ of Certiorari to Review Order of the COA | 1. Allowed **08/16/2023** Dissolved<br>2. Special Order<br>3. Special Order<br>4. Special Order |
| 203P23 | State v. Jamarkus Meshawn Smith | Def's PDR Under N.C.G.S. § 7A-31 (COA22-880) | Denied<br>**Riggs, J., recused** |
| 206PA21 | Town of Apex v. Beverly L. Rubin | 1. Parties' Joint Motion to Consolidate Appeals (COA20-305)<br>2. Parties' Joint Motion to Set a Briefing Schedule | 1. Allowed **12/20/2023**<br>2. Allowed **12/20/2023** |

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| 209P23-3 | State v. Travis Baxter | Def's Pro Se Motion to Set Aside Judgment | Dismissed |
| 212P22-4 | Andrew C. Davis v. Central Regional Hospital, et al. | 1. Plt's Pro Se Petition for Writ of Certiorari<br>2. Plt's Pro Se Petition for Writ of Certiorari | 1. Dismissed<br>2. Dismissed |
| 218P23 | Olschner v. Goines, et al. | Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-944) | Denied |
| 220P22 | Kimberly Bossian v. Dennis Bossian | 1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-483)<br>2. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Wake County | 1. Denied **12/13/2023**<br>2. Denied |
| 221P23 | GreaseOutlet.com, LLC v. MK South II, LLC | 1. Plt's PDR Under N.C.G.S. § 7A-31 (COA22-648)<br>2. Plt's Motion to Withdraw and Dismiss as Moot PDR | 1. — **01/03/2024**<br>2. Allowed **01/03/2024** |
| 225P23 | State v. Di'Keynian T. Floyd | Def's Pro Se Motion to Dismiss/Impeach Evidence | Dismissed |
| 225PA21-2 | North State Deli, LLC v. The Cincinnati Insurance Company, et al. | 1. United Policyholders and National Independent Venue Association's Motion to Admit Tyler Weinblatt Pro Hac Vice (COA21-293)<br>2. United Policyholders and National Independent Venue Association's Motion to Admit Rukesh A. Korde Pro Hac Vice<br>3. Cities of Charlotte and Durham's Motion to Admit Rhonda D. Orin Pro Hac Vice<br>4. Cities of Charlotte and Durham's Motion to Admit Madilynne R. Lee Pro Hac Vice<br>5. Cities of Charlotte and Durham's Motion to Admit Marshall Gilinsky Pro Hac Vice<br>6. United Policyholders and National Independent Venue Association's Amended Motion to Admit Tyler Weinblatt Pro Hac Vice<br>7. United Policyholders and National Independent Venue Association's Amended Motion to Admit Rukesh A. Korde Pro Hac Vice | 1. Dismissed as moot<br>2. Dismissed as moot<br>3. Allowed<br>4. Allowed<br>5. Allowed<br>6. Allowed<br>7. Allowed |

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| | | 8. Defs' Motion to Admit Daniel G. Litchfield Pro Hac Vice<br>9. Defs' Motion to Admit Alan I. Becker Pro Hac Vice | 8. Allowed<br>9. Allowed |
| 227P23-2 | Jasmine E. Golden v. North Carolina Agricultural and Technical State University | 1. Plt's Pro Se Motion for PDR<br>2. Def's Motion for Sanctions<br>3. Plt's Pro Se Motion for Petition to Proceed as an Indigent | 1. Dismissed<br>2. Denied<br>3. Allowed |
| 230P21-4 | State v. Jordan Nathaniel Mitchell | Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-270) | Denied |
| 233P23 | James Henry Conley v. Superior Court Judge James Gregory Bell | 1. Plt's Pro Se Motion for PDR<br>2. Plt's Pro Se Motion for Minutes and Transcripts of Proceedings Before the Judicial Standards Commission<br>3. Plt's Pro Se Motion to Proceed *In Forma Pauperis* | 1. Dismissed<br>2. Dismissed<br>3. Allowed |
| 236P23 | State v. Bridgette Lee Richard a/k/a Bridgette Lee Richards | Def's PDR Under N.C.G.S. § 7A-31 (COA22-357) | Denied |
| 241P23 | State v. Travis R. Overcash | 1. Def's Pro Se Motion for Discretionary Review (COA23-426)<br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis* | 1. Dismissed<br>2. Allowed |
| 243P23 | State v. Taiquan Rodgers | Def's PDR Under N.C.G.S. § 7A-31 (COA22-632) | Denied |
| 247P23 | Whitne Robinson v. Deborah Whitfield, Bonnie Monroe | Petitioner's Pro Se Petition for Writ of Mandamus | Denied |
| 248P23 | Whitne Robinson v. Wendy Maynard | Petitioner's Pro Se Petition for Writ of Mandamus | Denied |
| 261P23 | James Marecic v. Joanna Baker | 1. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-38)<br>2. Def's Motion for Sanctions | 1. Denied<br>2. Denied |
| 265P22-3 | State v. Sherman Lane Smith | Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Rockingham County (COAP23-825) | Dismissed |

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| 267P22 | State v. Anthony Lamar Johnson | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-573)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 271P23 | State v. Priscilla Yvonne Tillman | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-630)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed<br>**Riggs, J., recused** |
| 272P15-2 | In the Matter of E.J.V. | 1. Respondent's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-911)<br>2. Respondent's Pro Se PDR Under N.C.G.S. § 7A-31 | 1. Dismissed *ex mero motu*<br>2. Denied |
| 278A23 | Gregory Cohane v. The Home Missioners of America d/b/a Glenmary Home Missioners, Roman Catholic Diocese of Charlotte, NC, and Al Behm | 1. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) Notice of Appeal Based Upon a Dissent (COA22-143)<br>2. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) Notice of Appeal Based Upon a Constitutional Question<br>3. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) PDR Under N.C.G.S. § 7A-31<br>4. Plt's Motion to Dismiss Appeal<br>5. Plt's Motion to Amend Previously Filed Motion to Dismiss Appeal to Include Additional Authority<br>6. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) Motion to Amend Previously Filed Response to Motion to Dismiss Appeal to Include Additional Authority | 1. ---<br>2. ---<br>3. Allowed<br>4. Allowed<br>5. Allowed<br>6. Allowed |

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| | | 7. Defs' (The Home Missioners of America d/b/a Glenmary Home Missioners and the Roman Catholic Diocese of Charlotte, NC) Motion to Amend Response and Motion to Amend Previously Filed Response to Motion to Dismiss Appeal to Include Additional Authority | 7. Allowed<br>**Riggs, J., recused** |
| 281A22 | North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Matthew Bryan Hebert | Plt's Motion for Expedited Hearing (COA22-82) | Dismissed as moot **12/19/2023**<br>**Dietz, J., recused** |
| 281P06-16 | Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary | Plt's Pro Se Motion to Rehear | Dismissed |
| 284P23 | Stephanie Messick, Employee v. Walmart Stores, Inc., Employer, New Hampshire Insurance Company, Carrier (Claims Management Incorporated, Third-Party Administrator) | 1. Defs' Motion for Temporary Stay (COA22-1069)<br>2. Defs' Petition for Writ of Supersedeas<br>3. Defs' PDR Under N.C.G.S. § 7A-31<br>4. Defs' Motion to Withdraw PDR | 1. Allowed **10/24/2023** Dissolved<br>2. Dismissed as moot<br>3. ---<br>4. Allowed |
| 289P23 | State v. Kaylore Fenner | Def's PDR Under N.C.G.S. § 7A-31 (COA23-6) | Allowed |
| 290P23 | State v. Clarence Daley | Def's PDR Under N.C.G.S. § 7A-31 (COA23-7) | Denied |
| 291P23-2 | State v. Darnell W. King | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **03/07/2024** |
| 297P23-2 | Shannon Steger/T. Steger v. NCDHHS/ State of NC/ Robeson County DSS/County of Robeson | 1. Petitioner's Pro Se Motion to Reconsider/Vacate Dismissal of Appellant's Notice of Appeal<br>2. Petitioner's Pro Se Motion to Proceed as Indigent | 1. Dismissed<br>2. Allowed |

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| 297P23-3 | Shannon Steger/T. Steger v. NCDHHS/ State of NC/ Robeson County DSS/County of Robeson/Brandon Ivey | 1. Plt's Pro Se Motion for Temporary Stay (COAP23-662)<br>2. Plt's Pro Se Petition for Writ of Supersedeas<br>3. Plt's Pro Se Motion to Dismiss Action<br>4. Plt's Pro Se Motion to Dismiss Def's Motion<br>5. Plt's Pro Se Motion for Continuance<br>6. Plt's Pro Se Motion for Recusal of Judge Thelma Surgeon<br>7. Plt's Pro Se Motion to Proceed as an Indigent<br>8. Plt's Pro Se Motion to Include Judicial Notice | 1. Dismissed **01/19/2024**<br>2. Dismissed **01/19/2024**<br>3. Dismissed **01/19/2024**<br>4. Dismissed **01/19/2024**<br>5. Dismissed **01/19/2024**<br>6. Dismissed **01/19/2024**<br>7. Allowed **01/19/2024**<br>8. Allowed **01/19/2024** |
| 298P21-2 | State v. David Myron Dover | Def's PDR Under N.C.G.S. § 7A-31 (COA20-362-2) | Denied |
| 299P22-2 | Shaunesi DeBerry v. Tinita DeBerry, Reginald DeBerry, Larry DeBerry Jr. as Administrator of the Estate of Larry DeBerry Sr. | Petitioner's Pro Se Emergency Motion to Affirm December 19, 2023, Dismissals of Justice Allison Riggs and Justice Curtis Allen III | Dismissed<br>**Riggs, J., recused** |
| 301P23 | State v. Anton M. Lebedev | 1. Def's Pro Se Motion for Temporary Stay (COA23-249)<br>2. Def's Pro Se Petition for Writ of Supersedeas<br>3. Def's Pro Se Motion for Consideration of Attached Materials<br>4. Def's Pro Se Motion to Reconsider Denial of Temporary Stay<br>5. Def's Pro Se PDR Under N.C.G.S. § 7A-31<br>36. Def's Pro Se Motion to Take Judicial Notice | 1. Denied **11/09/2023**<br>2. Denied<br>3. Denied<br>4. Denied **11/14/2023**<br>5. Denied<br>6. Denied |
| 302P23 | State v. Terrell Jermaine Parker | Def's PDR Under N.C.G.S. § 7A-31 (COA23-90) | Denied |
| 303P23 | State v. David Adams, Jr. | Def's PDR Under N.C.G.S. § 7A-31 (COA23-132) | Denied |

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| 308P23 | Mark Anthony Hall v. Judge Ridgeway; District Attorney; Deontae L. Thomas | Petitioner's Pro Se Petition for Writ of Mandamus | Dismissed |
| 310P23 | State v. Rocky J. Bryant | 1. Def's Pro Se Motion for Appeal<br>2. Def's Pro Se Petition for Writ of Mandamus | 1. Dismissed<br>2. Dismissed<br>**Riggs, J., recused** |
| 312A19-2 | Nung Ha and Nhiem Tran v. Nationwide General Insurance Company | Amicus Curiae's Motion for Leave to Participate in Oral Argument | Allowed **03/05/2024** |
| 312P23 | State v. Mark Anthony Nieves | Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-993) | Denied |
| 313P23 | William Braxton, Betty Ferguson, Marcille Baker, George A. Braxton, Robert L. Braxton, Graves Braxton, and Kay B. Troxler, Being All of the Heirs of Mary Braxton Allred v. Ocean View Landing Property Owners Association | Plt's (William Braxton) PDR Under N.C.G.S. § 7A-31 (COA23-177) | Denied |
| 314PA21 | Paul Steven Wynn v. Rex Frederick, in his official capacity as a Magistrate, and Great American Insurance Company | Plt's Petition for Rehearing (COA20-472) | Denied **01/26/2024**<br>**Dietz, J., recused**<br>**Allen, J., recused** |
| 317P23 | Jamaal Gittens v. Department of Transportation | Petitioner's Pro Se Petition for Writ of Certiorari | Dismissed |
| 320P23 | State v. Elijah Rashad Dobson | Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-288) | Denied |
| 321P23 | State v. Ray Shawn Daniels | Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-22) | Dismissed |
| 323P23-2 | Betty Lou Tebib v. Hamza Tebib | Def's Pro Se Motion for Reconsideration | Dismissed |

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| 326P23-2 | In the Matter of D.T.P. & B.M.P. | Respondent-Parents' Pro Se Motion to Stay the Mandate Pending Writ of Certiorari to the Supreme Court of the United States (COA23-29) | Denied **12/14/2023** |
| 326P23-3 | In the Matter of D.T.P. & B.M.P. | 1. Respondent-Parents' Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-29)<br>2. Respondent-Parents' Pro Se Motion to Stay the Mandate<br>3. Respondent-Parents' Pro Se Motion for Notice of Appeal of Right<br>4. Respondent-Parents' Pro Se Motion for Appointment of Court Appointed Counsel | 1. Denied **01/11/2024**<br>2. Denied **01/11/2024**<br>3. Dismissed *ex mero motu* **01/11/2024**<br>4. Dismissed as moot **01/11/2024** |
| 326P23-4 | In the Matter of D.T.P. & B.M.P. | Respondent-Parents' Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-29) | Dismissed |
| 327P23 | State v. Norman Jermaine Nobles | 1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP23-291)<br>2. State's Motion for Extension of Time to File Response<br>3. State's Motion for Extension of Time to File Response | 1. Denied<br>2. Allowed **12/14/2023**<br>3. Allowed **01/17/2024**<br>**Riggs, J., recused** |
| 328P23 | State v. Shonda Monique Powe | Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Anson County | Denied |
| 329A09-6 | State v. Martinez Orlando Black | 1. Def's Pro Se Motion for Appeal (COAP22-663)<br>2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA | 1. Dismissed<br>2. Dismissed<br>**Riggs, J., recused** |
| 329P23 | Ricky L. Hefner v. Kimberly Orcutt | Plt's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Jackson County | Dismissed |
| 333P23 | In the Matter of L.L. | 1. Petitioners' Motion for Temporary Stay (COA22-1045)<br>2. Petitioners' Petition for Writ of Supersedeas<br>3. Petitioners' PDR Under N.C.G.S. § 7A-31 | 1. Allowed **12/12/2023**<br>2. Allowed<br>3. Allowed |

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| 335P23 | State v. Robert Wayne Simpson | 1. Def's Pro Se Motion for Extension of Time to File Motion for Discretionary Review (COA23-35)<br>2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 | 1. Dismissed as moot<br>2. Denied |
| 336P22-3 | William D. Woolens v. Charlene D. Cliborne | Plt's Pro Se Motion for Supreme Court Case | Dismissed |
| 336P23 | In re Sorrell | 1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA23-183)<br>2. Appellee's (U.S. Bank Trust, N.A.) Motion to Admit Aaron R. Goldstein Pro Hac Vice | 1. Denied<br>2. Allowed |
| 340P23 | State v. Lewis Victor Branche, III | Def's PDR Under N.C.G.S. § 7A-31 (COA22-768) | Denied |
| 341P23 | State v. Kim Y. Fraley | 1. State's Motion for Temporary Stay (COAP23-513)<br>2. Def's Motion to Dismiss the Petition for Writ of Certiorari as Moot and to Deny the Application for Temporary Stay<br>3. Def's Motion for Extension of Time to File Response to Petition for Writ of Certiorari<br>4. State's Petition for Writ of Supersedeas<br>5. State's Petition for Writ of Certiorari to Review Order of the COA | 1. Dismissed as moot **12/15/2023**<br>2. Dismissed as moot **02/13/2024**<br>3. Dismissed as moot **02/13/2024**<br>4. Denied **12/15/2023**<br>5. Denied **12/15/2023** |
| 342P23 | State v. Laketta Hussain | 1. Def's Pro Se Motion for Temporary Stay (COA22-1024)<br>2. Def's Pro Se Petition for Writ of Supersedeas<br>3. Def's Pro Se PDR Under N.C.G.S. § 7A-31<br>4. Def's Pro Se Petition for Writ of Certiorari<br>5. Def's Pro Se Motion for Extended Time to File Briefs<br>6. Def's Pro Se Motion to Waive Fees Associated with this Review | 1. Denied **12/18/2023**<br>2. Denied<br>3. Denied<br>4. Denied<br>5. Dismissed as moot<br>6. Allowed |
| 343P23 | Robert Terrell, III v. Siler City Police Department | Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA23-716) | Denied |

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| 344P23 | Universal Life Insurance Company v. Greg E. Lindberg | 1. Plt's Motion for Temporary Stay (COA23-274)<br>2. Plt's Petition for Writ of Supersedeas<br>3. Plt's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **12/22/2023**<br>2.<br>3. |
| 345P23 | Laura Leigh Linker v. Timothy Lyon<br>Linker v. Nancy Lyon Boling, Intervenor | 1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-328)<br>2. Plt's Petition for Writ of Mandamus | 1. Special Order **02/06/2024**<br>2. Special Order **01/09/2024** |
| 348P23 | State v. Donat Caleb Porter | 1. Def's Motion for Temporary Stay (COA22-516)<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's Pro Se PDR Under N.C.G.S. § 7A-31<br>4. Def's Motion to Withdraw Appellate Counsel | 1. Allowed **01/03/2024**<br>2.<br>3.<br>4. |
| 349P23 | State v. Jeremy Thomas Stevens | Def's PDR Under N.C.G.S. § 7A-31 (COA22-1057) | Denied |
| 350P23 | Abdolhossain Motealleh v. Duke Health Facilities (Duke Primary Care, Duke Specialty Clinics, and the Others 1 Through 100) | Plt's Pro Se Motion for Appeal | Dismissed |
| 351P23 | In re Hedgepeth | 1. Respondents' Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-226)<br>2. Respondents' Pro Se PDR Under N.C.G.S. § 7A-31<br>3. Petitioner's Motion to Dismiss Appeal<br>4. Respondents' Pro Se Motion for Consolidation of Actions<br>5. Respondents' Pro Se Motion for Temporary Stay<br>6. Respondents' Pro Se Petition for Writ of Supersedeas<br>7. Respondents' Pro Se Motion in the Cause | 1. ---<br>2. Denied<br>3. Allowed<br>4. Dismissed as moot<br>5. Allowed **01/19/2024** Dissolved<br>6. Denied<br>7. Dismissed as moot |

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| 352P23 | Ronnie C. Hedgepeth, Jr., and Shira Hedgepeth v. Smoky Mountain Country Club, SMCC Clubhouse, LLC, Conleys Creek Limited Partnership, and Smoky Mountain Country Club Property Owners Association, Inc., a North Carolina Corporation | 1. Plts' Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-222)<br>2. Plts' Pro Se PDR Under N.C.G.S. § 7A-31<br>3. Def's Motion to Dismiss Appeal<br>4. Plts' Pro Se Motion for Consolidation of Actions | 1. ---<br>2. Denied<br>3. Allowed<br>4. Dismissed as moot |
| 360A09 | State v. Hasson Jamaal Bacote | 1. State's Motion for Temporary Stay<br>2. State's Petition for Writ of Supersedeas<br>3. State's Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County<br>4. State's Motion for Expedited Consideration | 1. Denied **02/01/2024**<br>2.<br>3.<br>4. |
| 362P02-4 | Rickey Allen Bright v. Chris Wood, Warden III | Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP23-516) | Denied **01/08/2024** |
| 370P04-21 | State v. Anthony Leon Hoover | 1. Def's Pro Se Petition for Writ of Habeas Corpus (COA05-64)<br>2. Def's Pro Se Petition for Writ of Mandamus | 1. Denied **12/20/2023**<br>2. Denied **12/20/2023** |
| 381P22-4 | Matthew Safrit v. Todd Ishee and Drew Stanley | 1. Petitioner's Pro Se Motion for PDR<br>2. Petitioner's Pro Se Motion to Proceed as Indigent | 1. Denied **01/11/2024**<br>2. Allowed **01/11/2024**<br>**Riggs, J., recused** |

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| 403PA21 | Louis M. Bouvier, Jr., Karen Andrea Niehans, Samuel R. Niehans, and Joseph D. Golden v. William Clark Porter, IV, Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund | Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Motion to Recuse (COA20-441) | Special Order **03/04/2024**<br>**Earls, J., recused**<br>**Riggs, J., recused** |
| 410PA18-2 | Town of Apex v. Beverly L. Rubin | 1. Parties' Joint Motion to Consolidate Appeals<br>2. Parties' Joint Motion to Set a Briefing Schedule | 1. Allowed **12/20/2023**<br>2. Allowed **12/20/2023** |
| 412P13-8 | Henry Clifford Byrd, Sr. v. Superintendent John Sapper | Petitioner's Pro Se Motion to Vacate Court's Order (COA17-288) | Dismissed **01/02/2024** |
| 412P13-9 | Henry Clifford Byrd, Sr. v. Superintendent John Sapper | Petitioner's Pro Se Motion for Justice Riggs Recusal for Conflict of Interest and Judicial Bias (COA17-288) | Special Order **01/30/2024** |
| 415P17-2 | Michael Scott Davis v. Pia Law | 1. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COAP17-848)<br>2. Plt's Pro Se Motion for Leave to Amend PDR | 1. Denied<br>2. Dismissed as moot |
| 425A21-3 | Hoke County Board of Education et al. v. State of North Carolina, et al. | 1. Legislative-Intervenors' Motion and Suggestion of Recusal (COA22-86 23-788)<br>2. Plts' Motion and Suggestion of Recusal<br>3. Appellees' Consent Motion to Extend Time Limit for Oral Argument | 1. Special Order **01/31/2024**<br>2. Special Order **02/16/2024**<br>3. Special Order **02/16/2024** |
| 426A18-2 | Elizabeth Zander and Evan Galloway v. Orange County, NC and the Town of Chapel Hill | 1. Plts' Notice of Appeal Based Upon a Dissent (COA22-691)<br>2. Plt's' PDR as to Additional Issues | 1. ---<br>2. Denied<br>**Riggs, J., recused** |

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

22 MARCH 2024

| | | | |
|---|---|---|---|
| 469P09-2 | State v. James Edward Downey | Def's Pro Se Motion for Appeal | Dismissed |
| 514PA11-4 | State v. Harry Sharod James | Def's Pro Se Motion for PDR | Denied **03/13/2024** |
| 516P09-3 | Dennis Alexander Player v. David Cassidy, Warden of Caswell Correctional Center; Todd Ishee, Secretary of the Department of Adult Corrections, et al. | Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA | Denied **12/14/2023** |

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

## RULES GOVERNING THE ORGANIZATION OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 19, 2024.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01A, Section .0400, Election, *Succession, and Duties of Officers*, be amended as shown in the following attachments:

ATTACHMENT 1 - A: 27 N.C.A.C. 01A, Section .0400, Rule .0406, *Vacancies and Succession*

ATTACHMENT 1 - B: 27 N.C.A.C. 01A, Section .0400, Rule .0411, *Secretary*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 19, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of February, 2024.

s/Alice Neece Mine
Alice Neece Mine, 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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of March, 2024.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of March, 2024.

s/Riggs, J.
For the Court

**TITLE 27 - THE NORTH CAROLINA STATE BAR**

**CHAPTER 1 - RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR**

**SUBCHAPTER 1A - ORGANIZATION OF THE NORTH CAROLINA STATE BAR**

**SECTION .0400 - ELECTION, SUCCESSION, AND DUTIES OF OFFICERS**

## 27 NCAC 01A .0406 VACANCIES AND SUCCESSION

(a) Succession Upon Mid-term Vacancy in Office. Officer vacancies shall be filled as follows:

. . .

. . .

(d) Temporary Inability of Secretary to Perform Duties. If the secretary is absent or is otherwise temporarily unable to perform the duties of office, the assistant director and director for management, finance, and communications shall perform those duties until the secretary returns or becomes able to resume the duties. If the assistant director and director for management, finance, and communications is absent or is otherwise unable to perform those duties, the counsel of the State Bar shall perform those duties until the secretary returns or becomes able to resume the duties. If neither the assistant director and director for management, finance, and communications nor the counsel are able to perform those duties, then the president may select a member of the State Bar staff to perform those duties for the period of the secretary's absence or inability. Notwithstanding the foregoing, the secretary may delegate any ministerial task to any employee of the North Carolina State Bar.

*History Note:* *Authority G.S. 84-23;*
*Readopted Effective December 8, 1994;*
*Amendments Approved by the Supreme Court: September 24, 2015; September 20, 2018; March 20, 2024.*

# TITLE 27 - THE NORTH CAROLINA STATE BAR

## CHAPTER 1 - RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

## SUBCHAPTER 1A - ORGANIZATION OF THE NORTH CAROLINA STATE BAR

## SECTION .0400 - ELECTION, SUCCESSION, AND DUTIES OF OFFICERS

### 27 NCAC 01A .0411 SECRETARY

The secretary shall attend all meetings of the council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. The secretary shall, with the president, president-elect or vice-president, execute all contracts ordered by the council. He or she shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on behalf of the council or certified as emanating from the council. The secretary shall take charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the council; he or she shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the council, the secretary shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31 of each year and the secretary shall publish same in the annual reports as referred to above. He or she shall perform such other duties as may be imposed upon him or her, and shall give bond for the faithful performance of his or her duties in an amount to be fixed by the council with surety to be approved by the council. The secretary may delegate any ministerial task to any employee of the North Carolina State Bar.

*History Note:* *Authority G.S. 84-23;*
*Readopted Eff. December 8, 1994;*
*Amendments Approved by the Supreme Court: September 24, 2015, March 20, 2024.*

CERTIFICATION STANDARDS FOR
EMPLOYMENT LAW SPECIALTY

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:**

**RULES GOVERNING THE SPECIALIZATION PROGRAM**

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that a new section be added to the Rules and Regulations of the North Carolina State Bar to be set forth in 27 N.C.A.C. 01D, Section .3500, *Certification Standards for the Employment Law Specialty*, as shown in the following attachments:

ATTACHMENT 2 - A: 27 N.C.A.C. 01D, Section .3500, Rule .3501, *Establishment of Specialty Field*

ATTACHMENT 2 - B: 27 N.C.A.C. 01D, Section .3500, Rule .3502, *Definition of Specialty*

ATTACHMENT 2 - C: 27 N.C.A.C. 01D, Section .3500, Rule .3503, *Recognition as a Specialist in Employment Law*

ATTACHMENT 2 - D: 27 N.C.A.C. 01D, Section .3500, Rule .3504, *Applicability of Provisions of the North Carolina Plan of Legal Specialization*

ATTACHMENT 2 - E: 27 N.C.A.C. 01D, Section .3500, Rule .3505, *Standards for Certification as a Specialist in Employment Law*

ATTACHMENT 2 - F: 27 N.C.A.C. 01D, Section .3500, Rule .3506, *Standards for Continued Certification as a Specialist*

ATTACHMENT 2 - G: 27 N.C.A.C. 01D, Section .3500, Rule .3507, *Applicability of Other Requirements*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing rules, to be added 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 20, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of February, 2024.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing rules, to be added 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 20th day of March, 2024.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing rules, to be added to the Rules and Regulations of the North Carolina State Bar, were entered upon the minutes of the Supreme Court. The rules shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of March, 2024.

s/Riggs, J.
For the Court

***THE FOLLOWING IS AN ENTIRELY NEW SECTION (.3500) OF 27 NCAC 1D***

**SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR**

**SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY**

## 27 NCAC 01D .3501 ESTABLISHMENT OF SPECIALTY FIELD

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates Employment Law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

*History Note:* *Authority G.S. 84-23;*
*Approved by the Supreme Court March 20, 2024.*

CERTIFICATION STANDARDS FOR
EMPLOYMENT LAW SPECIALTY

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

### 27 NCAC 01D .3502 DEFINITION OF SPECIALTY

The specialty of Employment Law, in general, involves the practice of law as it applies to employers and employees (public and private) and their respective rights and obligations in accordance with myriad federal and state laws. The practice, more specifically, involves the counseling and representation of employers, employees, and independent contractors regarding the evolving array of torts, contractual issues, and federal and North Carolina statutes pertaining to employment relationships, including but not limited to: the Family and Medical Leave Act ("FMLA"); Americans with Disabilities Act ("ADA"); Section 504 of the Rehabilitation Act of 1973; Title VII of the Civil Rights Act; the Age Discrimination in Employment Act; Older Worker Benefits Protection Act; National Labor Relations Act ("NLRA") (insofar as it pertains to "protected concerted" activity and related unfair labor practices); Fair Labor Standards Act ("FLSA"); Occupational Safety and Health Act ("OSHA") (insofar as it pertains to obligations arising under the "General Duty Clause"); Worker Adjustment and Retraining Notification Act ("WARN"); Pregnancy Discrimination Act; the Uniformed Services Employment and Reemployment Rights Act ("USERRA"); Section 1981 of the Civil Rights Act of 1866; the North Carolina Wage and Hour Act ("WHA"), North Carolina Retaliatory Employment Discrimination Act ("REDA"); North Carolina Employment Security law; North Carolina Persons With Disabilities Protection Act; North Carolina State Human Resources Act ("HRA") (insofar as the last pertains to coverage of the HRA and deadlines by which relevant claims must be made); North Carolina law regarding restrictive covenants (non-competition, non-solicitation, and non-disclosure); and related regulations and developing common law. The specialty does not encompass matters arising under the North Carolina Workers' Compensation Act (other than proficient familiarity with the circumstances in which the Act may apply) or the practice of employee benefits law (such as but not limited to federal and North Carolina laws regulating group health insurance plans and tax-qualified retirement plans).

*History Note:* *Authority G.S. 84-23;*
*Approved by the Supreme Court March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

### 27 NCAC 01D .3503 RECOGNITION AS A SPECIALIST IN EMPLOYMENT LAW

If a lawyer qualifies as a specialist in Employment Law by meeting the standards set for the specialty, then the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Employment Law."

*History Note:* *Authority G.S. 84-23;*
*Approved by the Supreme Court March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

### 27 NCAC 01D .3504 APPLICABILITY OF PROVISIONS OF THE NORTH CAROLINA PLAN OF LEGAL SPECIALIZATION

Certification and continued certification of specialists in Employment Law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

*History Note:* *Authority G.S. 84-23;*
*Approved by the Supreme Court March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

### 27 NCAC 01D .3505 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN EMPLOYMENT LAW

Each applicant for certification as a specialist in Employment Law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in Employment Law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the Board that the applicant has experience through substantial involvement in Employment Law.

(1) Substantial involvement shall mean that, during the 5 years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of Employment Law but not fewer than 400 hours in any 1 year.

(2) Practice shall mean substantive legal work in Employment Law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3) below, or a practice equivalent as described in paragraph (4) below.

(3) Substantive legal work in Employment Law focuses on the practice of law as it applies to employers and employees and their respective rights and obligations to one another in accordance with myriad federal and state laws. The practice requires proficiency in federal and North Carolina statutes and related regulations, including but not limited to those laws listed above in ".3502 Definition of Specialty" as well as common law pertaining to employer and employee rights.

The specialist must be able to competently advise and represent clients in counseling and before administrative agencies or in court-based litigation (provided, that proficiency in civil

litigation is not required); recognize employment laws and spot related issues and risks that are or may be presented by the client's circumstances; know when the laws of states other than those of North Carolina may apply; know when the advice of lawyers who are conversant with other legal fields (such as taxation, business law and professional licensing requirements) may be required; and recognize ethical issues that can arise in the course of relationship with the client.

(4) "Practice equivalent" shall mean: Service as a law professor concentrating in the teaching of Employment Law for up to three years during the five years prior to application may be substituted for an equivalent number of years of experience necessary to meet the five-year requirement set forth in Rule .3505(b)(1).

(c) Continuing Legal Education - To be certified as a specialist in Employment Law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in Employment Law and related fields during the three years preceding application. The 36 hours must include at least 27 hours in Employment Law; the remaining 9 hours may be in related-field CLE. Related fields include contract law; administrative law; alternative dispute-resolution; workers' compensation law; the law of trade secrets and data privacy; business law/corporate governance law; employment benefits; tax law as regards compensation of employees; employment-related investigations; and civil litigation/trial advocacy. The applicant may request recognition of an additional field as related to Employment Law practice for the purpose of meeting the CLE standard.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of 10 lawyers and/or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of Employment Law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of Employment Law as defined and described in "Section .3502 Definition of Specialty", including but not limited to the following:

(A) Fair Labor Standards Act

(B) Family and Medical Leave Act

(C) Americans with Disabilities Act

(D) Title VII of the Civil Rights Act

(E) Equal Pay Act

(F) Genetic Information Nondiscrimination Act

(G) Section 504 of the Rehabilitation Act of 1973

(H) Age Discrimination in Employment Act

(I) Older Workers' Benefits Protection Act

(J) Worker Adjustment and Retraining Notification Act

(K) Pregnancy Discrimination Act

(L) Occupational Safety and Health Act (only as regards scope of "general duty" clause)

(M) National Labor Relations Act (only as regards employees' right to engage in Section 7 protected "concerted activity" and related unfair labor practices)

(N) Uniformed Services Employment and Reemployment Rights Act

(O) Section 1981 of the Civil Rights Act of 1866

(P) North Carolina Retaliatory Employment Discrimination Act

(Q) North Carolina Wage and Hour Act

(R) North Carolina statutes and common law regarding restrictive covenants (e.g., non-competition, non-solicitation, and non-disclosure agreements)

(S) North Carolina Persons With Disabilities Protection Act

(T) North Carolina State Human Resources Act

*History Note:* *Authority G.S. 84-23;*
*Approved by the Supreme Court March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

### 27 NCAC 01D .3506 STANDARDS FOR CONTINUED CERTIFICATION AS A SPECIALIST

The period of certification is five years. Before the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3505(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in Employment Law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 42 hours shall be in Employment Law, and the balance of 18 hours may be in related-field CLE (including but not necessarily limited to the related fields set forth in Rule .3505(c) of this subchapter). A list of the topics that qualify as related-field CLE shall be maintained by the board on its official website.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers and/or judges, all of whom are licensed and currently in good standing to practice law in North Carolina. References must be familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .3505(d) of this subchapter apply to this standard.

(d) Time for Application - Application for continued certification shall be made not more than 180 days nor fewer than 90 days before the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3505 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification was suspended or revoked during a period of certification, then the application shall be treated as if it were for initial certification under Rule .3505 of this subchapter.

*History Note:* *Authority G.S. 84-23;*
*Approved by the Supreme Court March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .3500 – CERTIFICATION STANDARDS FOR THE EMPLOYMENT LAW SPECIALTY

### 27 NCAC 01D .3507 APPLICABILITY OF OTHER REQUIREMENTS

The specific standards set forth herein for certification of specialists in Employment Law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

*History Note:* *Authority G.S. 84-23;*
*Approved by the Supreme Court March 20, 2024.*

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

## RULES GOVERNING THE AUTHORIZED PRACTICE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 19, 2024.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .0200, *Procedures for the Authorized Practice Committe*e, be amended as shown in the following attachments:

ATTACHMENT 3 - A: 27 N.C.A.C. 01D, Section .0200, Rule .0201, *General Provisions*

ATTACHMENT 3 - B: 27 N.C.A.C. 01D, Section .0200, Rule .0202, *Procedure*

ATTACHMENT 3 - C: 27 N.C.A.C. 01D, Section .0200, Rule .0203, *Definitions*

ATTACHMENT 3 - D: 27 N.C.A.C. 01D, Section .0200, Rule .0204, *State Bar Council - Powers and Duties*

ATTACHMENT 3 - E: 27 N.C.A.C. 01D, Section .0200, Rule .0205, *Chairperson of the Authorized Practice Committee - Powers and Duties*

ATTACHMENT 3 - F: 27 N.C.A.C. 01D, Section .0200, Rule .0206, *Authorized Practice Committee - Powers and Duties*

ATTACHMENT 3 - G: 27 N.C.A.C. 01D, Section .0200, Rule .0207, *Counsel - Powers and Duties*

ATTACHMENT 3 - H: 27 N.C.A.C. 01D, Section .0200, Rule .0208, *Suing for Injunctive Relief*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 19, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of February, 2024.

s/Alice Neece Mine
Alice Neece Mine, 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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of March, 2024.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of March, 2024.

s/Riggs, J.
For the Court

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0200 - PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

### 27 NCAC 01D .0201 GENERAL PROVISIONS

(a) The Authorized Practice Committee is a standing committee of the council. The committee is comprised of councilors and advisory members appointed by the president. All members may vote on all matters coming before the committee unless prohibited by other rules of the State Bar.

(b) The purpose of the ~~committee on the authorized practice of law~~ Authorized Practice Committee is to protect the public from ~~being unlawfully advised and represented in legal matters by unqualified persons.~~ the unauthorized or unlawful practice of law by investigating information received about the possible unauthorized practice of law, by seeking compliance with the law, and by seeking enforcement of the law when necessary.

(c) The Authorized Practice Committee may issue advisory opinions concerning questions of significant interest to the public, the bar, and the courts on what constitutes the unauthorized practice of law.

(d) The Authorized Practice Committee oversees the counsel's administration of the rules for registration of prepaid legal services plans and for online document providers, and directs the counsel to take such action as is necessary to enforce those rules.

*History Note:* *Authority G.S. 84-37;*
*Readopted Eff. December 8, 1994;*
*Amendments Approved by the Supreme Court: February 3, 2000, March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0200 - PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

### 27 NCAC 01D .0202 PROCEDURE

The Authorized Practice Committee operates under the procedures set forth in these rules.

~~(a) The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.~~

~~(b) District bars shall not conduct separate proceedings into unauthorized practice of law matters but shall assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.~~

*History Note:* *Authority G.S. 84-37;*
*Readopted Eff. December 8, 1994;*
*Amendments Approved by the Supreme Court: March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0200 - PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

### 27 NCAC 01D .0203 DEFINITIONS

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, have the meanings set forth in this Rule, unless the context clearly indicates otherwise.

~~(1) Appellate division - the appellate division of the General Court of Justice.~~

(~~2~~1) ~~Chairperson of the Authorized Practice Committee~~Chair - the councilor appointed by the president to serve as ~~chairperson~~ chair of the Authorized Practice Committee of the North Carolina State Bar.

(~~3~~2) Complainant~~ or the complaining witness~~ - any person who has complained~~ of~~ to the North Carolina State Bar alleging that the conduct of any person, ~~firm~~firm, or corporation ~~as relates to alleged~~ constitutes the unauthorized practice of l~~aw.~~law in North Carolina.

(~~4~~3) Complaint - ~~a formal pleading filed in the name of~~information submitted to the North Carolina State Bar~~ in the superior court against a person, firm or corporation after a finding of probable cause.~~ alleging the unauthorized practice of law.

(~~5~~4) Council - the Council of the North Carolina State Bar.

(~~6~~5) Councilor - a member of the Council of the North Carolina State Bar.

(~~7~~6) Counsel - the counsel of the North Carolina State Bar ~~appointed by the council.~~ or any attorney appointed by the counsel to provide legal services to the North Carolina State Bar.

(~~8~~7) Court or courts of this state - a court authorized and established by the Constitution or laws of the ~~state~~State of North Carolina.

~~(9) Defendant - any person, firm or corporation against whom a complaint is filed after a finding of probable cause.~~

(~~10~~8) Investigation - the gathering of information with respect to ~~alleged unauthorized practice of law.~~a complaint.

(~~11~~9) Investigator - any person designated by the committee or the counsel to assist in the investigation of ~~alleged unauthorized practice of law.~~ a complaint.

(~~12~~10) Letter of notice - a communication sent by the committee to ~~an accused individual or corporation~~ a respondent setting forth ~~the substance~~ a summary of ~~alleged~~ conduct ~~involving~~ that is alleged to constitute the unauthorized practice of ~~law.~~law seeking a response to the allegations.

(~~13~~11) Office of the counsel - the office and staff maintained by the counsel of the North Carolina State Bar.

(~~14~~12) Office of the secretary - the office and staff maintained by the secretary of the North Carolina State Bar.

~~(15) Party - after a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.~~

~~(16) Plaintiff - after a complaint has been filed, the North Carolina State Bar.~~

~~(17) Preliminary Hearing - hearing by the Authorized Practice Committee to determine whether probable cause exists.~~

(~~18~~13) Probable Cause - a finding by the Authorized Practice Committee that there is reasonable cause to believe that a ~~person or corporation~~ respondent has engaged in the unauthorized practice of ~~law~~law. ~~justifying legal action against such person or corporation.~~

(14) Respondent - any person, firm, or corporation alleged to have engaged in the unauthorized practice of law.

(~~19~~15) Secretary - the secretary of the North Carolina State Bar.

~~(20) Supreme Court - the Supreme Court of North Carolina.~~

(16) Vice-chair - the councilor appointed by the president to serve as the vice-chair of the Authorized Practice Committee of the North Carolina State Bar.

*History Note:* *Authority G.S. 84-37;*
*Readopted Eff. December 8, 1994;*
*Amendments Approved by the Supreme Court:*
*February 3, 2000; October 6, 2004; March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0200 - PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

### 27 NCAC 01D .0204 STATE BAR COUNCIL - POWERS AND DUTIES

The Council of the North Carolina State Bar shall have the power and duty: to supervise the conduct of the Authorized Practice Committee in accordance with the provisions of this subchapter.

~~(1) to supervise the administration of the Authorized Practice Committee in accordance with the provisions of this Subchapter;~~

~~(2) to appoint a counsel. The counsel shall serve at the pleasure of the council. The counsel shall be a member of the North Carolina State Bar but shall not be permitted to engage in the private practice of law.~~

*History Note:* *Authority G.S. 84-37;*
*Readopted Eff. December 8, 1994;*
*Amendments Approved by the Supreme Court: February 3, 2000; March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0200 - PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

### 27 NCAC 01D .0205 ~~CHAIRPERSON~~CHAIR OF THE AUTHORIZED PRACTICE COMMITTEE - POWERS AND DUTIES

(a) The ~~chairperson of the Authorized Practice Committee~~ chair shall have the power and duty:

(1) to supervise the activities of the counsel~~;~~ related to the conduct of the committee;

(2) to ~~recommend to the Authorized Practice Committee that an investigation be initiated;~~ authorize the counsel to initiate investigations upon receipt of ~~a complaint;~~ information indicating the possible unauthorized practice of law in North Carolina;

~~(3) to recommend to the Authorized Practice Committee that a complaint be dismissed;~~

(3) to authorize the counsel to forego an investigation under such circumstances as the chair deems appropriate;

(4) to recommend, or authorize the counsel to recommend, an appropriate disposition of a complaint;

(~~4~~5) to direct l~~etter~~letters of notice to ~~an accused person or corporation~~ respondents or ~~direct~~ to authorize the counsel to issue letters of notice in such cases or under such circumstances as the ~~chairperson~~chair deems appropriate;

(~~5~~6) to n~~otify~~notify, ~~the accused and~~or authorize the counsel to notify, any ~~complainant that~~ complainant, and any respondent who was notified of any investigation, of the committee's disposition of a ~~complaint~~complaint; ~~has been dismissed;~~

~~(6) to call meetings of the Authorized Practice Committee for the purpose of holding preliminary hearings;~~

(7) to issue subpoenas in the name of the North Carolina State Bar or to direct the secretary to issue such subpoenas;

(8) to administer oaths or affirmations to witnesses;

(9) to ~~file and~~ verify ~~complaints and petitions in the name of~~ court pleadings filed by the North Carolina State ~~Bar.~~Bar seeking enforcement of the prohibitions on the unauthorized practice of law.

(b) The ~~president, vice-chairperson or senior council member of the Authorized Practice Committee~~ vice-chair shall perform the functions of the ~~chairperson~~chair of the committee in any matter when the ~~chairperson~~ chair ~~or vice-chairperson~~ is absent or disqualified. If both the chair and the vice-chair are absent or disqualified, a councilor designated by the president shall serve as acting chair.

*History Note:* *Authority G.S. 84-37;*
*Readopted Eff. December 8, 1994;*
*Amendments Approved by the Supreme Court: February 3, 2000; March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0200 - PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

### 27 NCAC 01D .0206 AUTHORIZED PRACTICE COMMITTEE - POWERS AND DUTIES

The Authorized Practice Committee shall have the power and ~~duty~~duty:

(1) to direct the counsel to investigate any alleged unauthorized practice of law in this State by any person, firm, or ~~corporation~~ corporation; ~~in this State;~~

(2) to ~~hold preliminary hearings, find probable cause, and~~ recommend to the Executive Committee that ~~a complaint for injunction be filed in the name of the State Bar against respondent;~~ the counsel file a lawsuit against a respondent seeking to enjoin the unauthorized practice of law;

(3) to dismiss ~~allegations of the unauthorized practice of law upon a finding of no probable cause;~~ a complaint when there is insufficient evidence to show a violation of the law prohibiting the unauthorized practice of law;

(4) to issue a ~~letters~~letter of ~~caution,~~caution ~~which may include a demand to cease and desist,~~ to a respondent ~~respondents~~in a case ~~cases~~ in which~~where~~ the ~~Committee~~committee concludes ~~either~~ that:

(a) there is probable cause ~~established~~ to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) respondent has agreed to refrain from engaging in the conduct in the ~~future;~~future or the committee believes respondent will stop engaging in the conduct as a result of receiving the letter of caution;

(ii) respondent is unlikely to engage in the conduct again; or

(iii) ~~either~~neither referral to a district attorney ~~or~~nor ~~complaint for~~ injunction proceedings are~~is not~~ warranted under the circumstances; or

(b) ~~there is not~~the evidence is insufficient to establish probable cause ~~established to believe~~that respondent has engaged in the unauthorized practice of law in North Carolina, but the committee finds it appropriate to caution the respondent because the conduct could potentially lead to a violation of the law;

~~(i) the conduct of the respondent may be improper and may become the basis for injunctive relief if continued or repeated; or~~

~~(ii) the Committee otherwise finds it appropriate to caution the respondent.~~

(5) to direct the counsel to stop an investigation and take no action;

(6) to refer a matter to another regulatory or licensing authority; to a law enforcement agency, including t~~he~~a district ~~attorney~~ attorney, for criminal ~~prosecution~~prosecution; ~~and~~or to ~~other committees~~the Grievance Committee of the North Carolina State Bar; and

(7) to issue proposed advisory opinions ~~in accordance with procedures adopted~~ for adoption by the council concerning ~~as to~~ whether ~~the actual or contemplated conduct~~ identified activities of ~~nonlawyers~~significant public interest ~~would~~ constitute the unauthorized practice of law in North Carolina.

*History Note:* *Authority G.S. 84-37;*
*Readopted Eff. December 8, 1994;*
*Amendments Approved by the Supreme Court: February 20, 1995; February 3, 2000; October 6, 2004; March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0200 - PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

### 27 NCAC 01D .0207 COUNSEL - POWERS AND DUTIES

The counsel shall have the power and duty:

(1) to initiate an investigation concerning the alleged unauthorized practice of ~~law;~~law upon receipt of a complaint or upon receiving information from any other source indicating the possible unauthorized practice of law;

(2) to direct a letter of notice to a ~~respondent~~respondent; ~~when authorized by the chairperson of the Authorized Practice Committee~~;

(3) to make a recommendation to the committee on the disposition of a complaint;

~~(3) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of a complaint or otherwise;~~

~~(4) to recommend to the chairperson of the Authorized Practice Committee that a matter be dismissed because the complaint is frivolous or falls outside the council's jurisdiction; that a letter of notice be issued; or that the matter be considered by the Authorized Practice Committee to determine whether probable cause exists;~~

(5~~4~~) to prosecute before the courts all actions to enjoin the unauthorized practice of law ~~proceedings~~ as may be authorized by the Executive Committee or the council; ~~before the Authorized Practice Committee and the courts~~;

~~(6) to represent the State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law;~~

~~(7) to employ assistant counsel, investigators, and other administrative personnel in such numbers as the council may from time to time authorize;~~

(8~~5~~) to maintain ~~permanent~~ records of all matters processed by the counsel on behalf of the committee and of the disposition ~~of such matters;~~thereof, pursuant to the records retention policies of the North Carolina State Bar; and

(~~9~~6) to perform such other duties ~~as the council may from time to time direct.~~ incident to the operation of the committee as the president, the chair, the committee, or the council may direct.

*History Note:* *Authority G.S. 84-37;*
*Readopted Eff. December 8, 1994;*
*Amendments Approved by the Supreme Court: February 3, 2000; March 20, 2024.*

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0200 - PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

### 27 NCAC 01D .0208 SUING FOR INJUNCTIVE RELIEF

(a) ~~Upon receiving a recommendation from~~ If the Authorized Practice Committee recommends that ~~a complaint seeking~~ the North Carolina State Bar seek injunctive relief ~~be filed,~~to prevent the unauthorized practice of law, the chair will report the recommendation to the Executive ~~Committee~~Committee. ~~shall review the matter at the same quarterly meeting and determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.~~

(b) If the Executive Committee decides to ~~follow~~adopt the recommendation of the Authorized Practice Committee, ~~Committee's recommendation~~, it shall direct the counsel to prepare and file the necessary pleadings ~~as soon as practical for signature by the chairperson and filing with~~in the appropriate tribunal.

(c) If the Executive Committee decides not to ~~follow~~adopt the recommendation of the Authorized Practice Committee, ~~Committee's recommendation,~~ the ~~matter shall go before the~~ council ~~at the same quarterly meeting~~ will decide~~to determine~~ whether ~~the recommended action is necessary to protect the public interest and ought to be prosecuted.~~ to authorize prosecution of the matter.

(d) If the council decides not to ~~follow~~adopt the recommendation of the Authorized Practice Committee,~~Committee's recommendation,~~ the ~~matter~~file shall be referred back to the Authorized Practice Committee for alternative disposition.

(e) If probable cause exists to believe that a respondent is engaged in the unauthorized practice of law and the harmful nature of the conduct is such that immediate action is needed to protect the public interest before the next quarterly meeting of the Authorized Practice Committee, the ~~chairperson,~~chair, with the approval of the president, may direct the counsel to file ~~and verify~~ a complaint or petition in the name of the North Carolina State ~~Bar.~~Bar in~~with~~ the appropriate tribunal seeking such temporary, preliminary, and permanent relief as is warranted.

*History Note:* *Authority G.S. 84-37;*
*Approved by the Supreme Court: February 3, 2000;*
*March 20, 2024.*

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

## RULES GOVERNING STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .0700, *Procedures for Fee Dispute Resolution*, be amended as shown in the following attachment:

ATTACHMENT 4: 27 N.C.A.C. 01D, Section .0700, Rule .0708, *Settlement Conference Procedure*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of February, 2024.

s/Alice Neece Mine
Alice Neece Mine, 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 20th day of March, 2024.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming

volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of March, 2024.

s/Riggs, J.
For the Court

## SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0700 - PROCEDURES FOR FEE DISPUTE RESOLUTION

### 27 NCAC 01D .0708 SETTLEMENT CONFERENCE PROCEDURE

(a) . . . .

(b) The State Bar will ~~send~~serve a letter of notice ~~to~~upon the respondent lawyer. ~~lawyer by certified mail notifying the respondent that the petition was filed and notifying the respondent of the obligation to provide a written response to the letter of notice, signed by the respondent, within 15 days of service of the letter of notice upon the respondent, and enclosing copies of the petition and of any relevant materials provided by the petitioner.~~

(1) The letter of notice shall be served by one of the following methods:

(A) mailing a copy thereof by registered or certified mail, return receipt requested, to the last known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service;

(B) mailing a copy thereof by designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service;

(C) personal service by the State Bar counsel or deputy counsel or by a State Bar investigator;

(D) personal service by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process; or

(E) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar agreeing to accept service of the letter of notice by email. Service of the letter of notice will be deemed

complete on the date that the letter of notice is sent by email.

A member who cannot, with reasonable diligence, be served by one of the methods identified in subparagraphs (A)–(E) above shall be deemed served upon publication of the notice in the State Bar *Journal*.

(2) The letter of notice shall enclose copies of the petition and of any relevant materials provided by the petitioner.

(3) The letter of notice shall notify the respondent (i) that the petition was filed and (ii) of the respondent's obligation to provide to the State Bar a written response to the letter of notice, signed by the respondent, within 15 days of service of the letter of notice.

(c) . . . .

. . .

(e) The facilitator ~~will~~may conduct a telephone settlement conference.

. . . .

(f) The facilitator will explain the following to the parties:

(1) . . . ;

. . .

(8) that any agreement reached will be reached by mutual ~~consent.~~consent of the parties.

(g) . . . .

. . . .

*History Note* *Authority G.S. 84-23;*
*Adopted Eff. May 4, 2000;*
*Amendments Approved by the Supreme Court: March 11, 2010; September 25, 2019; March 20, 2024.*

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