No. 425A21-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION; et al.,
Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenor,

and

RAFAEL PENN, CHARLOTTE-MECKLENBURG BRANCH OF THE STATE CONFERENCE OF THE NAACP *et al*.,
Plaintiffs-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,
Defendants-Appellees,

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 Wake County
No. P21-511

****

PLAINTIFF-INTERVENORS' REPLY BRIEF

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Intervenor-Defendants.)

****

PLAINTIFF-INTERVENORS' REPLY BRIEF

****

SUMMARY OF ARGUMENT

It is not surprising that Intervenor-Defendants Philip E. Berger and Timothy K. Moore rehash the same unpersuasive arguments raised in their Opening Appellants' Brief: (1) that statewide relief is prohibited by *Leandro II* and that no court ever found a statewide violation, no matter the express language of this Court's *Leandro I* and *II* opinions or the substantial record developed over the past two decades; and (2) that the trial court erred in ordering the transfer of funds, despite the legislature's failure to fully fund the State-proposed and court-approved remedial plan. After all, they have largely ignored the Court's opinions in this case, as well the trial court's findings and orders, and refused to propose their own remedial plan, much less fully support any measures proposed by the State to this day.

Likewise, Controller Nels Roseland avers that the trial court erred in ordering the transfer of funds, launching a series of ill-fated defenses: misapplying the law of the case doctrine; improperly invoking the void *ab initio* doctrine with respect to the 10 November 2021 Order (the "November Order");

misstating the law when conflicts arise between statutory obligations and constitutional duties by suggesting that the former prevails; making unfounded threats of criminal liability facing the Controller and its employees; and erroneously complaining of the lack of due process of the November Order, even though the Controller itself filed a petition for a writ to enjoin parts of the November Order before it became effective. The Controller goes so far as to suggest that students across the state, including Penn-Intervenor schoolchildren, deprived of a sound basic education are out of luck, left only to the "good will of the legislature" to fund the remedial plan and enforce their constitutional rights. (Controller's Response Br. at 38).

The common thread among all of Intervenor-Defendants' and the Controller's arguments is that the Court should permit the legislature to avoid liability at all costs—even at the expense of schoolchildren. But many of these far-reaching defenses are irrelevant to the consideration of the 26 April 2022 Order—the subject of this appeal—and none deserve serious consideration.

The Court has made clear—in this case, as well as several others—that the judiciary has the authority to interpret rights and obligations due under the Constitution, and it can, indeed must, enforce constitutional rights when they are abridged—without interference from the legislature. Accordingly, Penn-Intervenors respectfully urge the Court to affirm the trial court's November Order, as well as the portion of 26 April 2022 Order (the "April

Order") that adjusts the transfer amounts in the November Order in light of the subsequently passed 2021 Budget Act.

ARGUMENT

I. The November Order's Transfer Provisions Were Not at Issue on Remand and the Law of This Case Compels a Judicially Enforceable Remedy

Both Intervenor-Defendants and the Controller misrepresent the terms of this Court's 21 March 2022 Order (the "Remand Order") in order to sidestep liability. They broadly interpret the Remand Order's directive to the trial court to determine "what effect, if any, the enactment of the State Budget has upon the *nature and extent* of the relief" in the November Order, suggesting that this language allowed the trial court to revisit the judicial authority supporting the transfer provisions and to amend the November Order. (Intervenor-Defendants' Appellee Br. at 23–24; Controller's Br. at 28–32). They further argue that the Court of Appeals' writ of prohibition entered on 30 November 2021 compelled the trial court to strike the transfer provisions of the November Order under the law of the case doctrine. They are wrong on both counts.

First, as discussed previously in Penn-Intervenors' Appellant Brief, *see* Br. at 21–27, the plain language of the Remand Order did not authorize the trial court to reconsider the merits of the November Order's directive to transfer the funds, regardless of the Court of Appeals' writ of prohibition. This Court knew that Plaintiffs and Penn-Intervenors were challenging that writ in

their respective appeals and petitions for review of the writ, and it had stayed those proceedings. *See* Remand Order, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 425A21-2 (N.C.). Had this Court intended for the trial court to revisit the constitutional basis for the transfer provisions or the impact of the writ on the November Order, it plainly would have said so—but it did not.

Furthermore, even if the Court considers the law of the case doctrine, the writ has no precedential value because it only operates as a temporary stay, not as a decision on the merits. If anything, this Court's *Leandro* rulings demonstrate that it was the Court of Appeals that failed to follow precedent. Indeed, in its three-page order, the Court of Appeals' 2-1 decision fails to reference any of this Court's three *Leandro* opinions, instead proffering "money judgment" cases for the proposition that the judiciary cannot compel State compliance with remedial orders. (R p 2008–10). But those cases are not on point, and the Court of Appeals' reasoning is not persuasive.

A. The Remand Order Limited the Trial Court to Determining the Impact of the Budget Act—Not the Writ of Prohibition—on the November Order

As the Controller acknowledges, this Court's mandate on remand "is binding upon [the trial court] and must be strictly followed without variation or departure. . . . Otherwise . . . the supreme tribunal of the state would be shorn of authority over inferior tribunals." (Controller's Br. at 29 (quoting *Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit*, 107 N.C. App. 375, 378–

79, 420 S.E.2d 462, 464 (1992) (internal citations and quotation marks omitted)). Nevertheless, he[1] proceeds to interpret the Remand Order in a way that grants large allowances to the trial court to act beyond this Court's mandate, suggesting that the trial court could issue any "necessary findings . . . it chooses to enter," irrespective of their connection to the narrow issue ordered on remand. (Controller's Br. at 30). Such broad interpretations in remand cases would give the trial courts unfettered discretion, undermining the force of this Court's narrow remands. And, it would require the parties to spend significant resources to relitigate issues that are already pending on appeal—similar to what is now occurring with this briefing.[2]

Because the trial court erred by exceeding the scope of the remand when it struck the transfer provisions of the November Order, this Court need not reach the merits of Intervenor-Defendants' and the Controller's argument that

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[1] Penn-Intervenors use the pronouns "he" and "his" to refer to the Controller because that is the pronoun used by Mr. Roseland, the current State Controller, in his brief. Linda Combs was the State Controller at the time of the November Order and the Writ of Prohibition.

[2] In fact, the Controller goes even further with his interpretation of the Remand Order and the April Order, averring that the April Order replaced the November Order in its entirety and that the latter now has no legal effect. (Controller's Br. at 30). But the express language of the Court of Appeals order is to the contrary, stating "the writ of prohibition does not impact the trial court's finding that these funds are necessary, and that portion of the judgment remains." (R p 2009).

the Court of Appeals' writ was binding authority on the trial court. Indeed, the Court should not reach the merits of the Court of Appeals' writ, as the plaintiff parties' appeals and petitions of the writ have been abated by this Court. (*See* Remand Order and 31 May 2022 Order).

B. The Writ of Prohibition Operates Only as a Temporary Stay, Not as Binding Precedent on the Merits

Intervenor-Defendants and the Controller characterize the Court of Appeals' order issuing a writ of prohibition as a binding decision on the merits, in support of their contention that the trial court had to strike the transfer provisions from the November Order. (*See* Controller's Br. at 16–18, Intervenor-Defendants' Appellant Br. at 23–25). They are incorrect. A writ of prohibition is not a decision on the merits, but rather is akin to a temporary stay pending appeal.

The purpose of a writ of prohibition is merely to maintain the status quo pending the exercise of appellate jurisdiction. Indeed, the writ "issues to and acts upon courts as an injunction acts upon parties[.]" *State v. Whitaker*, 114 N.C. 818, 822, 19 S.E. 376, 377 (1894) (internal citations omitted). "[P]rohibitory orders and injunctions"—which prohibit an action from being taken, similar to a writ of prohibition, and "preserv[e] the status quo"—"remain in effect on appeal . . . ." Scherer & Leerberg, 1 North Carolina Appellate Practice and Procedure § 6.03 (2022). As such, the writ of prohibition

merely stayed enforcement of the transfer provisions of the November Order pending the outcome of this appeal. *See Chavez v. Carmichael*, 262 N.C. App. 196, 217, 822 S.E.2d 131, 145 (2018) (Dietz, J., concurring) (noting that a trial court order entered while a writ of prohibition was in effect was "properly held . . . in abeyance pending the outcome of" the appeal of the case in which the writ was entered). The writ was not, as Intervenor-Defendants and the Controller claim, a reversal on the merits.

All parties, except for the Controller, appealed the November Order, divesting the trial court of jurisdiction to proceed with the matter. N.C. Gen. Stat. § 1-294; *see also RPR & Assocs. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002) ("[I]f a party appeals an immediately appealable interlocutory order, the trial court has no authority, pending the appeal, to proceed with the trial of the matter."). Thus, on remand, the trial court was bound only by the terms of this Court's Remand Order: to determine the effect of the State Budget on the amounts necessary to be transferred to fund the CRP. To strike the transfer provisions—which had not been reversed by the Court of Appeals, but had simply been held in abeyance pending appeal—was in error.

C. In Issuing its Writ of Prohibition, the Court of Appeals Plainly Disregarded This Court's *Leandro* Mandate to Remedy Constitutional Violations

If the Court reaches the law of the case doctrine's applicability here, it is this Court's *Leandro* opinions, requiring the judiciary to ensure an adequate remedy for a constitutional violation, that clearly control—not the Court of Appeals' order that ignored those rulings.

In *Leandro II*, this Court recognized the judiciary's important role of ensuring that the State abides by its constitutional duty to ensure a sound basic education. The Court proclaimed "we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 645, 599 S.E.2d 365, 395 (2004) ("*Leandro II*"). While the Court deferred to the State to present a remedy to resolve the constitutional violations proven by the record, the Court held that, if the State fails to satisfy its duty, a court "is empowered to order the deficiency remedied"; and if the State fails to act, "a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Id.* at 642, 599 S.E.2d at 393. In 2013, this Court affirmed that its mandates in *Leandro I*[3] and *II* "remain in full force and

[3] *Leandro v State of N. Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*").

effect." *Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 160, 749 S.E.2d 451, 455 (2013). The law of the case clearly demonstrates that the courts have a continuing duty to ensure a remedy is achieved for any established violations and to enforce that remedy.

Nevertheless, in its hastily issued order, the Court of Appeals ignored these rulings, erroneously characterizing the November Order as a "money judgment" and stating that, if the State failed to satisfy such judgment, then "the remedy lies not with the courts, but at the ballot box." (R p 2009 (quoting *Richmond County Board of Education v. Cowell*, 254 N.C. App. 422, 429, 803 S.E.2d 27, 32 (2017))). Intervenor-Defendants and the Controller also mischaracterize the November Order as a simple "money judgment." (Intervenor-Defendants' Appellee Br. at 46; Controller's Br. at 39). They are wrong, and this fundamental misunderstanding of the November Order and this Court's holdings in *Leandro I & II* show how the Court of Appeals' writ conflicts with the law of *this case* established by *this Court*.

First, the November Order is not a "money judgment." It is an order to enforce the implementation of the State's own comprehensive remedial plan (the "CRP") to resolve the denial of students' fundamental right to a sound basic education. In the trial court's June 2021 Consent Order, the Court recognized the import of *Leandro I*. It stated that, if the State failed to implement the CRP, "'it will then be the duty of this Court to enter a judgment

granting declaratory relief and such other relief *as needed to correct the wrong*.'" (R p 1683 (quoting *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261 (emphasis added))). Accordingly, the court ordered the State to ensure "the State's compliance with this Order, including without limitation seeking and securing such funding and resources as are needed and required to implement" the CRP. (R p 1684).

When the State, particularly the General Assembly, failed to provide the necessary funding and resources, despite significant available resources, the court took the next step to *correct the wrong* by ordering the transfer of such funds from unappropriated funds. This order to ensure the State's provision of the fundamental right to a sound basic education is inapposite to the cases involving *claims for money damages* cited by the Court of Appeals, Intervenor-Defendants and the Controller for the proposition that the courts cannot execute money judgments against the State. *See, e.g.*, *Smith v. State*, 289 N.C. 303, 311 S.E.2d 412, 418 (1976) (claim for damages related to alleged wrongful dismissal); *Richmond*, 254 N.C. App. at 423, 803 S.E.2d at 29 (school districts' claim to collect money damages against State for improperly directing certain funds to prisons instead of schools); *Able Outdoor v. Harrelson*, 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995) (claim for attorneys' fees). None of those cases suggests that the courts cannot right a constitutional wrong where funding is a necessary component to effectuating a remedial plan.

Second, even if this Court were to hold that the *Leandro* opinions did not establish binding precedent on the Court of Appeals, the law of the case doctrine should not be applied as rigidly as the Controller and Intervenor-Defendants contend here. As the Controller acknowledges, "the law of the case doctrine does not apply with equal force to every issue and may be disregarded where the issue is of special importance." (Controller's Br. at 32 (quoting *Watts v. N.C. Dep't of Envtl. & Nat. Res.*, No. COA09-1499, 2010 N.C. App. LEXIS 1246, at *9 (July 20, 2010) (unpublished) (citing *Am. Canoe Ass'n v. Murphy Farms, Inc.,* 326 F.3d 505, 515–16 (4th Cir. 2003) (citing 18B Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478.5 (2d ed. 2002) ("The force of law-of-the-case doctrine is affected by the nature of the first ruling and by the nature of the issues involved. If the ruling is avowedly tentative or the issues especially important, it may be said that law-of-the-case principles do not apply.")), *appeal after remand,* 412 F.3d 536 (2005)).

Here, given the enormity of the constitutional issues at hand, the collateral proceedings involving the writ, the appeals thereof that have been stayed, and the Court of Appeals' issuance of the writ after providing respondents only one day to respond, special circumstances are present. They counsel against affording the writ any weight under law of the case doctrine.

II. The Transfer Provisions of the November Order Do Not Violate the State Constitution

Ultimately, it may not matter whether the law of the case doctrine applies because the Court of Appeals' decision was incorrect. Intervenor-Defendants[4] and the Controller rehash the same arguments raised by Intervenor-Defendants in their Appellant Brief, proffering that the trial court exceeded its judicial authority by ordering state fiscal officers to transfer unappropriated funds for purposes of resolving the constitutional deprivation. (Intervenor-Defendants' Appellee Br. at 25–27; Controller's Br. at 25–27). They similarly argue that there is no support in the text or legislative history of the North Carolina Constitution to order the transfer of funds. (*See* Intervenor-Defendants' Appellee Br. at 27–55; Controller's Br. at 22–27). At their core, all

[4] Intervenor-Defendants also recycle arguments from their Appellant Brief that the trial court erred in addressing statewide constitutional violations through the CRP. (Intervenor-Defendants' Appellee Br. at 12–15). That issue is not relevant to any proper appeal of the April Order. Nevertheless, as discussed more fully in Penn-Intervenors' Appellee Brief (*see* Br. at 5–8, 82–94), *Leandro I* and *II* clearly contemplated that the plaintiff parties would present evidence of the statewide failures and a remedy that aligned with that evidence. *See, e.g.*, *Leandro I*, 346 N.C. at 345, 357, 488 S.E.2d at 254, 261 (remanding case, without limitation, for findings and conclusions related to the denial of the right to a sound basic education); *Leandro II*, 358 N.C. at 612 n.2, 613 n.5, 599 S.E.2d at 375 nn.2, 5 (acknowledging that not all of the claims for all parties have been presented in the trial court for final resolution and would be considered on remand). Indeed, this Court decisively held that, if the evidence on remand supported other violations, and the State failed to propose a remedy, the trial court itself could impose a remedial plan and enforce that order. *See Leandro II*, 358 N.C. at 642, 599 S.E.2d at 393.

of these arguments boil down to the same point: The legislature has sole and exclusive control over the power of the purse, without exception, under any circumstances. But, as explained in Penn-Intervenors' Appellee brief, this assertion is simply not accurate. *See* Penn-Intervenors' Appellee Br. at 29–58 (discussing judiciary's inherent, equitable and constitutional authority to remedy constitutional violation by ordering transfer of funds).

Indeed, the Controller's belittling reference to the fundamental right to a sound basic education as "aspirational" (Controller's Br. at 37), and his suggestion that the courts are powerless to enforce the right and can only rely on the "good will of the legislature" (Controller's Br. at 38), show how far removed he is from controlling precedent. As discussed above, this Court's holdings in *Leandro I* and *II* affirm the remedial and enforcement powers of the courts.

There is no question that, ordinarily, the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37, 852 S.E.2d 46, 58 (2020). But the Constitution also affirmatively requires that the State provide its children with a sound basic education. N.C. Const. art. I, § 15; art. IX, § 2(1). And, the Constitution instructs that a violation of this right must have a remedy. *See* N.C. Const. art. I, § 18. These constitutional provisions must be read together,

not cherry-picked to support the reading that the Intervenor-Defendants and the Controller desire. *See Leandro I*, 346 N.C. at 352, 488 S.E.2d at 258 ("It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself.").

This Court in *Cooper* specifically held that resolving separation of powers issues raised by conflicting constitutional provisions "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Cooper v. Berger*, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)). To suggest that the legislature has a role in applying canons of constitutional construction such as *in pari materia* is, quite simply, incorrect. Indeed, in the cases cited in the Controller's brief describing the *in pari materia* canon, the Court assumes singular responsibility for resolving various conflicting provisions via constitutional interpretation. *See Blankenship v. Bartlett*, 363 N.C. 518, 525–26, 681 S.E.2d 759, 765 (2009) (construing a constitutional provision giving citizens the right to vote for superior court judges in conjunction with the Equal Protection Clause to "prevent internal conflict"); *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (explaining that the rules of construction require *the courts* to construe competing articles of the North Carolina Constitution in conjunction with one another).

Where, as here, the courts have afforded the State every reasonable deference but it continues to fail in its duty to provide for a sound basic education, the judiciary must be empowered to enforce the Constitution itself. *See Leandro I*, 346 N.C. at 352, 488 S.E.2d at 258; *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 97, 405 S.E.2d 125, 131 (1991) (recognizing that the judiciary has authority to exercise its "incidental powers," *i.e.*, "some activities usually belonging to one of the other two branches," in order "to fully and properly discharge its duties"). To hold otherwise, as the trial court cautioned, "would render both the North Carolina State Constitution and the rulings of the Supreme Court meaningless." (R p 1825).

Intervenor-Defendants seemingly acknowledge that these constitutional provisions impose limits on the legislature's control over the power of the purse: they recognize that the Constitution "might" not permit the General Assembly to "wholly fail[] to provide for the public school system or [seek] to eliminate it entirely." (Intervenor-Defendants' Appellee Br. at 42). Thus, even under their reading of the Constitution, the power of the purse is not exclusively vested in the legislature, and the judiciary is empowered to protect the constitutional right to a sound basic education from complete elimination by legislative act. The Intervenor-Defendants, however, offer no principled basis for why the judiciary has the power to protect that right from complete eradication through a single legislative act, but not to protect it from death-by-

a-thousand-legislative-cuts over the span of nearly two decades. That is because the legislature cannot inflict such an arbitrary limitation on the judiciary's power. *See Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987) ("The existence of inherent judicial power is not dependent upon legislative action; . . . the General Assembly cannot abridge that power.").

The November Order flows from this Court's prior rulings recognizing that the judiciary has the power to step in under such circumstances. *See Leandro II*, 358 N.C. at 642, 599 S.E.2d at 393. The trial court acted in accordance with the Supreme Court's directive here.

III. The Controller's Other Defenses are Equally Unavailing.

The Controller proffers other defenses, none meritorious. First, the November Order was not void *ab initio* and could not be replaced wholesale by the April Order on remand. (*Compare* Controller's Br. at 34–36). Second, none of the appropriation statutes cited by the Controller would prohibit this Court, and any lower court pursuant to this Court's directive, from ordering the transfer of funds and enforcing that order against offending parties. (*Compare* Controller's Br. at 36–43). While the General Assembly ordinarily must appropriate funds pursuant to statute, the Constitution is the superior law of North Carolina. The courts can properly exercise their enforcement and remedial powers to ensure that all actors—including the Controller—abide by such orders to create and preserve access to a sound basic education for all.

A. The November Order was Not Void *Ab Initio* and A Subsequent Trial Court Could Not Overrule It

The Controller argues that Judge Robinson was not bound by Judge Lee's November Order because it was void *ab initio*. This argument misunderstands the procedural posture of this case and the law.

"An order is void *ab initio* only when it is issued by a court that does not have jurisdiction." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986). By contrast, "[a] judgment that is rendered according to the proper procedure of the court but contrary to law or based upon a mistaken view of the law is not void, but erroneous, and therefore subject to correction for errors of law committed in the trial court by appeal." North Carolina Civil Procedure § 60-9 (2021) (citing *Burton v. Blanton*, 107 N.C. App. 615, 421 S.E.2d 381 (1992); *Windham Distrib. Co. v. Davis*, 72 N.C. App. 179, 181, 323 S.E.2d 506, 508 (1984)).

Here, in its November Order, the trial court concluded that it had authority under the North Carolina Constitution, as interpreted by this Court in *Leandro I*, *Leandro II*, *Alamance County* and other cases, to order the transfer of funds necessary to implement the CRP. *See* Penn-Intervenors' Appellee Br. at 29–58. The Court of Appeals disagreed, concluding that the trial court's reading of the Constitution and Supreme Court precedent was erroneous. (*See* R p 2008 (stating that the "trial court *erred* for several reasons"

(emphasis added))). However, it did not hold that the trial court lacked jurisdiction to issue its order and that its decision was void *ab initio*. (R pp 2008–09). In fact, this Court will resolve the conflicting legal interpretations of the trial court and Court of Appeals (by way of Intervenor-Defendants and the Controller, who raise similar arguments) on this appeal.

Moreover, this Court granted appeal directly from the November Order, bypassing the Court of Appeals and holding its proceedings in abeyance. (*See* 21 March 2022 Order, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 425A21-2 (N.C.)) The issue before this Court, then, is whether the trial court's order was correct; the Court of Appeals order is not the subject of this appeal. (See Penn-Intervenors' Appellee Br. at 20, n.4). Thus, in arguing that the November Order is void *ab initio*, the Controller has "confused what constitutes an erroneous judgment with a void one." *Windham Distrib. Co.*, 72 N.C. App. at 182, 323 S.E.2d at 509.

B. No "New Information" Justified Elimination of the November Order's Transfer Provisions

The Controller argues that, at the time Judge Robinson issued the April Order, he had at his disposal new information about the passage of the 2021 Appropriations Act (the "Budget Act" or "State Budget") and related appropriation statutes and processes. (Controller's Br. at 36–43). According to the Controller, this information allowed him to "correct" the November Order

and align the order with the law and Article V, section 7 of the Constitution concerning the drawing of public funds. Those arguments miss the mark for several reasons.

First, as stated above and in Penn-Intervenors' Appellee Brief (*see* Br. at 41–47), Article V, section 7 of the North Carolina Constitution, in conjunction with the constitutional education provisions (N.C. Const. art. I, § 15; art. IX, §§ 2, 6 and 7), support the trial court's constitutional appropriation as an "appropriation made by law." Second, even if the aforementioned constitutional provisions do not authorize a constitutional appropriation, the transfer provisions of the November Order are authorized under the court's inherent and equitable powers to correct constitutional wrongs. Article V, section 7 of the Constitution cannot be used as a sword to strike down the judiciary's authority and as a shield to avoid its constitutional duties. (*See* Penn-Intervenors' Appellee Br. at 29–58). The judiciary has long recognized that it can use its inherent and equitable powers broadly and flexibly to remedy constitutional violations. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.); *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016) ("[O]nce a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, . . .

court[s] ha[ve] broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs." (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982))). This Court has similarly held that "trial courts have broad discretion to fashion equitable remedies to protect innocent parties when injustice would otherwise result." *Kinlaw v. Harris*, 364 N.C. 528, 532–33, 702 S.E.2d 294, 297 (2010). Therefore, it does not matter what "new information" was presented to the trial court in the April 26 Order; the court had the judicial authority to order the transfer of funds.

Third, and relatedly, statutes cannot be used to frustrate and override the State's constitutional duty to ensure a sound basic education. When a statute conflicts with a constitutional provision, "'this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.'" *Asheville v. State*, 369 N.C. 80, 88, 794 S.E.2d 759, 766–67 (2016) (citations omitted).

On this final point, the Controller suggests that, once the 2021 Budget Act passed, the Controller had to strictly abide by the statutes enacted by the General Assembly to appropriate funds. According to the Controller, those statutes do not allow the Controller to distribute unappropriated funds in the manner directed by the November Order and that the Controller cannot be forced to do so. In the mind of the Controller, the only appropriations it can

make are through the legislature. (*See* Controller's Br. at 36–43). However, that presupposes, wrongly, that legislative statutes supersede the North Carolina Constitution. The reverse is true. It is bedrock law that, when there is a conflict between a statute and the Constitution governing the rights, liabilities and duties of the parties, "the Constitution is the superior rule of law. . . ." *Nicholson v. State Ed. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969).

Should this Court hold that the transfer provisions are proper, then this Court's mandate and any necessary trial court order can be enforced against the Controller—*if* the Controller refuses to comply. For example, a mandamus proceeding could be initiated to command the Controller to make the transfer imposed by the Constitution. *See, e.g.*, *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 364, 777 S.E.2d 733, 736 (2015); *see also Alamance*, 329 N.C. at 102–06, 405 S.E.2d at 134–36 (discussing appropriateness of mandamus proceedings to compel state and county officers to comply with constitutional and statutory duties in various cases).[5]

[5] The Washington Supreme Court has utilized a variety of tools, including contempt proceedings and sanctions, to force the State to present and fully fund a constitutionally adequate education. *See* Order, *McCleary v. State*, No. 07-2-02323-2 SEA (Wash. 2018).

Finally, the Controller asserts that, while "the plaintiffs have a direct constitutional claim for a sound basic education," the State has not waived sovereign immunity on the execution of the judgment in this case. (Controller's Br. at 38). Seemingly relying on its mistaken position that the November Order is merely a "money judgment" (*see* Controller's Br. at 38–39), none of the cases cited by the Controller suggest that a court cannot compel the State and its officers to comply with an enforcement order involving a constitutional right.[6] As this Court has explained, "it would indeed be a fanciful gesture to say . . . that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity." *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 291

[6] The Controller cites, for example, *Deminksi v. State Board of Education* to assert that "the constitutional minimum for an adequate remedy as heretofore defined is the right to present a claim in court" and that the execution of any judgment against the State is subject to the "good will" of the legislature. (Controller's Br. at 38 (citing *Deminski v. State Bd. of Educ.,* 377 N.C. 406, 414, 858 S.E.2d 788, 794 (2021))). *Deminski*, however, did not discuss specific remediation under the North Carolina Constitution. Instead, the Court held that, to allege a cause of action under the North Carolina Constitution, there must first be no adequate state remedy. *Id.* at 413, 858 S.E.2d at 794. The Court clarified—using the quote cited in the Controller's Brief—that plaintiffs can make a constitutional claim for relief when a state law claim is barred by sovereign immunity. *Id.* at 413–14, 858 S.E.2d at 794. The Court did not, as the Controller posits, suggest that a plaintiff's ability to proceed with a direct constitutional claim constitutes an adequate remedy in and of itself. Such far-reaching arguments have been rejected in several cases cited in Penn-Intervenors' Appellee Brief, (*see* Br. at 29–58), and do not comport with this Court's *Leandro* decisions, *see* Argument Part I.

(1992). Constitutional rights "are a part of the supreme law of the State," while sovereign immunity "is not a constitutional right; it is a common law theory or defense established by this Court." *Id.*, 413 S.E.2d at 292. Thus, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.*

Ultimately, State actors cannot claim sovereign immunity to avoid execution of a remedial plan involving a fundamental right, and the legislature cannot interfere with the courts' authority to preserve such rights. *See, e.g.*, *State v. Buckner,* 351 N.C. 401, 411, 527 S.E.2d 307, 313 (2000) ("Inherent power is that which the court necessarily possesses irrespective of constitutional provisions. Such power may not be abridged by the legislature."); N.C. Const. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government[.]"). Here, there exists a statute that authorizes expenditures from the Savings Reserve to satisfy court orders, including the November Order. N.C. Gen. Stat. § 143C-4-2(b) (emphasis added). Thus, the transfer of funds is specifically authorized by law, sovereign immunity is not at issue, and the only barrier to relief for thousands of schoolchildren across the state is the legislature and the Controller's defiance of the November Order. That barrier cannot stand in light of this Court's duty

to do what is necessary for "the orderly and efficient exercise of the administration of justice." *Beard*, 320 N.C. at 129, 357 S.E.2d at 696 (1987).

C. The November Order Does Not Expose the Controller and His Employees to Civil and Criminal Liability Without Due Process

The Controller argues "Judge Lee entered his order without regard for the Controller's rights to procedural due process, and in doing so deprived the Controller of the right to be heard prior to the entry of any judgment affecting the Controller's substantial rights." (Controller's Br. at 14). Not so. In fact, this argument misrepresents both the terms of the November Order and the procedural history of this action.

First, the November Order did not go into effect immediately. Rather, as stated in the Order itself, "This Order, except the consultation period set forth in paragraph 3, is hereby stayed for a period of thirty (30) days to preserve the *status quo*, including maintaining the funds outlined in Paragraph 1 (a)–(c) above in the State Treasury, to permit the other branches of government to take further action consistent with the findings and conclusions of this Order." (R p 1842).

Thus, the Controller, as well as the Office of State Budget and Management and the Treasurer, were put on notice of the November Order prior to it taking effect. Indeed, the Controller acknowledges as much in his brief. (*See* Controller's Br. at 6 ("The November 10th Order contained a partial

stay delaying its implementation for thirty days . . . . Immediately after being made aware of the Order by the press reports, the Controller sought representation . . . which was approved by the Governor.”)). Further, when the Budget Act passed, the trial court scheduled a hearing for 13 December 2021 to consider amending its order in light of the enacted budget and further stayed its order for 10 days following the 13 December hearing. (R pp 2128–30). Rather than appearing in the trial court, the Controller instead elected to file a Petition for Writ of Prohibition, Temporary Stay, and Writ of Supersedeas. (Controller’s Br. at 6 (citing R p 1893)). On 30 November 2021, the Court of Appeals granted the Controller’s Petition for Writ of Prohibition. (R p 2008–10).

Therefore, the Controller acknowledges that he received notice and had the opportunity to participate in the trial court’s proceedings, but elected instead to petition the Court of Appeals. He cannot now be heard to complain that the trial court deprived him of the opportunity to be heard before the November Order took effect, when any such deprivation resulted from the Controller’s own litigation strategy.

Lastly, the Controller makes the related argument “that Judge Lee lacked jurisdiction to enter any order against the Office of State Controller on 10 November 2021.” (Controller’s Br. at 18). This, too, is unpersuasive. An order granting an injunction is effective not only on the parties to the litigation,

but also "their officers, agents, servants, employees, and attorneys." N.C. R. Civ. P. 65(d). The November Order applies to the Office of the State Controller in his official capacity—not an individual in a personal capacity. The Office of the State Controller operates within the executive branch under the Department of Administration. *See* N.C. Gen. Stat. § 143B-426.36. Unquestionably, the State's executive branch was a named party and participant throughout this litigation, including through the issuance of the November Order. In short, the Office of the State Controller was on notice of the November Order, and the trial court had jurisdiction to enter the same.

IV. The Court Lacks Jurisdiction to Consider the Intervenor-Defendants' Untimely Challenges to the Trial Court Orders Preceding the November Order

In their appellant brief, Intervenor-Defendants challenged the substance of orders preceding the November Order. (Intervenor-Defendants' Opening Br. at 55–56). In response, Penn-Intervenors addressed this Court's lack of jurisdiction to hear Intervenor-Defendants' challenges to those orders. (*See* Penn-Intervenors' Appellee Br. at 65–81). Intervenor-Defendants now argue that this Court has jurisdiction over their untimely appeal of the trial court's orders prior to the November Order because: (1) interlocutory orders are generally not subject to appeal absent limited exceptions; and (2) even when those exceptions apply, the affected party may delay appeal until after entry of final judgment. (Intervenor-Defendants' Appellee Br. at 17). Alternatively,

Intervenor-Defendants claim that this Court may grant their petition for a writ of *certiorari* over their untimely claims. (Intervenor-Defendants' Appellee Br. at 21, n.10).

These arguments are meritless, and this Court should hold that it lacks jurisdiction over their untimely appeal of the trial court's earlier orders. First, Intervenor-Defendants did not present their challenges to the earlier orders before the trial court, and thus they did not preserve these challenges for appeal. Second, they failed to designate those orders in their notice of appeal of the November Order, and their delayed attempt to amend their notice of appeal was untimely; as such, those challenges are not before this Court.

A. Intervenor-Defendants Failed to Preserve Their Objections Before the Trial Court

Intervenor-Defendants did not properly preserve any of their challenges to the earlier orders for appeal, because they failed to intervene and timely raise any objections before the trial court. (Penn-Intervenors' Appellee Br. at 73–75 (citing N.C. R. App. P. 10(a)(1); *State v. Spence*, 237 N.C. App. 367, 369–70, 764 S.E.2d 670, 674 (2014))). For example, Intervenor-Defendants contend that the trial court lacked authority to impose a statewide remedy, because statewide violations were not raised in the pleadings. But they never intervened asserting such claims, even though they knew for years that the trial court was considering and ruling upon evidence of statewide deprivations

and a statewide remedy. (*See* Penn-Intervenors' Appellee Br. at 85). As Intervenor-Defendants failed to properly preserve their challenges to the earlier orders, they are waived on this appeal. (*Id.* at 73–75).

B. Intervenor-Defendants Failed to Properly Designate the Earlier Orders in Their Notices of Appeal

Penn-Intervenors do not dispute that interlocutory orders are subject to appeal only in limited circumstances, nor that the orders in this case preceding the November Order were interlocutory. These earlier orders, however, were immediately appealable as affecting Intervenor-Defendants' substantial rights. (*See* Penn-Intervenors' Appellee Br. at 77–81). But Intervenor-Defendants have not properly appealed those orders: they did not appeal them at the time of entry, nor designate them in their later notices of appeal. Intervenor-Defendants thus have waived their right to appeal those orders.

Intervenor-Defendants argue that their failure to appeal these interlocutory orders immediately did not waive their right to seek later review, as a final judgment was not entered until the November and April Orders. (Intervenor-Defendants' Appellee Br. at 17). Even assuming the November and April Orders were final judgments,[7] Intervenor-Defendants are incorrect.

[7] "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. R. Civ. P. 54(a). "A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338

Where a party fails to designate an interlocutory order in its notice of appeal, it must satisfy this Court's three-prong test to appeal that interlocutory order, as articulated in *Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit, ACA*, 350 N.C. 47, 51, 510 S.E.2d 146, 159 (1999). (*See* Penn-Intervenors' Appellee Br. at 77–78 (collecting authority)). That test requires an appellant to demonstrate: (1) timely objection to the order, (2) the order is interlocutory and not immediately appealable, and (3) the order involves the merits and necessarily affected the judgment. *Floyd & Sons, Inc.*, 350 N.C. at 51–52, 510 S.E.2d at 159.

As further explained in Penn-Intervenors' Appellee Brief, Intervenor-Defendants did not designate the orders preceding the November Order in their first notice of appeal, and their later attempt to amend this deficient notice was untimely. (Penn-Intervenors' Appellee Br. at 66–72). Thus, they must satisfy the three-part test to appeal those earlier orders now. But they cannot. Intervenor-Defendants' fail that test, because they did not timely

(2005), *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005). Neither the November nor April Orders were designated as final judgments that fully resolved the issues between all parties, including Intervenor-Defendants. Thus, they are interlocutory orders. As noted above, Judge Lee had set a hearing for 13 December 2021 to determine the effect of the 2021 Budget Act on the November Order and had extended his stay of the order. Moreover, the April Order was entered on a limited remand from an appeal pending before the Supreme Court of the interlocutory November Order.

object to those earlier orders and the orders were immediately appealable. (*Id.* at 77–81).

Intervenor-Defendants argue that their decision not to immediately appeal the interlocutory orders preceding the November Order did not result in waiver of their right to seek review upon entry of final judgment, citing *Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N. Carolina., Inc.*, 175 N.C. App. 339, 342, 623 S.E.2d 334, 337 (2006), and *DOT v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999). (Intervenor-Defendants' Appellee Br. at 17). But they gloss over the fact that they did not merely *delay* their appeal of orders preceding the November Order until after entry of final judgment—they *failed* to preserve those issues for appeal before the trial court *and* to properly designate those orders for appeal. (Penn-Intervenors' Appellee Br. at 66–72). Such fatal defects were not at issue in *Atlantic Coast* and *Rowe*, as appellants properly preserved their objections and appealed interlocutory orders after entry of final judgment. *Atl. Coast*, 175 N.C. App. at 342, 623 S.E.2d at 337; *Rowe*, 351 N.C. at 174, 521 S.E.2d at 708. That is not the case here. This Court therefore lacks jurisdiction over the unpreserved and undesignated claims that Intervenor-Defendants ask it to review.

In a final pitch to get this Court to review its untimely challenges despite its lack of jurisdiction, Intervenor-Defendants ask the Court to grant their conditional petition for a writ of *certiorari* on their belated claims. (Intervenor-

Defendants' Appellee Br. at 21, n.10; *see also* Intervenor-Defendants' Conditional Pet. for Writ of *Certiorari*, ECF No. 22). But Intervenor-Defendants cannot use their petition to circumvent this Court's lack of jurisdiction. "'A writ of *certiorari* is not intended as a substitute for a notice of appeal' because such a practice would 'render meaningless the rules governing the time and manner of noticing appeals.'" *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021) (quoting *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017)).

Because Intervenor-Defendants did not appeal any of the earlier orders, this Court is "unable to reach the substance of" Intervenor-Defendants' challenges through a petition for *certiorari*. *Assure RE Intermediaries, Inc v. Pyrtle*, 280 N.C. App. 560, 2021-NCCOA-665, ¶ 24 (2021). In *Assure*, the petitioners appealed an order adopting the legal conclusions of an earlier order regarding venue, alternatively seeking a writ of *certiorari* to review the earlier order. *Id.* at ¶ 18. But the petitioners did not argue that the second trial judge erred by adopting the legal conclusions of the earlier order. *Id.* at ¶ 23. Rather, their "arguments for why the trial court erred [were] entirely premised on . . . purported errors of law" in the earlier order, "which [appellants] did not appeal from." *Id.* Consequently, the "rulings from the [first order] [were] not properly before" the Court of Appeals, and therefore it declined to grant *certiorari* to hear those issues. *Id.* at ¶ 24. Intervenor-Defendants now seek to replay this

scenario, asking this Court to review claims that lie outside its jurisdiction. This Court should not do so.

CONCLUSION

For the reasons stated above and in their prior briefs, Penn-Intervenors respectfully urge the Court to (1) affirm the trial court's November Order, as well as the portion of the April Order adjusting the transfer amounts in the November Order in light of the subsequent Budget Act; and (2) vacate, or otherwise void, that part of the April Order that eliminated the transfer provisions of the November Order.

Respectfully submitted this 12th day of August 2022.

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This the 12th day of August, 2022.

Electronically Submitted
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North Carolina Constitution

Article I.

Declaration of Rights.

§ 15. Education.

The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

…

§ 18. Court Shall Be Open.

All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

North Carolina Constitution

Article IV.

Judicial.

§ 1. Judicial Power

The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co -ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

North Carolina Constitution

Article IX.

Education.

§ 2. Uniform System of Schools.

(1) General and uniform system: term. The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) Local responsibility. The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

…

§ 6. State School Fund.

The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

…

§ 7. County School Fund; State Fund for Certain Moneys.

(a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools. (2003-423, s.1.)

North Carolina General Statutes

Chapter 1

Civil Procedure.

§ 1-294. Scope of stay; security limited for fiduciaries.

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars ($50,000), where it would otherwise exceed that sum. (C.C.P., s. 308; Code, s. 558; Rev., s. 602; C.S., s. 655; 2015-25, s. 2.)

North Carolina General Statutes

Chapter 143B-426.36

Executive Organization Act of 1973
Article 9 - Department of Administration.

143B-426.36. Office of the State Controller; creation.

There is created the Office of the State Controller. This office shall be located administratively within the Department of Administration but shall exercise all of its prescribed statutory powers independently of the Secretary of Administration.

North Carolina General Statutes

Chapter 143C-4-2

Savings Reserve.

(b) General Use of Funds.

In each fiscal year, funds reserved to the Savings Reserve shall be available for expenditure in an aggregate amount that does not exceed seven and one - half percent (7.5%) of the prior fiscal year's General Fund operating budget appropriations, excluding departmental receipts, upon appropriation by a majority vote of the membership of the Senate and House of Representatives present and voting for any of the following purposes:

1. (1) To cover a decline in General Fund revenue from one fiscal year to another.
2. (2) To cover the difference between that fiscal year's General Fund operating budget appropriations, excluding departmental receipts, and projected revenue.
3. (3) To pay costs imposed by a court or administrative order.
4. (4) To provide relief and assistance from the effects of an emergency, as that term is defined in G.S. 166A-19.3.

North Carolina Rules of Appellate Procedure

Rule 10

Preservation of Issues at Trial; Proposed Issues on Appeal.

Subsection (a)

Preserving Issues During Trial Proceedings.

(1) General. In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

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Watts v. N.C. Dep't of Envtl. & Natural Res.

Court of Appeals of North Carolina

April 26, 2010, Heard in the Court of Appeals; July 20, 2010, Filed

NO. COA09-1499

Reporter

2010 N.C. App. LEXIS 1246 *

KERRY WATTS, Plaintiff, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL AND NATURAL RESOURCES, Defendant.

Notice: PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD. THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Reported at *Watts v. N.C. Dep't of Envtl., 698 S.E.2d 201, 2010 N.C. App. LEXIS 1353 (N.C. Ct. App., July 20, 2010)*

Prior History: [*1] North Carolina Industrial Commission. I. C. No. TA-18068. 2005 NC Wrk. Comp. LEXIS 338; 2009 NC Wrk. Comp. LEXIS 147.

Watts v. N.C. Dep't of Env't & Natural Res., 362 N.C. 497, 666 S.E.2d 752, 2008 N.C. LEXIS 806 (2008)

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

damages, fact finding, costs, subject matter jurisdiction, law of the case doctrine, construction costs, future interest, construct, compensatory damages, law of the case, septic system, trial court, questions, quotation, marks

Counsel: James, McElroy & Diehl, P.A., by Preston O. Odom, III and John R. Buric, for plaintiff--appellant.

Roy Cooper, Attorney General, by Olga Vysotskaya, Assistant Attorney General, for defendant--appellee.

Judges: MARTIN, Chief Judge. Judges JACKSON and BEASLEY concur.

Opinion by: MARTIN

Opinion

Appeal by plaintiff from Decision and Order entered 20 July 2009 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2010.

MARTIN, Chief Judge.

Plaintiff appeals from a Decision and Order of the North Carolina Industrial Commission awarding plaintiff damages against the North Carolina Department of Environmental and Natural Resources ("NCDENR") and dismissing plaintiff's claim against the Montgomery County Health Department ("the Health Department") for lack of subject matter jurisdiction. We affirm in part, reverse in part, and remand for entry of an award consistent with this opinion.

While a full recitation of the facts and procedural history of this case may be found at *Watts v. N.C. Dep't of Environment & Natural Resources (Watts I), 182 N.C. App. 178, 641 S.E.2d 811*, **[*2]** *disc. review as to additional issues denied, 361 N.C. 704, 653 S.E.2d 878 (2007), disc. review allowed, 362 N.C. 349, 660 S.E.2d 899, modified and aff'd per curiam, 362 N.C. 497, 666 S.E.2d 752 (2008)*, we limit our discussion in this opinion to the facts and procedural history that are relevant to the issues before us. On 2 July 2003, plaintiff Kerry Watts filed a complaint with the North Carolina Industrial Commission under the North Carolina Tort Claims Act alleging NCDENR, the Health Department, and David Ezzell, an employee of the Health Department, negligently caused plaintiff to sustain monetary damages when defendants issued, and

subsequently revoked, an improvement permit authorizing plaintiff to build a three--bedroom residence on his property. After a hearing, the Deputy Commissioner dismissed the claim against David Ezzell and found NCDENR and the Health Department jointly and severally liable for $ 267,733 in compensatory damages; $ 18,611.07 in attorneys' fees pursuant to *N.C.G.S. § 1A-1, Rule 11*, *§ 6-13*, *§ 6-14*, *§ 6-20*, *§ 6-21.5*, *§ 7A-305(d)(3)*, *§ 143-291*, § 143.291.1, and § 143.291.2; **[*3]** and $ 13,034 in litigation costs. NCDENR appealed this decision to the Full Commission.

In a Decision and Order filed 3 October 2005, the Full Commission found it had jurisdiction over NCDENR and the Health Department and affirmed the award of compensatory damages, attorneys' fees, and litigation costs as ordered by the Deputy Commissioner. In doing so, it made the following relevant findings of fact:

> 21. Plaintiff has presented evidence, and the Full Commission so finds, that it has and will cost plaintiff the sum of approximately $ 96,024.30 to purchase Lot 861, and construct a suitable septic system on Lot 861, which is broken down as follows:
>
> . $ 70,000.00 - purchase additional lot
> . $ 5,000.00 - closing costs
> . $ 5,100.00 - installation of upgraded septic system on Lot 871
> . $ 150.00 - perk test on Lot 861
> . $ 5,380.49 - taxes on Lot 861 prorated over 30 years
> . $ 513.81 - Lake Tillery taxes on Lot 861
> . $ 250.00 - April 6, 2004, appraisal
> . $ 500.00 - August 9, 2004, appraisal
> . $ 9,150.00 - homeowner's dues over 30 years on Lot 861
>
> 22. The Full Commission finds that since the time in which plaintiff intended to construct his residence in 2002 and 2003, the cost for construction has increased **[*4]** by at least 5.8%. As a result, Plaintiff will spend at least $ 21,200.00 more dollars to construct his residence, if he is able to complete construction by mid-2005.
>
> 23. During the hearing of this matter before the Deputy Commissioner, plaintiff offered evidence, and the Full Commission finds as fact, that as a result of not being able to start construction as intended, plaintiff will incur higher interest costs to perform construction. The undersigned finds that had plaintiff been permitted and allowed to begin construction as anticipated, he would have locked in an interest rate of 5%. Since that time, interest rates have increased. The Full Commission finds that as a result of defendants' negligence and the resulting delay in construction, plaintiff will incur an increased interest rate of at least 1.5% over the term of its loan. The cost of this 1.5% increase in interest is $ 174,745.54.

NCDENR appealed to this Court. *Watts I, 182 N.C. App. at 181, 641 S.E.2d at 815*. In an opinion filed 20 March 2007, this Court affirmed the Commission's conclusion that plaintiff's claim was not barred by the public duty doctrine as well as the Commission's conclusion that NCDENR admitted to negligent **[*5]** conduct. *Id. at 184-85, 641 S.E.2d at 817*. However, we reversed the award of future interest rate damages as being too speculative, and the award of attorneys' fees as not being authorized by any of the statutes relied upon by the Commission. *Id. at 186-87, 641 S.E.2d at 818-19*.

NCDENR appealed to the North Carolina Supreme Court. *Watts v. N.C. Dep't of Env't & Nat. Res. (Watts II), 362 N.C. 497, 497, 666 S.E.2d 752, 752 (2008)*. In a *per curiam* opinion, the Court affirmed "the opinion of the Court of Appeals to the extent it h[eld] that the Industrial Commission did not err in failing to apply the public duty doctrine." *Id. at 497-98, 666 S.E.2d at 753*. None of the other issues addressed in our opinion were properly before the Supreme Court, and our decision as to those issues was left undisturbed. *Id. at 498, 666 S.E.2d at 753*.

Upon remand to the Commission, plaintiff filed a Motion to Enter a Corrected Amended Decision and Order pursuant to *Rule 60(a) of the North Carolina Rules of Civil Procedure.* In this motion, plaintiff requested the Commission to "[c]orrect [a]ll [e]rroneous [m]athematical [c]omputations." Specifically, plaintiff asked that $ 20 be added to the total damage amount **[*6]** set forth in the Commission's previous Finding of Fact 21 to reflect the proper sum of the figures identified therein. Plaintiff also requested that the Commission change its previous Conclusion of Law 4 because it "miscalculate[d] the sum of the damages specifically delineated in Findings of Fact 21-23." Thus, he requested that the total amount of damages, after proper calculations, be $ 291,989.84, instead of the $ 267,733 which the Commission had awarded. Plaintiff also requested that the Commission's new order "[a]ccurately [r]eflect [t]he [p]resent [p]osture [o]f [t]his [a]ction" by holding both NCDENR and the Health Department liable for his injuries. NCDENR filed a reply opposing plaintiff's *Rule 60(a)* motion and arguing that the Commission lacked subject matter

jurisdiction over the Health Department.

After considering plaintiff's motion and the mandate of this Court, the Commission entered its revised Decision and Order on 20 July 2009. In this order, the Commission corrected the computational error in its previous Finding of Fact 21 and awarded compensatory damages of $ 96,044.30 to remedy the injury caused by defendant's breach of duty. The Commission, however, awarded no **[*7]** damages for the increased cost of construction due to the delay caused by defendant's negligence. In accordance with the decision of this Court, the Commission declined to award damages for future interest rate costs and declined to award attorneys' fees. The Commission further concluded that it had no subject matter jurisdiction over the Health Department and dismissed the Health Department as a party. As a result, the Commission's final order held NCDENR solely liable to plaintiff for $ 96,044.30 in compensatory damages and $ 13,034 in litigation costs. Plaintiff appeals.

Plaintiff argues that the Commission erred in amending its 3 October 2005 Decision and Order by concluding, in its Decision and Order on remand, that it did not have subject matter jurisdiction over the Health Department. Specifically, plaintiff suggests that the law of the case doctrine precluded the Commission from making this change.

In discussing the law of the case doctrine, our Supreme Court has stated that

> [a]s a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining **[*8]** the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

Tennessee--Carolina Transp., Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (internal quotation marks omitted), *appeal after remand,* *289 N.C. 587, 223 S.E.2d 346 (1976)*, *opinion withdrawn on reh'g,* *291 N.C. 618, 231 S.E.2d 597 (1977)*. Recently, in *Boje v. D.W.I.T., L.L.C., 195 N.C. App. 118, 670 S.E.2d 910 (2009)*, this Court stated that the law of the case doctrine additionally "provides that when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." *195 N.C. App. at 122, 670 S.E.2d at 912*. Thus, in *Boje,* this Court held that "since [the defendant] did not appeal Deputy Commissioner Berger's 2003 opinion and award finding that it did not have workers' compensation insurance coverage on the date of plaintiff's accident," this finding was the law of **[*9]** the case and the defendant "was barred from relitigating that issue in subsequent proceedings." *Id.*

However, "[t]he doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a flexible discretionary policy which promotes the finality and efficiency of the judicial process." *Goetz v. N.C. Dep't of Health & Hum. Servs., ___ N.C. App. ___, ___, 692 S.E.2d 395, 403 (2010)* (internal quotation marks omitted). Accordingly, the law of the case doctrine does not apply with equal force to every issue and may be disregarded where the issue is of special importance. *Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 515-16 (4th Cir. 2003)* (citing 18B Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478.5 (2d ed. 2002) ("The force of law--of--the--case doctrine is affected by the nature of the first ruling and by the nature of the issues involved. If the ruling is avowedly tentative or the issues especially important, it may be said that law--of--the--case principles do not apply.")), *appeal after remand,* *412 F.3d 536 (2005)*. Thus, when a tribunal is faced with a question of its subject matter jurisdiction, a significantly important **[*10]** issue "which call[s] into question the very legitimacy of a court's adjudicatory authority," the goals of the law of the case doctrine are outweighed by the overriding importance and value of a correct ruling on this issue. *Id. at 515*; *see also* *Pub. Int. Res. Grp. of N.J., Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 118 (3rd Cir. 1997)* (finding that "the concerns implicated by the [jurisdictional] issue of standing . . . trump the prudential goals of preserving judicial economy and finality"). This principle is in line with other areas of law in which "the value of correctness in the subject matter jurisdiction context [has] overrid[den] . . . the procedural bars in place to protect the values of finality and judicial economy." *Am. Canoe Ass'n, 326 F.3d at 515*; *see also* *Forsyth Cty. Bd. of Soc. Servs. v. Div. of Soc. Servs., 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986)* ("Although they raise [the issue of standing] for the first time on appeal and would normally be barred by N.C. R. App. P. 16, questions of subject matter jurisdiction may properly be raised at any point, even in the Supreme Court.").

We hold the Commission did not err in concluding in its 20 July 2009 Decision and **[*11]** Order that it lacked subject matter jurisdiction over the Health Department. Although, in the previous appeal, no party challenged the Commission's 3 October 2005 conclusion to the contrary, we conclude the importance of reaching the proper conclusion as to the Commission's subject matter jurisdiction overrides the law of the case doctrine. *See* Am. Canoe Ass'n, 326 F.3d at 515. In the present case, the Commission clearly lacked jurisdiction over the Health Department. *See* N.C. Gen. Stat. § 143-291(a) (2009) ("The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies *of the State.*" (emphasis added)); *see also* Wood v. Guilford Cty., 143 N.C. App. 507, 511, 546 S.E.2d 641, 644 ("[T]he Tort Claims Act does not apply to county agencies, regardless of whether the county agencies are acting as an agent of the State."), *disc. review allowed, 354 N.C. 229, 553 S.E.2d 400 (2001), rev'd on other grounds,* 355 N.C. 161, 558 S.E.2d 490 (2002). Thus, the Commission's conclusion to that effect was proper.

Plaintiff **[*12]** also argues the Commission erred, in ruling on his Rule 60(a) motion, by refusing to award damages in the amount of $ 291,989.84, and by reducing his damages by refusing to award the damages, previously awarded, for his increased construction costs.

Rule 60(a) of the North Carolina Rules of Civil Procedure provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time . . . ." N.C. Gen. Stat. § 1A-1, Rule 60(a) (2009). "While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." In re C.N.C.B., ___ N.C. App. ___, ___, 678 S.E.2d 240, 242 (2009) (internal quotation marks omitted). "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order." Buncombe Cty. ex rel. Andres v. Newburn, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784, *disc. review denied, 335 N.C. 236, 439 S.E.2d 143 (1993).*

In *Watts I,* this Court determined that the Commission intended, in the 3 October 2005 Decision **[*13]** and Order, the total award amount to equal the sum of the $ 96,024.30 in costs to construct a septic system on Lot 861, $ 174,745.54 in future interest rate costs, and $ 21,200 in increased construction costs. *See* Watts I, 182 N.C. App. at 186, 641 S.E.2d at 818 (noting that the Commission awarded "damages for the cost of purchasing the adjoining lot and constructing a suitable septic system on the lot[,] . . . the increased construction costs[,]" and the future interest rate damages). As plaintiff suggests, these damages amount to $ 291,989.84, while, due to an apparent miscalculation, the Commission awarded only $ 267,733.

On remand, plaintiff sought to correct this miscalculation through its Rule 60(a) motion. However, the Commission, in considering plaintiff's motion, was bound by the holdings in *Watts I* and *Watts II. See* Couch v. Private Diagnostic Clinic, 146 N.C. App. 658, 667, 554 S.E.2d 356, 363 (2001) ("On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure." (internal quotation marks omitted)), *appeal dismissed and disc. review denied, 355 N.C. 348, 563 S.E.2d 562 (2002).* **[*14]** In *Watts I,* we held that the $ 174,745.54 in future interest rate damages, discussed in Finding of Fact 23, was too speculative and plaintiff was not entitled to recover this amount. Watts I, 182 N.C. App. at 185, 641 S.E.2d at 818. Thus, according to our mandate, the Commission properly declined to include this amount in the total damage award in its 20 July 2009 Decision and Order. The Commission did "correct . . . [the] typographical error in Finding of Fact 21, changing 96,024.30 to $ 96,044.30." As no party has challenged the validity of this corrected finding, it is binding on appeal. Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

However, the Commission inexplicably deleted its previous Finding of Fact 22 which addressed plaintiff's $ 21,200 in increased construction costs. This change was substantive in nature and impermissible under Rule 60(a). *See* Lee v. Lee, 167 N.C. App. 250, 254, 605 S.E.2d 222, 225 (2004) ("[T]he amount of money involved is not what creates a substantive right; rather, it is the **[*15]** source from which this money is derived." (internal quotation marks omitted) (alteration in original)), *appeal after remand, 190 N.C. App. 822, 662 S.E.2d 36 (2008).* Moreover, as the validity of this finding was never challenged during the previous appeal, it became the law of the case. *See* Boje, 195

N.C. App. at 122, 670 S.E.2d at 912; *see also Naddeo v. Allstate Ins. Co., 139 N.C. App. 311, 320, 533 S.E.2d 501, 507 (2000)* (finding that the "finding was conclusive on appeal and became the law of the case" when the party failed to challenge its validity on appeal). Accordingly, the Commission erred in removing this finding.

As we indicated in *Watts I,* the Commission intended the total damage amount to equal the sum of the figures identified in Findings of Fact 21, 22, and 23 set forth in its 3 October 2005 Decision and Order. *See 182 N.C. App. at 186, 641 S.E.2d at 818*. Since we previously struck down the award of future interest rate costs contained in the previous Finding of Fact 23, the total award amount on remand should be the sum of the $ 96,044.30 in costs to construct the new septic system and the $ 21,200 in increased construction costs. Therefore, we remand to the Commission **[*16]** with instructions to award damages, as it previously had done, for plaintiff's increased construction costs, and to enter a total award amount of $ 117,244.30 in compensatory damages. The award of $ 13,034 for litigation costs and expenses has not been challenged on appeal, and we, therefore, express no opinion as to such award.

Affirmed in part, reversed in part, and remanded.

Judges JACKSON and BEASLEY concur.

Report per Rule 30(e).

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FILED
JUN - 7 2018
WASHINGTON STATE
SUPREME COURT

THE SUPREME COURT OF WASHINGTON

MATHEW & STEPHANIE McCLEARY, et al.,	)	**ORDER**
Respondents/Cross-Appellants,	)	Supreme Court No. 84362-7
v.	)	
STATE OF WASHINGTON,	)	King County No. 07-2-02323-2 SEA
Appellant/Cross-Respondent.	)	

In *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), this court recognized our duty to interpret and apply the Washington Constitution's requirement that the State fulfill its "paramount duty . . . to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex." WASH. CONST. art. IX, § 1; *McCleary*, 173 Wn.2d at 515. We unanimously held that the State had failed to meet that paramount duty. We recognized, however, that the legislature had enacted a promising set of reforms and was making progress toward funding those reforms.

The court therefore deferred to the legislature's chosen means of discharging its paramount duty, while retaining jurisdiction to help ensure steady and measurable progress. We set a firm deadline for full compliance of September 1, 2018. The court has measured progress specifically according to the areas of basic education identified in Engrossed Substitute House Bill (ESHB)

2261 (LAWS OF 2009, ch. 548) and the implementation benchmarks established by Substitute House Bill (SHB) 2776 (LAWS OF 2010, ch. 236). *See McCleary*, 173 Wn.2d at 484.

In 2014, the court directed the State to provide a complete plan for fully implementing its program of basic education for each school year leading up to the target date for full funding: the 2018-19 school year. When the State failed to comply with this directive, the court found the State in contempt, but initially withheld sanctions. When noncompliance continued, we imposed a sanction of $100,000 per day until the State adopted the court-ordered plan for complying with its constitutional obligation, with the funds from the sanction to be held in a segregated account for the benefit of basic education.

Progress followed. In an order issued on November 15, 2017, the court determined that the State had achieved full compliance with this court's orders and with the provisions of ESHB 2261 and SHB 2776 save in one major respect: the legislature delayed complete implementation of the new allocation model for full state funding of basic education salaries until the 2019-20 school year. Finding that the model was adequate but that the delay failed to satisfy the State's obligation to fully implement its program of basic education by September 1, 2018, the court ruled that the State remained in contempt and we kept sanctions in place until the State purged its contempt by enacting measures fully funding the program of basic education, including the new salary allocation model, by the 2018-19 school year.[1]

Further progress followed these orders. During the 2018 legislative session, the legislature enacted measures designed to fully implement the new salary allocation model by the 2018-19 school

[1] The court further noted that the State had failed to establish a separate account dedicated to public education into which the sanctions were to be deposited, and failed to appropriate funds for the sanctions.

year, amending its 2017 legislation to make the new minimum state salary allocations fully effective as of the 2018-19 school year and supplementing the 2017-19 biennial budget to reflect increased salary allocations for the 2018-19 school year and to appropriate additional funds. LAWS OF 2018, ch. 266, § 202(5), (6), (7); LAWS OF 2018, ch. 299, §§ 503(1)(c), 504(5).[2] Also, the 2018 supplemental budget establishes a dedicated penalty account for the contempt sanctions, and it appropriates to that account $105.2 million, representing accumulated sanctions from the date sanctions were imposed to the end of the 2018 fiscal year, June 30, 2018. LAWS OF 2018, ch. 299, §§ 802, 920. From that account, the supplemental budget appropriates $84,020,000 toward basic education salaries and $21,180,000 to fund an increased special education excess cost multiplier. *Id.* §§ 504(5), 507(13).

In light of these developments, the State asks this court to (1) find that it has completed the final item of compliance specified by this court's order of November 15, 2017, (2) hold that the State has fulfilled this court's directives issued pursuant to *McCleary*, (3) find that the State has purged its contempt, lift the contempt order, and permit the funds paid into the segregated account to be expended on basic education, and (4) relinquish the court's retained jurisdiction and terminate appellate review.

The plaintiffs still dispute the constitutional adequacy of the funding formulas. But they acknowledge that the State has now complied with this court's orders to fully implement the State's

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[2] To fund the increased allocations for the 2018-19 school year, the supplemental budget appropriates an additional $775.8 million for the 2019 fiscal year to cover the first 10 months of the school year, LAWS OF 2018, ch. 299, § 504(5), with the expectation that $194 million will be appropriated for fiscal year 2020 to cover the last two months of the school year. This approach is necessitated by the fact that the school year and the fiscal year do not exactly correspond to one another. Plaintiffs accept the State's representation that it will appropriate the additional funds for the last two months of the 2018-19 school year during the 2019 legislative session.

new program of basic education by September 1, 2018, and that therefore the State's appeal that led to this court's decision in *McCleary* may come to an end. As one item of affirmative relief, the plaintiffs request that the court order the State to pay prejudgment interest on the accrued sanctions.

The court concludes that the State has complied with the court's orders to fully implement its statutory program of basic education by September 1, 2018, and has purged its contempt. This justifies the termination of the court's retained jurisdiction and the lifting of the contempt sanctions. Therefore, it is hereby

ORDERED:

(1) The monetary penalty of $100,000 per day is lifted, and the court approves the expenditure of funds deposited into the dedicated *McCleary* penalty account for the support of basic K-12 education.

(2) The request for prejudgment interest on sanctions is denied.

(3) This court's retention of jurisdiction pursuant to *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), is terminated.

DATED at Olympia, Washington, this 7th day of June, 2018.

Fairhurst, C.J.
Chief Justice

WE CONCUR: