292 N.C. App.—No. 1 Pages 1-111

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 12, 2024

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

THE COURT OF APPEALS

OF

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COURT OF APPEALS

CASES REPORTED

FILED 2 JANUARY 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Contested case—entry in Health Care Personnel Registry—substantiation of abuse—definition of abuse—burden of proof—In a contested case brought by a health care technician (petitioner), whose name the Department of Health and Human Services (DHHS) had entered into the Health Care Personnel Registry after petitioner kicked an elderly, intellectually disabled patient, the superior court erred in upholding an administrative law judge's (ALJ) decision to reverse DHHS's substantiation of abuse based on the kicking incident. First, the ALJ mistakenly concluded that petitioner's behavior did not meet the definition of "abuse" found in 10A N.C. Admin. Code 13O.0101 where, in her conclusion of law, the ALJ stated that evidence of "resulting physical harm, pain, or mental anguish" to the patient was required to support a finding of abuse. Additionally, the ALJ erred by improperly placing on DHHS the burden of proving that petitioner abused her patient rather than placing on petitioner the burden of proving the facts alleged in her petition for a contested case hearing. **N.C. Dep't of Health & Hum. Servs. v. Peace, 41.**

ADOPTION

Petition to adopt—legitimation of child prior to petition—parent's consent for adoption required—After a mother placed her child up for adoption without

the knowledge or consent of the child's biological father (respondent), the trial court properly denied petitioners' petition to adopt the child where, before the petition was filed, respondent and the mother had executed a "voluntary acknowledgement of paternity" in the child's home state of Tennessee. Because the acknowledgement of paternity constituted a legitimation of the child under Tennessee law, respondent's consent to the child's adoption was required under N.C.G.S. § 48-3-601(2)(b)(3). **In re B.M.T., 26.**

APPEAL AND ERROR

Abandonment of issues—failure to cite legal authority—In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, defendant's argument on appeal that the trial court erred by granting summary judgment in favor of the town on one of the town's claims and on three of defendant's counterclaims was deemed abandoned because defendant failed to support its argument with any legal citations as required by Rule of Appellate Procedure 28(b)(6). **Town of Forest City v. Florence Redevelopment Partners, LLC, 86.**

Appellate jurisdiction—criminal case—Rule 4—judgment "rendered"—The Court of Appeals had jurisdiction to hear defendant's appeal from his convictions for first-degree forcible rape and other related offenses where, although the trial court's written judgments were neither file-stamped nor certified by the clerk of court, the judgments were signed by the judge, defendant's notice of appeal was file stamped the next day, and the parties did not dispute that the judgments had in fact been entered for purposes of Appellate Rule 4 (allowing an appeal from a judgment that is "rendered" in a criminal case). **State v. Thompson, 81.**

Interlocutory appeal—petition for writ of certiorari regarding additional issues—mootness—In an action arising from two failed real estate transactions in which plaintiffs sought to buy a former school from a county historic landmarks commission, where the appellate court addressed several issues in the appeal from an interlocutory order, defendants' petition for certiorari review of two additional issues was dismissed in part as moot—where the appellate court had reversed portions of the trial court's order—and denied in part as to an issue regarding a motion for which no ruling appeared in the record on appeal. **Bates v. Charlotte-Mecklenburg Historic Landmarks Comm'n, 1.**

Interlocutory order—sovereign immunity defense—motion to dismiss—multiple bases—Rule 12(b)(1) dismissed—In an appeal from an interlocutory order regarding plaintiffs' action against a county historic landmarks commission and several of its members over two failed real estate transactions, where the trial court's order allowing in part and denying in part defendants' motion to dismiss plaintiff's suit—in which defendants asserted governmental and public official immunity—cited all three subsections of Civil Procedure Rule 12 relied upon by defendants —12(b)(1), 12(b)(2), and 12(b)(6)—defendants' appeal was dismissed to the extent it was based on 12(b)(1) (which was not immediately appealable as affecting a substantial right) but was allowed to the extent it was based on Rules 12(b)(2) and (6). **Bates v. Charlotte-Mecklenburg Historic Landmarks Comm'n, 1.**

CITIES AND TOWNS

Contract to sell property—lack of pre-audit certificate—no expense incurred in first year—In a contract dispute between a town and a prospective buyer

(defendant) of a historic town property, the trial court erred by granting summary judgment to the town (and denying defendant's motion for summary judgment) on the town's claim that the contract was void as a matter of law for lack of a pre-audit certificate as required by N.C.G.S. § 159-28(a). Where the parties entered into the contract five days prior to the end of the fiscal year and the town was not obligated to satisfy a financial obligation during that short window, a pre-audit certificate was not required. Although the property closing technically could have occurred within those five days, no matter how improbable, no expense was actually incurred. **Town of Forest City v. Florence Redevelopment Partners, LLC, 86.**

CONTEMPT

Civil—order requiring specific performance of separation agreement—spousal support—appeal from order still pending—In a breach of contract action, where the trial court entered an order requiring an ex-husband to specifically perform his obligation under a separation agreement to pay spousal support to his ex-wife, the court lacked jurisdiction to enter a second order finding the ex-husband in civil contempt of the initial order while the ex-husband's appeal from the initial order was still pending. Consequently, the court's civil contempt order was vacated. **Meeker v. Meeker, 32.**

CONTRACTS

Breach of separation agreement—spousal support provision—no cohabitation by ex-wife—support obligation not terminated—In a breach of contract action, where an ex-husband stopped making spousal support payments to his ex-wife pursuant to their separation agreement because he believed that she was cohabiting with another man—which, if true, would have terminated his spousal support obligation under the agreement—the trial court properly found that the ex-husband's support obligation had not been terminated because his ex-wife was not "cohabiting" within the statutory or common law definition of the term. The court made extensive findings to support its determination, including that: the ex-wife's relationship with the other man began as a sexual relationship but eventually ceased to be so; although the ex-wife spent most nights at the man's home for two years, she did so to care for him due to his deteriorating mental health; the ex-wife maintained a separate residence at all times, never kept clothes at the man's home, and did not sleep in the same room as him; and there had been "no assumption of marital duties, rights and/or obligations" between the ex-wife and the man. **Meeker v. Meeker, 32.**

Contract to purchase town property—terms of contract—automatic termination—waiver by continued performance—In a contract dispute between a town and a prospective buyer (defendant) of a historic property, the trial court erred by granting summary judgment to the town (and denying defendant's motion for summary judgment) on the town's claim that the contract automatically terminated pursuant to its own terms when defendant failed to timely deliver a "Notice of Suitability." Although the contract had "time is of the essence" and "no waiver" provisions, the town's acceptance of defendant's notice of suitability twenty-eight days after the deadline specified in the contract and continued interactions with defendant about the property for more than a year after that point constituted a waiver of the contract's notice deadline. **Town of Forest City v. Florence Redevelopment Partners, LLC, 86.**

CRIMINAL LAW

Motion for mistrial—rape prosecution—victim as witness—alcohol consumption before testifying—In a prosecution for first-degree forcible rape and other related offenses, where the State informed the trial court on the fourth day of trial that the victim (who was testifying for the State) was seen in possession of alcohol and had possibly consumed alcohol that morning, the trial court did not abuse its discretion by denying defendant's motion for a mistrial after noting—on the record and outside of the jury's presence—that the victim had taken a portable breathalyzer test that day with "a 0.0 outcome." Further, although the victim later admitted to consuming alcohol that morning and the day before, the court did not err in declining to declare a mistrial sua sponte, since the court took immediate measures to address the victim's behavior, including ordering her to refrain from consuming any impairing substances, requiring her to remain in the courtroom until she needed to testify again, and advising her that a member of the district attorney's office would stay with her while she was not testifying to ensure her compliance. **State v. Thompson, 81.**

DAMAGES AND REMEDIES

Breach of separation agreement—spousal support provision—specific performance—inadequacy of remedies at law—ability to pay support—In a breach of contract action, where an ex-husband stopped making spousal support payments to his ex-wife pursuant to their separation agreement, the trial court erred in awarding specific performance of the ex-husband's monthly support obligation as the ex-wife's remedy. Although the agreement contained a provision stating that any remedies at law would be inadequate for any breach thereof, the ex-wife was still required to show to the court that her remedies at law were, in fact, inadequate. Further, the court entered insufficient findings regarding the ex-husband's ability to make the required support payments under the agreement. **Meeker v. Meeker, 32.**

DIVORCE

Breach of separation agreement—spousal support provision—payment made pursuant to vacated contempt order—claim for attorney fees—In a breach of contract action, where the appellate court vacated the trial court's order holding an ex-husband in civil contempt for failing to pay spousal support, but where the appellate court affirmed the trial court's finding in a prior order that the ex-husband owed his ex-wife over $113,000 in spousal support arrearages under the parties' separation agreement, it was not unjust for the ex-wife to retain a $38,800 payment that the ex-husband made as a purge condition under the vacated contempt order. Therefore, the ex-husband's request for an order on remand that he be reimbursed the $38,800 payment was denied on appeal. Additionally, defendant's request that he be awarded attorney fees based on his claim that his ex-wife breached the separation agreement was meritless, where the ex-wife was not cohabiting with another man and, even if she were, such cohabitation would not have constituted a breach—rather, it would have merely terminated the ex-husband's spousal support obligation under the agreement. **Meeker v. Meeker, 32.**

IMMUNITY

Governmental—contract to purchase town property—waiver—In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, in which the town asserted governmental immunity as a bar to defendant's counterclaims (for breach of contract, breach of the covenant of good faith and

unfair dealing, unjust enrichment, and declaratory judgment), the trial court erred by granting summary judgment to the town on those counterclaims, where the town waived immunity when it entered into the contract and where the appellate court had determined that there was no merit to the town's argument that the contract was void. **Town of Forest City v. Florence Redevelopment Partners, LLC, 86.**

Governmental—real estate transaction—waiver not alleged—not a defense to breach of covenant of good faith and fair dealing—In an action brought by plaintiffs against a county historic landmarks commission and several of its members over two failed real estate transactions (regarding a former school plaintiffs sought to purchase), the trial court erred by denying defendants' motion to dismiss the claims of negligence in the care of historic property, conversion, and unjust enrichment as to the commission and the individual defendants in their official capacities, because plaintiffs failed to allege that defendants waived their governmental immunity. However, the trial court did not err by denying defendants' motion to dismiss plaintiffs' claim for breach of the covenant of good faith and fair dealing, to which governmental immunity is not a defense, because that claim is contract-based, and immunity cannot be claimed by a government entity that has entered into a valid contract. **Bates v. Charlotte-Mecklenburg Historic Landmarks Comm'n, 1.**

Public official—real estate transaction—individual defendants sued in individual capacity—malice or corruption not alleged—In an action brought by plaintiffs against a county historic landmarks commission and several of its members over two failed real estate transactions (regarding a former school plaintiffs sought to purchase), the trial court erred by denying defendants' motion to dismiss the claims of negligence in the care of historic property and unjust enrichment as to the individual defendants in their individual capacities, because plaintiffs failed to allege that defendants acted with malice, corruption, or outside the scope of their official duties, as required to defeat defendants' claim of public official immunity. However, with regard to plaintiff's claim of conversion, which is not an intentional tort, no such allegation was required; therefore, the trial court's order denying the motion to dismiss the claim of conversion against the individual defendants in their individual capacities was affirmed. **Bates v. Charlotte-Mecklenburg Historic Landmarks Comm'n, 1.**

PUBLIC OFFICERS AND EMPLOYEES

Position designated exempt—political affiliation discrimination—prima facie case—lack of discriminatory intent—An administrative law judge did not err by granting summary judgment in favor of the Office of Administrative Hearings (OAH) in a contested case in which petitioner, who was employed at OAH as general counsel, challenged the designation of his position as an exempt managerial position by the OAH director (which was allowed after the legislature enacted a special provision). Petitioner failed to establish a prima facie case of political affiliation discrimination pursuant to N.C.G.S. § 126-34.02 where the evidence did not show that the director made the designation with discriminatory intent, primarily since petitioner's arguments about the director's state of mind amounted to mere speculation, but also because the director designated three additional positions as managerial exempt, one of which was held by someone who had a different political affiliation than petitioner. **Culpepper v. N.C. Off. of Admin. Hearings, 15.**

correct classification was supported by the evidence, including that the business took possession but not ownership of the vehicles, the vehicles were only stored temporarily on the property, the vehicles were sold on behalf of various entities via online action, the sales included both damaged and undamaged vehicles, and no vehicles were dismantled or demolished on the property. **Town of La Grange v. Cnty. of Lenoir, 99.**

N.C. COURT OF APPEALS

2024 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	8 and 22
February	5 and 19
March	4 and 18
April	1, 15, and 29
May	13 and 27
June	10
August	12 and 26
September	9 and 23
October	7 and 21
November	4 and 18
December	2

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

TYSON BATES AND REGINA BATES, PLAINTIFFS
v.
CHARLOTTE-MECKLENBURG HISTORIC LANDMARKS COMMISSION; DANIEL MORRILL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CONSULTING DIRECTOR OF THE CHARLOTTE-MECKLENBURG HISTORIC LANDMARKS COMMISSION; HAROLD LEONARD NORMAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PROJECTS COMMITTEE; AND JACK THOMSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CHARLOTTE-MECKLENBURG HISTORIC LANDMARKS COMMISSION, DEFENDANTS

No. COA23-57

Filed 2 January 2024

1. **Appeal and Error—interlocutory order—sovereign immunity defense—motion to dismiss—multiple bases—Rule 12(b)(1) dismissed**

   In an appeal from an interlocutory order regarding plaintiffs' action against a county historic landmarks commission and several of its members over two failed real estate transactions, where the trial court's order allowing in part and denying in part defendants' motion to dismiss plaintiff's suit—in which defendants asserted governmental and public official immunity—cited all three subsections of Civil Procedure Rule 12 relied upon by defendants—12(b)(1), 12(b)(2), and 12(b)(6)—defendants' appeal was dismissed to the extent it was based on 12(b)(1) (which was not immediately appealable as affecting a substantial right) but was allowed to the extent it was based on Rules 12(b)(2) and (6).

2. **Immunity—governmental—real estate transaction—waiver not alleged—not a defense to breach of covenant of good faith and fair dealing**

In an action brought by plaintiffs against a county historic landmarks commission and several of its members over two failed real estate transactions (regarding a former school plaintiffs sought to purchase), the trial court erred by denying defendants' motion to dismiss the claims of negligence in the care of historic property, conversion, and unjust enrichment as to the commission and the individual defendants in their official capacities, because plaintiffs failed to allege that defendants waived their governmental immunity. However, the trial court did not err by denying defendants' motion to dismiss plaintiffs' claim for breach of the covenant of good faith and fair dealing, to which governmental immunity is not a defense, because that claim is contract-based, and immunity cannot be claimed by a government entity that has entered into a valid contract.

3. Immunity—public official—real estate transaction—individual defendants sued in individual capacity—malice or corruption not alleged

In an action brought by plaintiffs against a county historic landmarks commission and several of its members over two failed real estate transactions (regarding a former school plaintiffs sought to purchase), the trial court erred by denying defendants' motion to dismiss the claims of negligence in the care of historic property and unjust enrichment as to the individual defendants in their individual capacities, because plaintiffs failed to allege that defendants acted with malice, corruption, or outside the scope of their official duties, as required to defeat defendants' claim of public official immunity. However, with regard to plaintiff's claim of conversion, which is not an intentional tort, no such allegation was required; therefore, the trial court's order denying the motion to dismiss the claim of conversion against the individual defendants in their individual capacities was affirmed.

4. Appeal and Error—interlocutory appeal—petition for writ of certiorari regarding additional issues—mootness

In an action arising from two failed real estate transactions in which plaintiffs sought to buy a former school from a county historic landmarks commission, where the appellate court addressed several issues in the appeal from an interlocutory order, defendants' petition for certiorari review of two additional issues was dismissed in part as moot—where the appellate court had reversed portions of the trial court's order—and denied in part as to an issue regarding a motion for which no ruling appeared in the record on appeal.

Appeal by defendants from order entered 14 October 2022 by Judge Reggie E. McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2023.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson, for defendant-appellants.

Q Byrd Law, by Quintin D. Byrd, for plaintiff-appellees.

THOMPSON, Judge.

In this interlocutory appeal which concerns two failed real estate transactions, defendants contend that the trial court erred in denying their motion to dismiss some of plaintiffs' claims based upon defendants' assertions of governmental and sovereign immunity. As discussed below, in light of controlling precedent and certain deficiencies in plaintiffs' complaint, we agree in part and therefore we reverse the trial court's denial of defendants' motion to dismiss (1) claims for negligence in the care of historic property and unjust enrichment as to all defendants and (2) the claim of conversion as to the entity defendant and the individually named defendants in their official capacities. However, we leave undisturbed the trial court's denial of defendants' motion to dismiss plaintiffs' (3) claim of breach of the covenant of good faith and fair dealing against all defendants and their (4) conversion claim against the individual defendants in their individual capacities.

Defendants have also filed a petition for writ of certiorari in this Court, (5) seeking consideration of additional issues for which there is no right of immediate appeal, which we dismiss as moot in part and deny in part.

I. Factual Background and Procedural History

This case arises from plaintiffs' attempt to purchase from defendants a property located in Huntersville and known as the Torrence-Lytle School. According to plaintiffs' complaint, the property, which is no longer in use as a school and has fallen into disrepair, "is one of the oldest remaining African-American school buildings in Mecklenburg County" and is therefore of historic significance. In November 2007, the property was transferred to defendant Charlotte-Mecklenburg Historic Landmarks Commission (HLC),[1] an entity created by the

1. The individual defendants are the former consulting director, director, and a member of HLC.

City of Charlotte and Mecklenburg County pursuant to N.C. Gen. Stat. § 160D-941 *et seq.*, for the purpose of identifying and preserving historic properties. Plaintiffs attempted to purchase the property from HLC by entering into contracts for purchase[2] in 2016 and again in 2019 but were never able to obtain ownership. As a result of this frustration of their purpose, plaintiffs filed a complaint in the Superior Court, Mecklenburg County on 22 March 2022 which alleged eight claims against defendants[3]: discriminatory real estate practices, breach of the covenant of good faith and fair dealing, breach of contract, negligence in the care of historic property, unfair and deceptive trade practices, conversion, unjust enrichment, and punitive damages.

On 10 June 2022, defendants filed a motion for summary judgment on plaintiffs' breach of contract claim and a motion to dismiss all of plaintiffs' claims pursuant to Rule of Civil Procedure 12(b)(1), (2), and (6), raising governmental immunity on behalf of HLC and the individual defendants in their official capacities, and public official immunity on behalf of the individual defendants in their individual capacities, along with other defenses. After the motions were heard at the 11 July 2022 civil session of the Superior Court, Mecklenburg County, the trial court allowed defendants' motion to dismiss plaintiffs' claims for discriminatory real estate practices, unfair and deceptive trade practices, and punitive damages. The trial court, however, denied the motion to dismiss as to plaintiffs' claims for breach of the covenant of good faith and fair dealing, breach of contract, negligence in the care of historic property, conversion of earnest money deposits, and unjust enrichment. No ruling by the trial court on defendants' motion for summary judgment appears in the record on appeal. Defendants filed their notice of appeal on 2 November 2022.

II. Analysis

Defendants argue that the trial court erred in denying their motion to dismiss plaintiffs' claims for breach of the covenant of good faith and fair dealing, negligence in the care of historic property, conversion, and unjust enrichment based upon defendants' assertion of sovereign immunity defenses: governmental immunity on behalf of HLC and the individual defendants in their official capacities and public official immunity on

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2. Preservation commissions such as HLC are authorized to "exchange or dispose of the property by public or private sale, lease or otherwise, subject to covenants or other legally binding restrictions that will secure appropriate rights of public access and promote the preservation of the property." N.C. Gen. Stat. § 160D-942(3) (2021).

3. The individual defendants were sued in both their official and individual capacities.

behalf of the individual defendants in their individual capacities. As to HLC and the individual defendants in their official capacities, we agree as to plaintiffs' claims for negligence in the care of historic property, conversion, and unjust enrichment, but we conclude that neither governmental nor public official immunity is a defense to a claim of breach of the covenant of good faith and fair dealing. As to the claim of conversion against the individual defendants in their individual capacities, we hold that the trial court properly denied defendants' motion to dismiss, as plaintiffs' complaint was sufficient to survive those defendants' immunity defense at the pleading stage, and accordingly, we reverse the trial court's order as to that portion of that claim. Plaintiffs' petition for writ of certiorari seeking review of other issues is denied in part and dismissed as moot in part.

A. Appellate jurisdiction

[1] The order from which this appeal is taken is interlocutory. *See*, *e.g.*, *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court to settle and determine the entire controversy." (citation omitted)). "As a general proposition, interlocutory orders are not immediately appealable unless the order in question affects a substantial right." *State ex rel. Stein v. Kinston Charter Academy*, 379 N.C. 560, 571, 866 S.E.2d 647, 655 (2021) (citing N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019)). *See also* N.C. Gen. Stat. § 1-277(a) (2021) (providing that "[a]n appeal may be taken from every judicial order or determination of a judge of a superior . . . court, upon or involving a matter of law or legal inference . . . that affects a substantial right").

Where a defendant asserts a form of sovereign immunity,[4] "such immunity is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit, for damages." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citing *Mitchell v. Forsyth*, 472 U.S. 511,

4. "The doctrine of sovereign/governmental immunity provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them in their official capacity," with sovereign immunity applying to claims against the State and governmental immunity applying to claims against counties and cities. *Wray v. City of Greensboro*, 247 N.C. App. 890, 892, 787 S.E.2d 433, 436 (2016) (citations omitted), *affirmed*, 370 N.C. 41, 802 S.E.2d 894 (2017). In turn, "[t]he defense of public official immunity is a 'derivative form' of governmental immunity." *Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016) (citation omitted).

525 (1985)). For this reason, a trial court's ruling "on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right, as '[t]he entitlement is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.' " *Craig*, 363 N.C. at 338, 678 S.E.2d at 354 (quoting *Mitchell*, 472 U.S. at 526).

We are mindful, however, that "[o]rders denying Rule 12(b)(1) motions to dismiss based on sovereign immunity, and therefore public official immunity, 'are not immediately appealable because they neither affect a substantial right nor constitute an adverse ruling as to personal jurisdiction.' " *Green v. Howell*, 274 N.C. App. 158, 164, 851 S.E.2d 673, 668 (2020) (quoting *Can Am South, LLC v. State*, 234 N.C. App. 119, 124, 759 S.E.2d 304, 308 (citation omitted), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014)). *See also Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (holding, in the context of interlocutory appeals implicating sovereign immunity, that "while [N.C. Gen. Stat. §] 1-277(b)[5] permits the immediate appeal of an order denying a motion made pursuant to Rule 12(b)(2) to dismiss for lack of jurisdiction over the person, that statute does not apply to orders denying motions made pursuant to Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction"). However, the " 'denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b),' " while "the denial of a 12(b)(6) motion based on the defense of sovereign immunity affects a substantial right and is immediately appealable under section 1-277(a)." *Green*, 274 N.C. App. at 164, 851 S.E.2d at 668 (quoting *Can Am South, LLC*, 234 N.C. App. at 124, 759 S.E.2d at 308) (other citations omitted).

As noted above, defendants' motion to dismiss asserting governmental and public official immunity was made pursuant to Rule of Civil Procedure 12(b)(1), (2), and (6), but although the trial court's order allowing in part and denying in part defendants' motion cites all three subsections of Rule 12 as the basis for the motion, the order does not specifically state the ground or grounds upon which the court ruled. Accordingly, we dismiss defendants' appeal from the trial court's order to the extent it was premised upon Rule 12(b)(1) but allow the appeal to the extent that the trial court's ruling was based upon Rule 12(b)(2) and (6).

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5. "Any interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant." N.C. Gen. Stat. § 1-277(b).

B. Standard of review

When reviewing a trial court's ruling on a motion to dismiss, this Court must consider all of the allegations in the complaint as true. *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). We then consider legal questions, such as the applicability of governmental and public official immunity, de novo. *Wray*, 370 N.C. at 47, 787 S.E.2d at 436.

C. Governmental immunity

[2] HLC and the individual defendants in their official capacities contend that the trial court erred in denying their motion to dismiss the claims for breach of the covenant of good faith and fair dealing, negligence in the care of historic property, conversion, and unjust enrichment because plaintiffs' complaint fails to allege that defendants waived their governmental immunity.[6] We agree in part, but we are not persuaded that governmental immunity is a defense to a claim of breach of the covenant of good faith and fair dealing.

"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity," *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citations omitted), and in turn, "a municipal corporation has immunity for acts committed in its governmental capacity." *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004).

> *In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity.* Absent such an allegation, the complaint fails to state a cause of action. No particular language is required to allege a waiver of governmental immunity, but the complaint must allege facts that, if taken as true, are sufficient to establish a waiver by the State of governmental immunity.

Fullwood, 250 N.C. App. at 37, 792 S.E.2d at 550 (emphasis added) (citations, quotation marks, and brackets omitted).

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6. Defendants do not contest the trial court's denial of their motion to dismiss the breach of contract claim on the basis of their assertion of sovereign immunity because "[a] State or local government . . . waives that immunity when it enters into a valid contract, to the extent of that contract." *Wray*, 370 N.C. at 47, 802 S.E.2d at 899 (citations omitted). Thus, sovereign immunity is not a defense to a breach of contract claim. *Id.* Accordingly, that claim is not before the Court in this interlocutory appeal and remains pending in the trial court.

Here, the complaint does not allege a waiver of governmental immunity. In their brief to this Court, plaintiffs acknowledge their failure to include such an allegation in their pleading and agree that precedent holds, "[a]bsent an allegation of waiver of immunity, . . . HLC is entitled to governmental immunity" on their claims of negligence in the care of historic property, conversion, and unjust enrichment. But while conceding error by the trial court in denying defendants' motion to dismiss as to the claims for negligence in the care of historic property, conversion, and unjust enrichment, as against HLC and the individual defendants in their official capacities, plaintiffs contend that governmental immunity is not available as a defense to claims of breach of the covenant of good faith and fair dealing because that cause of action arises from a contract, and thus plaintiffs ask that we leave the trial court's ruling as to that claim undisturbed. We find merit in this argument.

The specific question of whether governmental immunity is potentially applicable upon a claim of breach of the covenant of good faith and fair dealing appears to be a matter of first impression in North Carolina. No party cites, and our research has not revealed, any North Carolina appellate decision explicitly addressing this specific issue. However, reasoning from our precedent regarding the implied covenant, breach of contract, and sovereign immunity, we hold that sovereign immunity in its various forms is not a defense to this contract-based claim.

"In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation and internal quotation marks omitted). Because the covenant of good faith and fair dealing is in effect an unstated term of every contract, where, as here, the underlying factual allegations supporting both causes of action are the same, appellate courts in North Carolina have treated a claim of breach of the implied covenant in a similar manner to a traditional breach of contract claim:

> As a general proposition, where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as its claim for breach of contract, we treat the former claim as "part and parcel" of the latter. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997); *see Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 ("As the jury determined that

> plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 180 (2012).

Cordaro v. Harrington Bank, FSB, 260 N.C. App. 26, 38–39, 817 S.E.2d 247, 256, *disc. review denied*, 371 N.C. 788, 821 S.E.2d 181 (2018). *See also Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 451, 781 S.E.2d 1, 9 (2015). Further, our Supreme Court has recently clarified:

> A plaintiff may rely on the implied covenant [of good faith and fair dealing] when there is a gap in the contract and a defendant behaves in an unexpected manner, thereby frustrating the fruits of the bargain that the asserting party reasonably expected. Stated another way, breach of the implied covenant is a claim available to a plaintiff who could not have contracted around a defendant's allegedly arbitrary or unreasonable behavior.

Value Health Sols., Inc. v. Pharm. Rsch. Assocs., 385 N.C. 250, 268, 891 S.E.2d 100, 115 (2023) (citation omitted).

As noted previously, "[a] State or local government . . . waives [sovereign or governmental] immunity when it enters into a valid contract, *to the extent of that contract*." *Wray*, 370 N.C. at 47, 802 S.E.2d at 899 (citations omitted). Thus, because *every* contract—including those to which a governmental entity is a party—includes as an implied term a covenant of good faith and fair dealing, we hold that the general rule—that sovereign immunity is waived upon the entry by a government entity into a valid contract—encompasses a waiver of immunity against suit for a breach of the implied covenant term just as it does for the explicit terms of the contract.

Accordingly, we reverse the trial court's order denying the motion to dismiss plaintiffs' claims for negligence in the care of historic property, conversion, and unjust enrichment as to HLC and the individual defendants in their official capacities, but affirm the denial of defendants' motion to dismiss plaintiffs' claim for a breach of the covenant of good faith and fair dealing.

D. Public official immunity

[3] The individual defendants in their individual capacities contend that the trial court should have dismissed the remaining claims against them on the basis of public official immunity because plaintiffs failed to allege

malice, corruption, or actions outside defendants' official duties—and facts supporting such allegations—that if true would be sufficient to rebut the applicable presumption of good faith accorded to public officials. Our review of the complaint reveals that the individual defendants are correct, both as to the controlling precedent on this point and the contents of plaintiffs' complaint.

> It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious . . . , or that he acted outside of and beyond the scope of his duties. . . . As long as a public officer 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, he is protected from liability.

Smith v. State, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citations and quotation marks omitted). Moreover,

> absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence.
>
> *To rebut the presumption and hold a public official liable in his individual capacity, a plaintiff's complaint must allege, and the facts alleged must support a conclusion, that the official's act, or failure to act, was corrupt or malicious, or that the official acted outside of and beyond the scope of his duties.*

Green, 274 N.C. App. at 165–66, 851 S.E.2d at 679 (emphasis added) (citations, quotation marks, and brackets omitted).[7]

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7. "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. An act is corrupt when it is done with a wrongful design to

Here, plaintiffs' complaint fails to allege that any of the individual defendants acted outside the scope of their duties or acted with malice or corruption, a point they appear to concede given that their entire appellate argument regarding public official immunity is as follows:

> Defendants' argument for the denial of personal liability for the individual defendants should be discarded by this Court as they focus solely on the issue of malice or corruption. This Court has repeatedly held that the normal analysis of whether a public official acted with malice or corruption sufficient to remove qualified immunity is "unnecessary" when they are being sued (1) in their individual capacities and (2) for intentional torts. *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 320–21, 567 S.E.2d 803, 812–13 (2002); *see also Beck v. City of Durham*, 154 N.C. App. 221, 230, 573 S.E.2d 183, 190 (2002) and *Richmond v. City of Asheville*, 2015 N.C. App. LEXIS 551, at *9, 242 N.C. App. 252, 775 S.E.2d 925 (2015) (unpublished).

We find the cases cited by plaintiffs inapposite as to all but one of their claims against the individual defendants in their individual capacities given that the rules on which plaintiffs rely apply only where *intentional torts* are alleged. In such cases, "[b]ecause malice encompasses intent, . . . if a party alleges an intentional tort claim, the doctrine of qualified immunity does not immunize public officials . . . from suit in their individual capacities." *Hawkins v. State*, 117 N.C. App. 615, 630, 453 S.E.2d 233, 242 (applying the rule in a case where the plaintiff alleges, *inter alia*, intentional infliction of emotional distress), *disc. rev. denied*, 342 N.C. 188, 463 S.E.2d 79 (1995); *see also Wells*, 152 N.C. App. at 320, 567 S.E.2d at 813 (applying the rule in a case where the plaintiff alleges, *inter alia*, intentional infliction of emotional distress) and *Beck*, 154 N.C. App. at 230, 573 S.E.2d at 190 (applying the rule to claims of constructive willful discharge, intentional infliction of emotional distress, tortious interference with contract, and tortious interference with prospective advantage).

As noted above, because a claim for breach of the covenant of good faith and fair dealing is treated in this context as akin to a breach of contract claim, public official immunity, a derivative form of governmental immunity, is not an available defense for the individual defendants in any capacity. Two of the other claims which are the subject of this

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acquire some pecuniary profit or other advantage." *Green*, 274 N.C. App. at 167, 851 S.E.2d at 679–80 (citations and internal quotation marks omitted).

appeal—negligence in the care of historic properties and unjust enrichment—are not intentional torts. One claim, negligence in the care of historic property, specifically concerns the individual defendants' official duties, as demonstrated by the pertinent allegations in the complaint which concern various votes, the review of expert recommendations, and the consideration of cost in stabilizing the historic property in question, and moreover asserts negligence rather than intentional acts by the individual defendants. Further, there is no inferred malice in the tort of unjust enrichment, which the Supreme Court has defined as having

> five elements[:] First, one party must confer a benefit upon the other party[; s]econd, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances[; t]hird, the benefit must not be gratuitous[; f]ourth, the benefit must be measurable[; and l]ast, the defendant must have consciously accepted the benefit.

JPMorgan Chase Bank, N.A. v. Browning, 230 N.C. App. 537, 541–42, 750 S.E.2d 555, 559 (2013) (citations and quotation marks omitted).

Because negligence in the care of historic properties and unjust enrichment are not intentional torts, there is no "stand-in" implication of bad intent which could serve to cover for the absence in the complaint of allegations of malice, corruption, or acting outside of the scope of official duties by the individual defendants as to those claims. Accordingly, we reverse the portion of the trial court's order which denied the motion to dismiss plaintiffs' claims for negligence in the care of historic properties and unjust enrichment against the individual defendants.

"Conversion, however, is an intentional tort." *Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App. 163, 167, 567 S.E.2d 215, 218 (2002) (citations omitted).[8] Thus, under *Hawkins*, there was no need for plaintiffs to allege malice in order to surmount the affirmative defense of public official immunity as to their claim of conversion against the

8. "[T]he tort of conversion is well defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (citation and internal quotation marks omitted); s*ee also Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) ("There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant." (citation omitted)).

individual defendants in their individual capacities. *See Hawkins*, 117 N.C. App. at 630, 453 S.E.2d at 242. The trial court's denial of the motion to dismiss is therefore affirmed as to the claim of conversion against the individual defendants in their individual capacities.[9]

III. Defendants' Petition for Writ of Certiorari

[4] In addition to their interlocutory appeal, defendants seek review by certiorari of two issues which they acknowledge are not immediately appealable: whether the trial court erred in denying defendants' motion for summary judgment on plaintiffs' breach of contract claim and whether the trial court erred in denying defendants' motion to dismiss plaintiffs' claims for breach of the covenant of good faith and fair dealing, negligence in the care of historic property, conversion of two earnest money payments, and unjust enrichment. Defendants contend that these matters should be addressed by this Court now because these issues are interrelated with those raised in their appeal based upon governmental and public official immunity such that immediate review would "serve the expeditious administration of justice," citing *Jessee v. Jessee*, 212 N.C. App. 426, 431, 713 S.E.2d 28, 32–33 (2011), and because defendants believe that they "have meritorious defenses in addition to governmental and public official immunity."

As an initial matter, we cannot review by certiorari, or otherwise, any ruling on defendants' motion for summary judgment on plaintiffs' breach of contract claim because no order resolving that motion appears in the record before this Court.[10] The order entered by the trial court on 14 October 2022 and appealed from as a matter of right is captioned as resolving defendants' motion to dismiss and addresses only that motion, as defendants themselves note in their "Statement of the Organization of the Trial Court." Accordingly, there is simply nothing for this Court to review regarding defendants' motion for summary judgment.

In this decision, we have reversed the trial court's denial of defendants' motion to dismiss plaintiffs' claims for negligence in the care

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9. As discussed in section II-C, plaintiffs' conversion claim against the individual defendants *in their official capacities* is barred by governmental immunity, *see*, *e.g.*, *DeMurry v. N.C. Dep't of Corr.*, 195 N.C. App. 485, 492, 673 S.E.2d 374, 380 (2009), and the portion of the trial court's order to the contrary is reversed.

10. If the trial court did not in fact rule on defendants' summary judgment motion and defendants wished to obtain such a ruling on their motion for summary judgment, they could have filed a motion with the trial court alleging a mistake pursuant to Rule of Civil Procedure 60(b)(1) or a petition with this Court seeking a writ of mandamus pursuant to Rule of Appellate Procedure 22. Defendants did not elect to do either.

of historic property, conversion of two earnest money payments, and unjust enrichment, and thus the petition for writ of certiorari regarding those issues is rendered moot. As for the trial court's denial of defendants' motion to dismiss plaintiffs' claim for breach of the covenant of good faith and fair dealing, defendants do not explain how that matter is "interrelated" with the issues of governmental and public official immunity which are before this Court as a matter of right and instead focus the majority of their petition for writ of certiorari on their "meritorious defenses in addition to governmental and public official immunity." We see no obvious overlap between the immunity issues addressed above and the defenses presented in defendants' certiorari petition, and accordingly, we leave for the trial court an evaluation of their merits.

IV. Conclusion

For the reasons discussed above, we reverse the trial court's order denying defendants' motion to dismiss plaintiffs' claims for negligence in the care of historic property and unjust enrichment against all defendants, and the claim for conversion against HLC and the individual defendants in their official capacities, but we affirm the denial of the motion to dismiss as to the claims for breach of the covenant of good faith and fair dealing against all defendants and for conversion against the individual defendants in their individual capacities. Put simply, plaintiffs' case may proceed on their breach of contract and breach of the covenant of good faith and fair dealing claims against all defendants and on their claim of conversion against the individual defendants in their individual capacities.

Defendant's petition for writ of certiorari is dismissed as moot in part and denied in part.

REVERSED IN PART; AFFIRMED IN PART; DISMISSED IN PART; DENIED IN PART; REMANDED.

Judges HAMPSON and STADING concur.

WILLIAM T. CULPEPPER, III, PETITIONER
v.
N.C. OFFICE OF ADMINISTRATIVE HEARINGS, RESPONDENT

No. COA23-236

Filed 2 January 2024

Public Officers and Employees—position designated exempt—political affiliation discrimination—prima facie case—lack of discriminatory intent

An administrative law judge did not err by granting summary judgment in favor of the Office of Administrative Hearings (OAH) in a contested case in which petitioner, who was employed at OAH as general counsel, challenged the designation of his position as an exempt managerial position by the OAH director (which was allowed after the legislature enacted a special provision). Petitioner failed to establish a prima facie case of political affiliation discrimination pursuant to N.C.G.S. § 126-34.02 where the evidence did not show that the director made the designation with discriminatory intent, primarily since petitioner's arguments about the director's state of mind amounted to mere speculation, but also because the director designated three additional positions as managerial exempt, one of which was held by someone who had a different political affiliation than petitioner.

Appeal by Petitioner from a final decision entered 2 December 2022 by Administrative Law Judge Beecher R. Gray in the Office of Administrative Hearings. Heard in the Court of Appeals 20 September 2023.

Hornthal, Riley, Ellis & Maland, L.L.P., by John D. Leidy, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for respondent-appellee.

WOOD, Judge.

William Culpepper ("Petitioner") alleges the Office of Administrative Hearings ("OAH" or "Respondent") engaged in political affiliation discrimination by designating the position of General Counsel at OAH as exempt from the provisions of the Human Resources Act, a position he

held from 1 January 2015 to 30 June 2022. We hold the trial court did not err by granting summary judgment in Respondent's favor because Petitioner failed to carry his burden of establishing a *prima facie* case of political affiliation discrimination.

I. Factual and Procedural History

Petitioner is a member of the North Carolina State Bar and practiced law in Edenton, North Carolina from 6 September 1973 until 1 January 2006. Petitioner served as an elected Democrat member of the North Carolina House of Representatives from 5 May 1993 until 1 January 2006 and alleges his reputation as a prominent Democrat was widely known and reported in the news during his time in office.

In October 2014, Petitioner applied for the position of General Counsel with the OAH. The Job Class Title for this position was "Attorney II." The description of work provided in the job posting for the position stated the hired employee:

> "performs a full range of legal services in matters affecting the legal responsibilities of OAH[,] . . . provides the delivery of legal services involving legal advice, opinions, research, writing, adjudications, consultations, mediations, and judicial administration[,] . . . act[s] as the agency rule coordinator[,] . . . [and] prepares opinions on North Carolina law for the three divisions [Civil Rights, Rules, and Hearings].

Petitioner was appointed to the position effective 1 January 2015.

On 1 July 2021, Chief Justice Paul Newby of our Supreme Court appointed Donald van der Vaart ("Director van der Vaart") as the Director and Chief Administrative Law Judge of OAH. Petitioner alleges Director van der Vaart is a registered Republican. Petitioner further alleges that, according to OAH's Senior Administrative Law Judge Fred Morrison ("Judge Morrison"), shortly after Director van der Vaart assumed his position at OAH, Director van der Vaart asked Judge Morrison why Petitioner was at OAH.[1] Judge Morrison allegedly replied to Director van der Vaart that he and Petitioner had a long association over the years, Petitioner was no longer involved in politics, was loyal to OAH, and he would be loyal to Director van der Vaart.

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1. Director van der Vaart states in his affidavit he was aware Petitioner had been appointed to serve on the North Carolina Utilities Commission by a former Democrat Governor.

As part of the Current Operations Appropriations Act of 2021 (S.L. 2021-180, S.B. 105) enacted on 18 November 2021, the General Assembly included a provision (the "Special Provision") allowing the Chief Administrative Law Judge to designate five OAH employees as exempt from the Human Resources Act. The Special Provision reads:

> The number of administrative law judges and employees of the Office of Administrative Hearings shall be established by the General Assembly. The Chief Administrative Law Judge and five employees of the Office of Administrative Hearings as designated by the Chief Administrative Law Judge are exempt from provisions of the North Carolina Human Resources Act as provided by [N.C. Gen. Stat. §] 126-5(c1)(27). All other employees of the Office of Administrative Hearings are subject to the North Carolina Human Resources Act.

Current Operations Appropriations Act of 2021, S.L. 2021-180 (S.B. 105).

Petitioner alleges Judge Morrison told him about a purported meeting between Director van der Vaart and Kenan Drum ("Drum") at the Legislative Building prior to the Special Provision becoming public on 15 November 2021. Drum was the Policy Advisor for General Government Appropriations to the Senate President Pro Tempore. Petitioner alleges that, according to Judge Morrison, the meeting was arranged by Ashley Berger Snyder ("Ms. Snyder"), Senator Berger's daughter. Petitioner alleges the appropriations budget for OAH is formulated by the General Government Appropriations Subcommittee of the General Assembly's House and Senate. Petitioner further alleges Judge Morrison was told by Director van der Vaart that Drum had referred to Judge Morrison as an "old time Democrat."

After the Special Provision became public, "much talk and concern" arose among OAH personnel, particularly among the Administrative Law Judges ("ALJ"). According to Judge Morrison, when Director van der Vaart heard about these concerns, he sought to allay the ALJs' fears by proclaiming that the Special Provision was not meant for them. Judge Morrison allegedly told Director van der Vaart one person felt the Special Provision was directed at him. Judge Morrison told Petitioner that he felt that Director van der Vaart was referring to Petitioner, but neither specifically stated Petitioner's name. Director van der Vaart replied to Judge Morrison, "that might be right," or words to that effect. The Petitioner discussed with Judge Morrison his fears regarding the Special Provision adversely affecting his employment.

By letter dated 4 January 2022, Director van der Vaart notified Petitioner he was designating the position of General Counsel as exempt from the State Human Resources Act, pursuant to the authority in the Special Provision. The letter informed Petitioner of the right to appeal the designation pursuant to N.C. Gen. Stat. § 126-5(h) and provided information on commencing a contested case under N.C. Gen. Stat. § 150B-23. On 2 February 2022, Petitioner filed a Petition for a Contested Case Hearing in which he alleged Respondent: (1) designated his position as an exempt managerial position based on Respondent's discrimination against Petitioner due to his political affiliation in violation of N.C. Gen. Stat. § 126-34.02(b) (2022); (2) improperly designated his position as an exempt managerial position as defined by N.C. Gen. Stat. § 126-5(b)(2) (the "Designation Claim"); and (3) violated Petitioner's state and federal constitutional rights by changing the position's designation.

On 10 February 2022, Respondent filed its letter to Petitioner notifying him of his position's designation change. This letter documented the agency action from which Petitioner filed his petition for a contested case hearing. On 11 February 2022, Respondent filed a Partial Motion to Dismiss pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that as to Petitioner's political affiliation discrimination claim, he had failed to exhaust his administrative remedies as required by N.C. Gen. Stat. § 126-34.01 (2022) and failed to establish a *prima facie* case of political discrimination.

On 24 February 2022, Petitioner filed an Amended Petition for a Contested Case Hearing, specifying his and Director van der Vaart's political affiliations. On 8 March 2022, Respondent filed a Partial Motion to Dismiss Petitioner's amended petition. On 18 May 2022, ALJ Gray issued an order in which he dismissed Petitioner's constitutional claims for lack of subject matter jurisdiction and deferred judgment on Petitioner's political affiliation discrimination claim and requested additional briefing. On 10 June 2022, ALJ Gray denied Respondent's motion to dismiss Petitioner's political affiliation discrimination claim. Director van der Vaart discharged Petitioner from employment on 30 June 2022.

On 31 August 2022, Respondent filed a motion for summary judgment, supported by affidavits by Director van der Vaart and Judge Morrison, on Petitioner's political affiliation claim. Petitioner filed his own affidavit in response to Respondent's motion for summary judgment on 15 September 2022. After a hearing on 10 November 2022, ALJ Gray issued an order on 2 December 2022 in which he found no genuine dispute exists as to any material fact in Petitioner's designation and political affiliation claims.

ALJ Gray entered summary judgment for Petitioner on his claim that his position was improperly designated as an exempt managerial position, and ordered he be "reinstated to his status as a Career State Employee under [N.C. Gen. Stat.] § 126-1.1 and further that he be awarded back pay and benefits for any pay and benefits he has lost or loses before he is so reinstated." ALJ Gray entered summary judgment in favor of Respondent on Petitioner's political affiliation claim, dismissing it with prejudice.

On 3 January 2023, Petitioner filed written notice of appeal to this Court pursuant to N.C. Gen. Stat. §§ 126-34.02 and 7A-29. On 9 April 2023, upon the parties' cross-Motions for Judicial Review, the superior court vacated ALJ Gray's order granting summary judgment in favor of Petitioner on his Designation Claim, and remanded to ALJ Gray for consideration of whether Director van der Vaart's designation of Petitioner's position as exempt from the Human Resources Act was other than as required by law, including under the state and federal constitutions. *Culpepper v. N.C. Office of Administrative Hearings*, Nos. 22 CVS 110 and 213 (N.C. Super. Ct. Apr. 9, 2023). Petitioner has filed a separate contested case regarding his discharge, which is not at issue here. All other relevant facts are provided as necessary in our analysis.

II. Analysis

The sole issue before this Court is whether ALJ Gray erred in granting summary judgment in favor of Respondent on Petitioner's political affiliation discrimination claim.

Appellate courts review an appeal from a summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when:

> there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

Id. at 573, 669 S.E.2d at 576 (citations omitted).

Under N.C. Gen. Stat. § 126-34.02, a petitioner of a contested case in OAH is entitled to this Court's judicial review of a final decision of

OAH if a State employee alleges discrimination based on political affiliation in the terms and conditions of his employment. N.C. Gen. Stat. § 126-34.02(a), (b)(1); *see* N.C. Gen. Stat. § 7A-29. North Carolina courts "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *N.C. Dep't of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Specifically, North Carolina courts have adopted the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Gibson*, 308 N.C. at 136, 301 S.E.2d at 82. This framework requires the claimant to establish a *prima facie* case of discrimination. *Id.* at 137, 301 S.E.2d at 82.

First, a claimant must show:

> (1) the employee worked for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation), (2) the employee had an affiliation with a certain political party, and (3) the employee's political affiliation was the cause behind, or motivating factor for, the adverse employment action.

N.C. Dep't of Pub. Safety v. Ledford, 247 N.C. App. 266, 288, 786 S.E.2d 50, 65 (2016) (brackets and ellipsis omitted). The court in *Ledford* provided further guidance on establishing a *prima facie* case:

> [T]he burden of establishing a *prima facie* case of discrimination is not onerous and may be established in various ways, including a showing of dissimilar treatment of the claimant as compared to other employees. This is because the showing of a *prima facie* case is not equivalent to a finding of discrimination. Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations.

Id. at 287–88, 786 S.E.2d at 64 (citation, quotation marks, and brackets omitted).

Second, if the claimant establishes a *prima facie* case of political discrimination, "[t]he burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection." *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82; *see id.* at 293, 786 S.E.2d at 67–68 ("Our case law makes [it] clear that once the employee has satisfied the three elements of his *prima facie* case, the burden shifts to

the employer to articulate some nondiscriminatory reason for taking adverse action against him.").

Third, and finally, "[i]f a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination." *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82. "To carry this burden, it is permissible for the employee to rely on evidence offered to establish his *prima facie* case." *Ledford*, 247 N.C. App. at 294, 786 S.E.2d at 68. Nevertheless, "[t]o raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the [employer's] nondiscriminatory motive." *Head v. Adams Farm Living, Inc.*, 242 N.C. App. 546, 558, 775 S.E.2d 904, 912 (2015) (brackets omitted).

Respondent concedes Petitioner has satisfied the first two prongs of establishing a *prima facie* case. Respondent, however, contends Petitioner failed to establish Respondent's alleged discriminatory intent as a matter of law. We agree.

The Human Resources Act and its employment protections apply to all State employees not specifically exempted in N.C. Gen. Stat. § 126-5. Exempt positions are either "exempt managerial" or "exempt policy-making." N.C. Gen. Stat. § 126-5(b)(2)–(3a). Exempt managerial positions are those "delegated with significant managerial or programmatic responsibility that [are] essential to the successful operation of a State department, agency, or division, so that the application of [N.C. Gen. Stat. §] 126-35 (2022)[2] to an employee in the position would cause undue disruption to the operations of the agency, department, institution, or division." N.C. Gen. Stat. § 126-5(b)(2).

The General Assembly amended N.C. Gen. Stat. § 126-5, effective 18 November 2021, to allow the OAH Director to designate five OAH employees as exempt from the Human Resources Act. N.C. Gen. Stat. § 126-5(c1)(27). Director van der Vaart designated Petitioner and three other positions as managerially exempt.

Considering the evidence of Respondent's alleged discriminatory intent chronologically, the first event relevant to Respondent's asserted state of mind occurred shortly after Director van der Vaart assumed his

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2. N.C. Gen. Stat. § 126-35 provides: "No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a).

position as OAH Director and Chief Administrative Law Judge when he asked Judge Morrison why Petitioner was at OAH. There is no explanation in the Record regarding why Director van der Vaart asked Judge Morrison this question. In his affidavit, Petitioner quotes Director van der Vaart's affidavit in which he states he was aware Petitioner had been appointed to serve on the Utilities Commission by a Democrat Governor. However, this "admission" followed his statement asserting he had not considered the political affiliation of any of the individuals whose positions he designated as managerial exempt, although he was aware Petitioner was registered as a Democrat. Director van der Vaart's "admission" is also relevant to Respondent's concession of prong two of Petitioner's *prima facie* case, that Petitioner is affiliated with a certain political party, but it does not explain a discriminatory reason behind him asking Judge Morrison why Petitioner worked at OAH. *Ledford*, 247 N.C. App. at 288, 786 S.E.2d at 65.

According to Petitioner, Judge Morrison apparently interpreted Director van der Vaart's inquiry as displaying concern regarding Petitioner's loyalty because Judge Morrison assured Director van der Vaart that Petitioner was no longer involved in politics and was loyal to OAH. Judge Morisson's response to Director van der Vaart is not evidence of Respondent's discriminatory intent when there is a total absence of context surrounding Director van der Vaart's question to Judge Morrison. To conclude that Director van der Vaart's question held discriminatory intent would require looking beyond his question and speculating about his motive based on Judge Morrison's seeming interpretation of his question.

Petitioner next alleges that before the Special Provision became public, Director van der Vaart had a meeting with Drum at the Legislative Building in which Drum had referred to Judge Morrison as an "old time Democrat." The statement has very little, if any, relevance to discerning Respondent's motivation for designating Petitioner's position as managerial exempt. Director van der Vaart is not the person alleged to have made the statement. Moreover, no connection to Drum's alleged statement and Director van der Vaart's statement is asserted, such as adoption by Director van der Vaart of what Drum said (for example, "I know, right?" or "I agree."). No evidence is shown of any disparaging or discriminatory remark made by Director van der Vaart in response to Drum's purported statement concerning Judge Morrison. Its relevance is limited to Director van der Vaart's knowledge that Judge Morrison is a registered Democrat, but it does not demonstrate any discriminatory intent in designating Petitioner's position as managerial exempt.

We next consider the concern among OAH personnel regarding the Special Provision as well as Director van der Vaart's comment stating, "that might be right." The fact that the Special Provision was a subject of "much talk and concern" among OAH personnel demonstrates, if anything, that it was not clear which positions would be designated managerial exempt. After Judge Morrison stated to Director van der Vaart that there was one person who felt the Special Provision was meant for him, Director van der Vaart responded, "that might be right," or words to that effect, without identifying Petitioner by name, leaving any effort to determine whether Director van der Vaart had targeted Petitioner based on political affiliation merely speculative.

Moreover, even if Petitioner were the person to whom Judge Morrison referred, the conversation could just as easily, and perhaps even more logically, be interpreted to mean the *General Assembly*, rather than Director van der Vaart, had targeted Petitioner with its Special Provision. In his affidavit, Director van der Vaart stated that he "had no conversations with members of the General Assembly about establishing exempt positions at OAH and was therefore surprised to learn of legislators' revisions to [N.C. Gen. Stat.] § 126-5(c1)(27) giving me, as the Director, the authority to designate five additional positions within OAH as exempt from the" Human Resources Act.

The Record does not show whether Plaintiff was the subject of their conversation, and we will not rely upon mere conjecture to reach a conclusion. *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 505, 451 S.E.2d 650, 658 (1995) (summary judgment properly entered for defendants where plaintiffs could only "rely on mere conjecture and have shown no facts sufficient to support their allegations of a common agreement and objective" of gender discrimination).

In summary, the Record indicates Director van der Vaart only mentioned Petitioner by name once to inquire of Judge Morrison why he was working at OAH, and it is mere conjecture to presume Judge Morrison and Director van der Vaart were speaking of Petitioner when Director van der Vaart commented "that might be right."

Director van der Vaart designated three other positions as managerial exempt: Lamont Goins, the Director of the Civil Rights Division; Ms. Snyder, the Codifier of Rules; and Angeline Hariston, the Human Resources Director. Director van der Vaart designated the Codifier of Rules as exempt, even though he was aware the employee was a registered Republican. Additionally, the Record reveals Director van der Vaart was not aware of the political affiliations of the Director of the

Civil Rights Division or of the Human Resources Director. Therefore, we cannot "infer discriminatory intent or design." *Ledford*, 247 N.C. App. at 288, 786 S.E.2d at 64.

The Record does not provide an explanation for the designation or evidence that amounts to more than mere speculation. We are unpersuaded that it is more likely than not Director van der Vaart designated Petitioner's position as exempt based on political discrimination, especially in the light of the fact that Director van der Vaart designated three other positions as exempt, including at least one of which was occupied by a registered Republican. *Ledford*, 247 N.C. App. at 287–88, 786 S.E.2d at 64. Petitioner has not established a *prima facie* case of discrimination. Accordingly, ALJ Gray did not err in granting summary judgment in Respondent's favor.

We briefly address Petitioner's argument that his position's lack of managerial responsibility demonstrates the pretextual nature of Respondent's explanation for designating it as managerial exempt. Petitioner argues Respondent failed to consider the Division of State Archives' Functional Schedule for North Carolina State Agencies, which states that communications by "agency staff who are involved in decision-making, policy development, or other high-level planning for the agency" shall be archived permanently. Petitioner further argues Respondent failed to consider the definition of "Managerial positions" as is defined in 25 N.C. Admin. Code 1L.0306 (2023):

> Managerial positions are defined as positions which manage established divisions or subdivisions of a department, agency or university. These employees direct the work of one or more supervisors and have the authority to hire, reward, discipline, or discharge employees. These employees may also provide suggestions for changes in policy to senior executives with policy-making authority.

25 N.C. Admin. Code 1L.0306(b) (2023).

First, we note these arguments are more properly aimed at Petitioner's Designation Claim, which is focused on the legality of Respondent's designation. This claim is not before us on appeal. Second, the manner by which the Division of Archives classifies communications lacks any discernable relevance to Respondent's state of mind in designating Petitioner's position as exempt. Third, 25 N.C. Admin. Code 1L.0306(b) is written in the context of Title 25 of our Administrative Code, Subchapter 1L, Section 0.300, titled, "Equal Employment Opportunity Institute" ("EEOI").

The definition of "Managerial positions" in that section answers the question of who must participate in the EEOI, as is required in 25 N.C. ADMIN. CODE 1L.0302 (2023): "Supervisors and managers hired, promoted or appointed on or after July 1, 1991 shall participate in the EEOI." Whether Respondent did or did not consider this part of our State's Administrative Code is not probative of his state of mind in designating Petitioner's position as exempt.

Petitioner's argument asserting Respondent should have designated other positions as managerial exempt concerns the propriety and legality of Respondent's designation, which are not currently before us. The only issue before us is whether Respondent acted with impermissible political motive.

III. Conclusion

The General Assembly vested Director van der Vaart with statutory authority to designate five employees at OAH as exempt. The Record does not establish a *prima facie* case that Director van der Vaart did so with political motivations in Petitioner's position. Therefore, we conclude ALJ Gray did not err in granting summary judgment in Respondent's favor on Petitioner's political affiliation discrimination claim. The judgment appealed from is affirmed.

AFFIRMED.

Judges TYSON and COLLINS concur.

IN RE B.M.T.

[292 N.C. App. 26 (2024)]

IN THE MATTER OF THE ADOPTION OF B.M.T., A MINOR

No. COA22-377-2

Filed 2 January 2024

Adoption—petition to adopt—legitimation of child prior to petition—parent's consent for adoption required

After a mother placed her child up for adoption without the knowledge or consent of the child's biological father (respondent), the trial court properly denied petitioners' petition to adopt the child where, before the petition was filed, respondent and the mother had executed a "voluntary acknowledgement of paternity" in the child's home state of Tennessee. Because the acknowledgement of paternity constituted a legitimation of the child under Tennessee law, respondent's consent to the child's adoption was required under N.C.G.S. § 48-3-601(2)(b)(3).

Judge STADING concurring in result.

On remand from the Supreme Court of North Carolina by Order dated 15 November 2023. Appeal by Petitioners from Order entered 16 September 2021 by Judge Teresa H. Vincent in Guilford County District Court. Originally heard in the Court of Appeals 1 November 2022 with opinion issued 20 December 2022. *Matter of Adoption of B.M.T.*, 287 N.C. App. 95, 882 S.E.2d 145 (2022).

Manning, Fulton, & Skinner, P.A., by Michael S. Harrell, for Petitioners-Appellants.

Lindley Law Firm, PLLC, by Kathryn S. Lindley, for Respondent-Appellee.

HAMPSON, Judge.

Background

Respondent is the biological father of Layla.[1] Petitioners are the prospective adoptive parents of Layla. Without Respondent's knowledge or consent, on 13 June 2019, Layla's biological mother placed Layla with

1. A pseudonym used for the minor child designated in the caption as B.M.T.

Petitioners for the purpose of adoption. On 20 June 2019, Respondent and Mother executed a Voluntary Acknowledgement of Paternity with the State of Tennessee. Subsequently, Respondent's name was added to Layla's birth certificate, and Layla's surname was changed to the surname of Respondent. Petitioners filed a Petition to adopt Layla on 27 June 2019. On 16 September 2021, the trial court entered an Order concluding Respondent's consent to the minor child's adoption is required pursuant to N.C. Gen. Stat. § 48-3-601.

On 20 December 2022, we issued a unanimous opinion affirming the trial court and concluding Respondent's consent to adoption was required before Petitioners could adopt Layla. *Matter of Adoption of B.M.T.*, 287 N.C. App. 95, 882 S.E.2d 145 (2022). We held Respondent's consent was required under N.C. Gen. Stat. § 48-3-601 because we agreed with the trial court's determination that Respondent provided, in accordance with his financial means, reasonable and consistent payments for the support of both Layla's biological mother and Layla to satisfy the requirement of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2021).

On 24 January 2023, Petitioners filed a Petition for Discretionary Review in the Supreme Court of North Carolina. The Supreme Court granted discretionary review on 4 April 2023. On 15 November 2023, the Supreme Court issued an Order stating in full: "Reversed for the reasons stated in *In re C.H.M.*, 371 N.C. 22 (2018), and remanded for consideration of any outstanding issues on appeal."

Analysis

In our prior opinion, we analyzed, applied, and—solely on the facts of this case—ultimately distinguished *In re C.H.M.*, explaining our reasoning, discussing related cases, and how we reached our conclusion in this case. Our Supreme Court, however, provided no explanation for its decision as to why our prior decision should be reversed, thereby leaving a rather significant question mark in this important area of law. Nevertheless, we are bound by the Supreme Court's Order to simply consider any remaining outstanding issues on appeal.

Our faithful consideration of the outstanding issues on appeal here reveals an alternative basis for affirming the trial court's decision. On appeal to this Court, Respondent, in his principal Appellee's Brief, argued the parties' execution of a Voluntary Acknowledgement of Paternity in Tennessee prior to the filing of the North Carolina adoption petition served as a legitimation under Tennessee law. As such, Respondent contends Respondent's consent is required prior to Layla's adoption under the separate ground of N.C. Gen. Stat. § 48-3-601(2)(b)(3).

N.C. Gen. Stat. § 48-3-601(2)(b)(3) provides in a direct placement, consent is required of a man who may or may not be the biological father but who "[b]efore the filing of the [adoption] petition, has legitimated the minor under the law of any state[.]" N.C. Gen. Stat. § 48-3-601(2)(b)(3) (2021). Here, the trial court found:

> 10. The Respondent filed a Voluntary Acknowledgment of Paternity in Tennessee on June 20, 2019, before the petition for adoption was filed with the Clerk of Superior Court in Guilford County; further that the mother of the child executed the document on June 20, 2019 and that both signatures were notarized on June 20, 2019.
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> 11. The Tennessee Voluntary Acknowledgment of Paternity specifically provides that this document allows the legal father "the ability to protect your legal rights by having a say in any attempted adoption of your child by others"; a certified copy of this document dated July 18, 2019, was provided to this Court as Respondent's Exhibit 20; further the Acknowledgment and the certified copy were dated prior to Respondent being served with the Notice of the Petition for Adoption in this case.
>
> 12. Tennessee was the home state of the minor child and Tennessee law clearly provides that once the father has voluntarily acknowledged paternity the father's consent is necessary.

To the extent these are Factual Findings, Petitioners have not challenged the sufficiency of the evidence to support these Findings, and these Findings are binding on appeal. *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal."). Moreover, as noted by the trial court, the evidence in the Record quite plainly supports the Finding Respondent filed a Voluntary Acknowledgement of Paternity in Tennessee before the filing of the adoption petition in North Carolina. Respondent's Exhibit 20, contained in the Record Supplement, is a certified copy of the Voluntary Acknowledgement of Paternity from the Tennessee Department of Health with the notarized signatures of both Respondent and the biological mother dated 20 June 2019. Thus, the trial court's Factual Findings are supported by evidence in the Record. *See Hanson v. Legasus of N.C., LLC*, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010).

In their Reply Brief to this Court, Petitioners contended the Voluntary Acknowledgement of Paternity is itself insufficient to establish legitimation in Tennessee and that Tennessee instead requires an Order of Parentage. The Tennessee Court of Appeals has, however, held the opposite:[2]

> Mother also appears to rely somewhat on Chapter 36 of the Tennessee Code, arguing that "[t]here is nothing in the statute which establishes the procedure by which parentage is ordered which substitutes a Voluntary Acknowledgment of Paternity for an Order of Parentage." Respectfully, we disagree with Mother's interpretation of the applicable Tennessee statutes to the extent that she maintains that an order of parentage is the only mechanism by which a father may establish parentage and acquire standing to sue for custody or visitation. Tennessee Code Annotated section 36-2-301 serves as a statement of purpose regarding the subsequent statutes regarding paternity and legitimation in the Tennessee Code. It expressly states that "[t]his chapter provides a single cause of action to establish parentage of children other than by adoption . . . *or by acknowledgment of parentage* . . ." Tenn. Code Ann. § 36-2-301. Furthermore, Tennessee Code Annotated section 36-2-305(b)(1) states that "[a]bsent an agreement or *an acknowledgement of parentage* as prescribed by § 68-3-203(g), § 68-3-302, or § 68-3-305(b), a complaint to establish parentage may be filed." Tenn. Code Ann. § 36-2-305(b)(1). These referenced provisions from Title 68 are the very provisions pursuant to which a VAP under Tennessee Code Annotated section 24-7-113 is completed. *See* Tenn. Code Ann. 24-7-113(a) ("A voluntary acknowledgment of paternity which is completed under § 68-3-203(g), § 68-3-302, or § 68-3-305(b) or under similar provisions of another state or government shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment[.]").
>
> Based on our plain reading of the applicable statutes, it appears that the Code provides for multiple ways in which

2. We quote extensively from the Tennessee Court of Appeals' opinion as we defer to that Court on matters of Tennessee law rather than apply our own interpretation.

> parentage may be established rather than the sole option of filing suit to specifically establish same. As indicated above, the statement of purpose in section 36-2-301 itself notes that parentage may be established by ways other than a cause of action to establish parentage of children by its inclusion of "other" along with express mentions of both adoption and acknowledgment of parentage. This language alone indicates that an order establishing parentage is not the sole manner in which a father may obtain standing to sue for custody and visitation rights.

Baxter v. Rowan, 620 S.W.3d 889, 895-96 (Tenn. Ct. App. 2020). Indeed, as *Baxter* points out, under the Tennessee statute:

> A voluntary acknowledgment of paternity which is completed under § 68-3-203(g), § 68-3-302, or § 68-3-305(b) by an unwed father or under similar provisions of another state or government shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment, subject to rescission as provided in subsection (c). The acknowledgment, unless rescinded pursuant to subsection (c), shall be conclusive of that father's paternity without further order of the court.

Tenn. Code Ann. § 24-7-113(a).

Here, the Voluntary Acknowledgement of Paternity constitutes a legal finding of paternity. Moreover, Tennessee statutes provide for a unified process equating establishing paternity with legitimation.[3] Again re-emphasizing the Tennessee Court of Appeals' decision in *Baxter*:

> Tennessee Code Annotated section 36-2-301 serves as a statement of purpose regarding the subsequent statutes regarding paternity and legitimation in the Tennessee Code. It expressly states that "[t]his chapter provides a single cause of action to establish parentage of children other than by adoption . . . *or by acknowledgment of parentage* . . ." Tenn. Code Ann. § 36-2-301. Furthermore, Tennessee Code Annotated section 36-2-305(b)(1) states that "[a]bsent an agreement *or an acknowledgement of parentage* as prescribed by § 68-3-203(g), § 68-3-302, or § 68-3-305(b), a complaint to establish parentage may be filed." Tenn. Code Ann. § 36-2-305(b)(1). These referenced provisions

3. Unlike North Carolina. *See* N.C. Gen. Stat. § 49-14(a) (2021).

> from Title 68 are the very provisions pursuant to which a VAP under Tennessee Code Annotated section 24-7-113 is completed. *See* Tenn. Code Ann. 24-7-113(a) ("A voluntary acknowledgment of paternity which is completed under § 68-3-203(g), § 68-3-302, or § 68-3-305(b) or under similar provisions of another state or government shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment[.]").

Baxter, 620 S.W.3d at 896; *see* Tenn. Code Ann. § 36-2-301 ("This chapter provides a single cause of action to establish parentage of children other than establishment by adoption pursuant to chapter 1 of this title, or by acknowledgement of parentage pursuant to § 68-3-203(g), § 68-3-302 or § 68-3-305(b)."). Under Tennessee law, and in light of *Baxter*, the Voluntary Acknowledgement of Parentage entered in this case constitutes legitimation. This legitimation occurred prior to the filing of the adoption petition in this case.

Thus, before the filing of the adoption petition in this case, Respondent legitimated the minor under the law of Tennessee. Therefore, under N.C. Gen. Stat. § 48-3-601(2)(b)(3), Respondent's consent is required prior to Layla's adoption by Petitioners. Consequently, on this alternative basis, the trial court did not err in concluding Respondent's consent was required in order for Layla to be legally adopted.

Conclusion

Accordingly, for the foregoing reasons, we again affirm the trial court's 16 September 2021 Order requiring Respondent's consent prior to the adoption of the minor child.

AFFIRMED.

Chief Judge STROUD concurs.

Judge STADING concurs in result.

LUCINDA M. MEEKER, PLAINTIFF
v.
JAMES E. MEEKER, DEFENDANT

No. COA22-931

Filed 2 January 2024

1. Contracts—breach of separation agreement—spousal support provision—no cohabitation by ex-wife—support obligation not terminated

In a breach of contract action, where an ex-husband stopped making spousal support payments to his ex-wife pursuant to their separation agreement because he believed that she was cohabiting with another man—which, if true, would have terminated his spousal support obligation under the agreement—the trial court properly found that the ex-husband's support obligation had not been terminated because his ex-wife was not "cohabiting" within the statutory or common law definition of the term. The court made extensive findings to support its determination, including that: the ex-wife's relationship with the other man began as a sexual relationship but eventually ceased to be so; although the ex-wife spent most nights at the man's home for two years, she did so to care for him due to his deteriorating mental health; the ex-wife maintained a separate residence at all times, never kept clothes at the man's home, and did not sleep in the same room as him; and there had been "no assumption of marital duties, rights and/or obligations" between the ex-wife and the man.

2. Damages and Remedies—breach of separation agreement—spousal support provision—specific performance—inadequacy of remedies at law—ability to pay support

In a breach of contract action, where an ex-husband stopped making spousal support payments to his ex-wife pursuant to their separation agreement, the trial court erred in awarding specific performance of the ex-husband's monthly support obligation as the ex-wife's remedy. Although the agreement contained a provision stating that any remedies at law would be inadequate for any breach thereof, the ex-wife was still required to show to the court that her remedies at law were, in fact, inadequate. Further, the court entered insufficient findings regarding the ex-husband's ability to make the required support payments under the agreement.

3. Contempt—civil—order requiring specific performance of separation agreement—spousal support—appeal from order still pending

In a breach of contract action, where the trial court entered an order requiring an ex-husband to specifically perform his obligation under a separation agreement to pay spousal support to his ex-wife, the court lacked jurisdiction to enter a second order finding the ex-husband in civil contempt of the initial order while the ex-husband's appeal from the initial order was still pending. Consequently, the court's civil contempt order was vacated.

4. Divorce—breach of separation agreement—spousal support provision—payment made pursuant to vacated contempt order—claim for attorney fees

In a breach of contract action, where the appellate court vacated the trial court's order holding an ex-husband in civil contempt for failing to pay spousal support, but where the appellate court affirmed the trial court's finding in a prior order that the ex-husband owed his ex-wife over $113,000 in spousal support arrearages under the parties' separation agreement, it was not unjust for the ex-wife to retain a $38,800 payment that the ex-husband made as a purge condition under the vacated contempt order. Therefore, the ex-husband's request for an order on remand that he be reimbursed the $38,800 payment was denied on appeal. Additionally, defendant's request that he be awarded attorney fees based on his claim that his ex-wife breached the separation agreement was meritless, where the ex-wife was not cohabiting with another man and, even if she were, such cohabitation would not have constituted a breach—rather, it would have merely terminated the ex-husband's spousal support obligation under the agreement.

Appeal by Defendant from Order entered on 28 June 2021 and from Contempt Order entered 30 November 2021 by Judge Lawrence J. Fine in Forsyth County District Court. Heard in the Court of Appeals 5 September 2023.

Connell & Gelb PLLC, by Michelle D. Connell, for plaintiff-appellee.

Jonathan McGirt, for defendant-appellant.

DILLON, Judge.

James E. Meeker ("Husband") appeals from an Order entered finding him in breach of a support provision in a separation agreement and from a Contempt Order finding him in contempt of the Order.

I. Background

Husband and Lucinda M. Meeker ("Wife") were married in 1982, had two children by 1996, separated in 2009, and divorced in May 2011.

In 2010, after separating but before divorcing, Husband and Wife entered into a separation agreement (the "Agreement"). The Agreement provided, among other matters, that Husband pay Wife spousal support of $7,577.78 each month[1] until 2025 and that Wife waive any right to alimony in any subsequent divorce action. The Agreement also provided that, while each party was free to reside anywhere and with anyone (s)he "may deem fit or as each of them may desire[,]" Husband's obligation to pay spousal support would terminate prior to 2025 upon the "death, remarriage, or cohabitation" of Wife.

The Agreement and the trial court orders in this matter all refer to the monthly spousal support payments due under the Agreement as "alimony." However, the Agreement was never adopted by any trial court in an order. Accordingly, the monthly spousal support payments are better characterized as a contractual obligation (or "spousal support payments") rather than as "alimony." *See* N.C. Gen. Stat. § 50-16.1A(1) (defining "alimony" as "an order [by a court] for payment for the support and maintenance of a spouse or former spouse").

In 2011, the parties divorced.

In 2018, Wife began dating a man and stayed almost every night at his home for over two years.

In 2019, Husband stopped paying Wife monthly spousal support under the Agreement, based on his belief that Wife was cohabiting with another man and that, accordingly, his obligation to pay monthly support to Wife had terminated.

Wife commenced this action alleging Husband had breached the Agreement and seeking, in part, an order directing Husband to specifically perform his obligation to pay her monthly spousal support under that Agreement.

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1. Pursuant to the Agreement, the monthly support payments of $7,577.78 were initially characterized as $6,000.00 for spousal support and the remainder for child support. However, the monthly payment was entirely characterized as a spousal support payment by late 2014, when the parties' younger child turned 18 years of age.

In June 2021, after extensive hearings on the matter, the trial court entered its Order, finding that Wife had not been cohabiting. The trial court directed Husband to "specifically perform under the [Agreement] for the payment of [spousal support]" which "shall be ongoing in the future." The trial court separately determined Husband owed fifteen months in back support payments and that Husband was obligated to continue making payments as they came due.

In July 2021, Husband noticed an appeal from the Order. This Order was not stayed.

In November 2021, the trial court entered its Contempt Order, holding Husband in civil contempt for his willful failure to comply with the earlier Order to specifically perform his obligation to pay the $113,666.70 in arrearages. Recognizing that Husband did not have the present ability to pay all the arrearages, the trial court directed that Husband could purge himself of contempt (1) by paying $38,800.00 by 29 November 2021 and (2) by paying $2,500.00 per month beginning January 2022 until he satisfied the remaining balance of $74,866.70.

On 30 November 2021, Husband tendered a check for $38,800.00. He then appealed the Contempt Order.

II. Analysis

This appeal concerns the July 2021 Order and the November 2021 Contempt Order. Husband makes three arguments on appeal, which we address below.

A. Cohabitation

[1] Husband has contended all along that his obligation to pay spousal support ceased under the terms of the Agreement before 2019, when Wife began cohabiting with a man Husband alleges to be Wife's boyfriend. He argues the trial court erred by applying a statutory interpretation of "cohabitation" as used in the Agreement to find that Wife was not cohabiting.

In 1995, our General Assembly amended the law concerning alimony *orders*, such that an obligation to pay alimony would terminate if the dependent spouse "engages in cohabitation[.]" N.C. Gen. Stat. § 50-16.9(b) (2021). In that amendment, our General Assembly defines "cohabitation," in part, as "the act of two adults dwelling together continuously and habitually in a private heterosexual relationship" which is evidenced "by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married

people, and which include, but are not necessarily dependent on, sexual relations." *Id.*

This statutory definition of "cohabitation" is similar to the definition that had been applied earlier by our Supreme Court and by this Court:

> Cohabitation is defined as: "To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." Black's Law Dictionary 236 (5th ed. 1979). In *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945), [our Supreme] Court stated . . . "[C]ohabitation means living together as man and wife, though not necessarily implying sexual relations." *Id.* at 344, 34 S.E.2d at 157. In *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (1945) . . . the Court stated:
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> > Cohabit, according to Winston's Dictionary, Encyclopedia Edition (1943), means: "To live together as man and wife, usually, though not necessarily, implying sexual intercourse." Black's Law Dictionary, Third Edition, defines the meaning of cohabitation, as: "Living together, living together as man and wife; sexual intercourse." Cohabitation includes other marital duties besides marital intercourse.
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> *Id.* at 85-86, 33 S.E.2d at 490-91.

Rehm v. Rehm, 104 N.C. App. 490, 493, 409 S.E.2d 723, 724 (1991).

In its Order, the trial court stated that it was applying the statutory definition of "cohabitation" found in N.C. Gen. Stat. § 50-16.9(b). We agree with Husband that the statutory definition of "cohabitation" does not *per se* dictate the proper interpretation of "cohabitation" as used in the Agreement. Rather, "[t]he intention of the parties is the controlling guide to [a contract's] interpretation." *Duke v. Mut. Life Ins. Co. of N.Y.*, 286 N.C. 244, 247, 210 S.E.2d 187, 189 (1974).

However, given the similarities between the statutory definition and the definition found in our case law, we conclude that any error by the trial court in relying on the statutory definition does not warrant a new trial on the issue of cohabitation. The trial court made extensive findings regarding the nature of Wife's relationship with the man she was caring for which support its determination that Wife was

not cohabiting under either the definition of cohabitation found in the statute or under our case law. We note that Husband does not point to any evidence that either he or Wife intended some other interpretation to control, and that the Agreement otherwise allows Wife to "reside" with anyone she deems fit.

Specifically, based on competent evidence, the trial court found the following concerning Wife's relationship with her male friend: Wife and the man engaged in a sexual relationship earlier in their relationship; however, their sexual relationship did not continue. Wife, though, did begin staying most nights at the man's home for two years. However, she did so in order to care for him, as the man's mental health was deteriorating. But, at all times, Wife maintained a separate residence. She did not keep clothes at the man's home. They did not sleep in the same room. They never showed any public displays of affection. They did not share expenses. She did not benefit financially from the relationship. She did no chores at his house. And "[t]here has been no assumption of marital duties, rights and/or obligations between [Wife] and [the man], that are associated with married people."[2]

B. Specific Performance Order

[2] Husband makes several arguments challenging the trial court's authority to grant Wife the remedy of specific performance in its Order.

Our Supreme Court has held that specific performance may be an appropriate remedy to enforce payment obligations under a separation agreement. *Moore v. Moore*, 297 N.C. 14, 17, 252 S.E.2d 735, 738 (1979), *overruled on other grounds by Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986). More recently, the Court stated that if the trial court finds "the state of defendant's finances warrants it, the trial judge may order specific performance of all or any part of the separation agreement unless plaintiff otherwise has an adequate remedy at law." *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 658, 347 S.E.2d 19, 23 (1986).

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2. In its Order, the trial court placed the burden on Husband to show that Wife was cohabiting, holding that Husband had "failed to prove by the greater weight of the evidence that [Wife] has cohabited[.]" Certainly, if Husband's obligation was to pay court-ordered alimony, the burden would be on him to show that Wife was cohabiting to avoid his obligation to continue paying. *See, e.g.*, *Cunningham v. Cunningham*, 345 N.C. 430, 438, 480 S.E.2d 403, 407 (1997). However, since the Agreement was never incorporated by the trial court, contract principles apply. And for a breach of contract claim, the burden is typically on the party alleging the breach. *See, e.g.*, *Cater v. Baker*, 172 N.C. App. 441, 445, 617 S.E.2d 113, 116 (2005). Husband makes no argument that the trial court improperly placed on him the burden of proving that wife was cohabiting in this contract case. Accordingly, we do not address this issue.

Indeed, our Court has recently reiterated that "[a] separation agreement may be enforced through the equitable remedy of specific performance"; that "[s]pecific performance is appropriate if the remedy at law is inadequate, the obligor can perform, and the obligee has performed her obligations"; and that "damages are usually an inadequate remedy in the context of separation agreements." *Diener v. Brown*, 290 N.C. App. 273, 278, 892 S.E.2d 212, 215 (2023).

In its Order, the trial court decreed that Husband "is ordered to specifically perform under the contract for the payment of [spousal support]; and [Husband's] obligation shall be ongoing in the future"; that there were fifteen missed payments that were due at the time the Order was entered; and that Husband's "failure to pay alimony will be ongoing."

In their respective briefs, Husband and Wife agree that the remedy of specific performance granted by the trial court in the July 2021 Order only applied to Husband's obligation to make monthly payments going forward and, otherwise, did not apply to the fifteen months of arrearages. For instance, Husband contends the trial court erred in ordering specific performance as to his obligation to pay the arrearages, because the trial court failed to determine that Wife lacked an adequate remedy at law. And Wife contends that "[t]he Specific Performance Order states what [Husband] was obligated to do under the Agreement and what he is now obligated to do under the court order. The court does not order Defendant to *actually* perform payment of the arrears at this time; therefore, it was not necessary to make a finding or conclusion that [Wife] lacks an adequate remedy at law to collect the arrears."

Given the language in the Order including the lack of findings regarding Husband's ability to pay arrearages, we likewise construe the language of the Order concerning the arrearages as a statement that they were owed and *not* as a decree of specific performance concerning those arrearages.

We now address whether the trial court erred in its Order by decreeing that Husband specifically perform his obligation under the Agreement to make monthly $7,577.78 support payments to Wife as they become due going forward.

It is true, as Wife notes, that the parties agreed in the Agreement itself that remedies at law would be inadequate for any breach thereof. However, our Court has held that such a contractual provision does not relieve a party from her obligation to otherwise show to the court that her remedies at law are, indeed, inadequate:

> Plaintiff first argues that the Settlement Agreement expressly requires specific performance upon a party's breach. Upon review, we determine the Settlement Agreement does not extinguish Plaintiff's burden to prove the requirements for specific performance.

Reeder v. Carter, 226 N.C. App. 270, 276, 740 S.E.2d 913, 918 (2013).

In any event, our Supreme Court has held that specific performance "will not be decreed against a defendant who is incapable of complying with his contract[,]" *Cavenaugh*, 317 N.C. at 657, 347 S.E.2d at 23, and that "when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement . . . the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance." *Id.*

Here, Husband put at issue his ability to pay $7,577.78 per month going forward. In its Order, the trial court found that Husband's income and assets had decreased after he had sold his business and started a new one. The trial court, though, made no determination that Husband had the ability to pay $7,577.78 per month or otherwise to what amount Husband could pay. Rather, the trial court merely determined that Husband had "the ability to comply partially or in whole" in making the full monthly payments. Accordingly, the trial court's findings fail to support its Order directing specific performance. We, therefore, vacate the portion of the trial court's order directing Husband to specifically perform his obligation to pay monthly spousal support going forward.

We note Husband's argument that the trial court failed to determine whether Wife otherwise has an adequate remedy at law. However, since we are vacating the portion of the Order directing specific performance, we do not reach this or the other arguments of Husband. On remand, the trial court may reconsider whether Wife is entitled to a decree of specific performance.

C. Civil Contempt Order

[3] Husband next argues the trial court erred by entering the Contempt Order, finding Husband in contempt for failing to pay the arrearages and setting forth purge provisions, months after entering the Order. We agree.

Generally, a trial court has no jurisdiction to enforce its order by contempt while that order is on appeal. N.C. Gen. Stat. § 1-294 (providing that a perfected appeal "stays all further proceedings in the court

below upon the judgment appealed from, or upon the matters embraced therein"); *see Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 582, 273 S.E.2d 247, 259 (1981) (holding that upon a party noticing an appeal, "the court lost jurisdiction to take further action on the contempt matter").

Here, based on the record before us, it does not appear the trial court had jurisdiction to enter the Contempt Order. The record shows Husband noticed his appeal from the Order in July 2021, four months before the trial court held a hearing regarding Husband's alleged contempt of that Order and entered its Contempt Order finding Husband in civil contempt of the Order.

We recognized that our General Assembly has provided "[n]otwithstanding the provisions of G.S. 1-294 . . . an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal." N.C. Gen. Stat. § 50-16.7(j) (2021). However, here, the Order was not one directing the payment of "alimony." No court had ever directed Husband to pay alimony. Rather, the Order directed Husband to pay a contractual obligation. Therefore, the trial court had no jurisdiction to enforce its Order through civil contempt after Husband properly noticed his appeal from that Order. We, therefore, must vacate the Contempt Order.

D. Other Matters

[4] In the "Conclusion" section of his brief, Husband asks our Court, in part, "to remand the cause for entry of an order dismissing [Wife's] claim for specific performance, with instructions for (1) reimbursement of sums unjustly paid by [Husband] to [Wife], and (2) determination of reasonable attorney's fees owed by Wife to Husband for her breach of contract."

Regarding the request for "reimbursement of sums unjustly paid," it appears Husband is requesting an order on remand that he be reimbursed the $38,800 he paid to Wife in November 2021 as a purge condition under the Contempt Order. Though we are vacating the Contempt Order itself, we cannot say that it would be unjust for Wife to retain the $38,800 paid to her by Husband in November 2021. Indeed, we are affirming the trial court's findings in the earlier Order that Wife had not cohabited and that Husband owed Wife $113,666.70 in arrearages. And Husband has not otherwise shown why it would be unjust for Wife to retain the $38,000 paid to her by Husband to reduce the arrearages he owes.

We find no merit in Husband's request that he be awarded attorney's fees for Wife's breach of contract. First, we affirm the trial court's

determination that Wife has not cohabited. Further, cohabitation by the Wife would not be a "breach" of the Agreement. Wife is free to cohabitate, as she is to remarry. Rather, cohabitation by Wife merely terminates Husband's obligation to continue paying spousal support.

III. Conclusion

We affirm the trial court's finding in the Order that Wife has not cohabited, and that Husband continues to be obligated to pay Wife spousal support, including arrearages. We vacate the portion of the trial court's Order granting Wife the remedy of specific performance concerning Husband's obligation to pay her spousal support. And we vacate the Contempt Order, as the trial court lacked jurisdiction to enter that order while the original Order was on appeal.

We remand the matter for further proceedings. On remand, the trial court may, in its discretion, take on further evidence, make new findings, and order relief (including, for example, a money judgment on arrearages still owed) supported by its findings and conclusions.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges MURPHY and THOMPSON concur.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, PLAINTIFF
v.
ANITA D. PEACE, DEFENDANT

No. COA22-918

Filed 2 January 2024

Administrative Law—contested case—entry in Health Care Personnel Registry—substantiation of abuse—definition of abuse—burden of proof

In a contested case brought by a health care technician (petitioner), whose name the Department of Health and Human Services (DHHS) had entered into the Health Care Personnel Registry after petitioner kicked an elderly, intellectually disabled patient, the superior court erred in upholding an administrative law judge's (ALJ) decision to reverse DHHS's substantiation of abuse based on the kicking incident. First, the ALJ mistakenly concluded that

petitioner's behavior did not meet the definition of "abuse" found in 10A N.C. Admin. Code 13O.0101 where, in her conclusion of law, the ALJ stated that evidence of "resulting physical harm, pain, or mental anguish" to the patient was required to support a finding of abuse. Additionally, the ALJ erred by improperly placing on DHHS the burden of proving that petitioner abused her patient rather than placing on petitioner the burden of proving the facts alleged in her petition for a contested case hearing.

Judge HAMPSON concurring in result only.

Appeal by plaintiff from order entered 8 July 2022 by Judge Cindy King Sturges in Vance County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Farrah R. Raja, for plaintiff-appellant.

Ajulo E. Othow, for defendant-appellee.

THOMPSON, Judge.

This appeal has resulted from administrative and legal proceedings arising from the entry in the Health Care Personnel Registry of substantiated findings of neglect and abuse of a patient by defendant-petitioner, a health care technician. Plaintiff-respondent agency appeals from the superior court's reversal of its final agency decision to make such entries upon a petition for judicial review in the lower tribunal. Before this Court, plaintiff-respondent raises the following issues: (1) whether the superior court erred by concluding that defendant-petitioner did not abuse a resident of Murdoch Developmental Center (Murdoch) in Butner within the meaning of 42 C.F.R. § 488.301, as incorporated by reference at 10A N.C. Admin. Code 13O.0101; (2) whether the superior court erred in determining that the Administrative Law Judge (ALJ) did not exceed her statutory authority by placing a burden of proof on plaintiff-respondent in the contested case; and (3) whether there was substantial evidence in the record to support plaintiff-respondent's finding of abuse against defendant-petitioner. After careful review, we hold that the superior court erred in upholding the ALJ's statement of the law regarding the proof of abuse and its improper placement of the burden of proof on plaintiff-respondent. Accordingly, we reverse the order entered by the superior court and remand for further proceedings as described below. In light of these holdings, we do

not address plaintiff-respondent's substantial evidence argument as the evidence in this matter will need to be reconsidered on remand under the appropriate legal standards discussed herein.

I. Factual Background and Procedural History

Plaintiff-respondent, the Division of Health Service Regulation, is a division of the North Carolina Department of Health and Human Services and is statutorily required to maintain the North Carolina Health Care Personnel Registry (the Registry), which is a compilation of the names of all unlicensed health care personnel working in North Carolina health care facilities against whom plaintiff has substantiated neglect, abuse, misappropriation, diversion of drugs, or fraud. N.C. Gen. Stat. § 131E-256(a)(1) (2021). Pursuant to N.C. Gen. Stat. § 131E-256(d) and (d1), health care personnel who wish to challenge plaintiff's allegations or findings of, *inter alia*, neglect and abuse are entitled to an administrative hearing in the Office of Administrative Hearings (OAH) upon the filing of a petition to initiate a contested case, as provided by the Administrative Procedure Act. In turn, pursuant to N.C. Gen. Stat. §§ 150B-43 and 150B-45 (2021), any party aggrieved by a final decision from OAH is entitled to judicial review by filing a petition for judicial review in superior court.

The record on appeal in this matter reveals the following: Defendant-petitioner was employed at Murdoch as a Health Care Technician I, providing direct care services to sixteen individual residents at Murdoch, each of whom has severe or profound intellectual disabilities. Defendant-petitioner had been employed at Murdoch from 2004 to 2020 and had no disciplinary issues during the time she worked there. In her position, defendant-petitioner had worked closely on a daily basis with D.L., a 71-year-old resident of Murdoch, from the time of his readmission to the facility in 2008 and ongoing to the time of the incident at issue here. D.L. is nonverbal but can provide limited communication through a combination of signs, a communication board, very limited word approximation, facial expressions, and body language. D.L. had been diagnosed with profound intellectual disability, other conduct disorders, age-related osteoporosis, osteopenia of the hip, irritable bowel syndrome, and various other physical and psychological disorders. D.L. also wore Saucony brand shoes to accommodate a condition known as bilateral pronation.[1] D.L.'s Behavioral Support Plan (BSP) advised

1. Pronation is a condition in which the weight tends to be more on the inside of the foot when walking. *See* https:www.healthline.com/health/bone-health/whats-the-difference-between-supination-and-pronation (last visited on 4 October 2023.).

staff of D.L.'s bone health issues and did not allow staff to use therapeutic holds, walks, or carries on D.L. except in extreme emergencies. D.L.'s BSP further prohibited staff from using their feet to move D.L. if he was noncompliant and from removing D.L.'s property in an effort to induce compliance. Defendant-petitioner stated she felt that she and D.L. understood each other based on the years defendant-petitioner had spent caring for D.L., and that she knew when something was wrong with him.

On 4 December 2019, defendant-petitioner was working in a location at Murdoch known as Newport Cottage. Around 9:15 a.m., defendant-petitioner discovered D.L. in the dayroom there. D.L. had stooled and soiled his clothes. When defendant-petitioner asked D.L. to get up so that she could clean and redress him, D.L. would not get up and replied, "No." After several attempts to get D.L. to comply with her requests, defendant-petitioner enlisted the aid of her co-worker, Ian Denson, to lift D.L. from his seat. D.L. "straightened his legs, bore down his weight, and slid to the floor" where he lay partially on top of one of defendant-petitioner's feet. D.L. did not respond when defendant-petitioner twice requested that he get up and off of her foot. At that point, defendant-petitioner "moved her legs and feet in a forward motion, kicking D.L.'s body, then pushing or scooting D.L.'s body around the floor with her foot. [Defendant-petitioner] kicked D.L.'s foot or lower leg and pushed his body again with her foot." Defendant-petitioner testified that she then took D.L.'s shoes and walked to the door of the dayroom because she knew he would get up and follow her if she took them. D.L. stood up, assisted by a male staff member, and followed defendant-petitioner to the bathroom to be cleaned.

The 4 December 2019 incident between defendant-petitioner and D.L. was captured on the facility's video surveillance. Additionally, there were five other staff members in the dayroom at the time the incident occurred, although only one—Quavella Warren—reported that she saw defendant-petitioner kick D.L. After a facility investigation of the incident, and an interview with defendant-petitioner in which she denied that her foot made physical contact with D.L., the facility found that defendant-petitioner abused D.L. when she struck him with her foot and also found defendant-petitioner to be neglectful of D.L. for taking his shoes. The facility's findings resulted in a substantiation of physical abuse and neglect against defendant-petitioner and a report of the incident to the Registry; defendant-petitioner was notified by certified letter dated 1 April 2020 of the substantiation of the abuse and neglect allegations and advised that her name would be placed in the Registry.

On 15 January 2020, defendant-petitioner submitted to the OAH a petition for a contested case hearing against plaintiff-respondent. The hearing was set for 27 August 2020 by the OAH before ALJ Melissa Owens Lassiter. In a final decision issued 8 February 2021, the ALJ affirmed the plaintiff-respondent's decision "to substantiate an allegation of neglect and place such finding of neglect next to [defendant-petitioner's] name on the Health Care Personnel Registry," but reversed plaintiff-respondent's substantiation of the allegation of abuse against defendant-petitioner, finding that plaintiff-respondent "substantially prejudiced [defendant-petitioner's] rights and exceeded its authority or jurisdiction" in so doing. Among the ALJ's conclusions of law and pertinent to the dispositive issue we address in this appeal are the following:

> 9. On or about December 4, 2019, Petitioner abused a resident of a health care facility when she willfully kicked D.L., a 71-year-old man with intellectual developmental disability and osteoporosis, multiple times while he was lying on the floor. Petitioner willfully inflicted intimidation and punishment on D.L. to get him to get off the floor when he did not wish to do so. . . .
>
> 10. The evidence at hearing showed that not all forward movements of the leg or foot are made with the same force, and not all forward movements of the leg or the foot will result in physical harm. Five of the seven forward movements Petitioner made towards D.L. were a softer "scoot" or push of D.L.'s body across the floor. Nonetheless, Petitioner still kicked D.L. with her foot or leg, at least twice, on December 4, 2019. The evidence at hearing proved that Petitioner willfully struck D.L., intimidated D.L., and punished D.L. with her foot, regardless of the force used.
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> 11. The second part of the definition of "abuse" only becomes relevant once the willfulness prong is satisfied, and requires that "physical harm, pain, or mental anguish" result from the acts of the Petitioner. In this case, there was no evidence presented at hearing proving that Petitioner's kicking and/or scooting of D.L.'s body resulted in physical harm, pain, mental anguish, or emotional distress to D.L. Even Ms. Norwood noted in her report that D.L.'s psychologist found "it is difficult to determine" if D.L.'s change in behavior surrounding this incident was a result of the December 4, 2019 incident. Resp. Ex. M.

> Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress, Respondent failed to prove that Petitioner "abused" D.L. on December 4, 2019 in violation of 10A [N.C. Admin. Code] 13O.0101 and 42 C.F.R. Part 488 Subpart E.
>
> 12. A preponderance of the evidence at hearing established that Respondent otherwise substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction by substantiating the allegation that Petitioner abused resident D.L. on December 4, 2019 and by listing that finding of abuse by Petitioner's name on the Health Care Personnel Registry.

Plaintiff-respondent sought judicial review of the ALJ's reversal as to substantiation of the abuse allegation by filing a petition on 9 March 2021 in the Superior Court, Vance County. Plaintiff-respondent specifically objected to Conclusions of Law 11 and 12 from the ALJ's final decision, contending that Conclusion of Law 11 contained errors of law and was in excess of the ALJ's statutory authority, and that Conclusion of Law 12 was an error of law and unsupported by substantial evidence in the record. The hearing on plaintiff-respondent's petition took place on 18 April 2022, and on 8 July 2022, the superior court entered its order affirming the ALJ's 8 February 2021 decision, citing the definition of abuse found in 42 C.F.R. § 488.301 and concluding, *inter alia*, that (1) the ALJ's decision to reverse the abuse finding was proper because there was no evidence of resulting physical harm, pain, or mental anguish to D.L.; (2) plaintiff-respondent's argument that the ALJ improperly placed a burden of proof on plaintiff-respondent to provide evidence of physical harm, pain, or mental anguish was meritless; and (3) review of the whole record indicated the ALJ's decision to reverse the abuse finding was supported by substantial evidence because only the first prong of the "abuse" definition was satisfied. Plaintiff-respondent timely appealed on 2 August 2022.

II. Analysis

We find dispositive the first legal error identified by plaintiff-respondent: that the superior court erred in affirming the ALJ's mistaken conclusion that defendant-petitioner did not abuse D.L. within the definition of 42 C.F.R. § 488.301, as incorporated by reference at 10A N.C. Admin. Code 13O.0101. As a result, the superior court order must be reversed, and the case remanded for further proceedings as discussed in more detail below. We are also persuaded by plaintiff-respondent's contention regarding the inappropriate placement of the burden of proof

and address that issue as well, in an effort to prevent the error from being repeated on remand.

A. Standard of review

Where a party appeals from the ruling of a superior court sitting in an appellate capacity to review a final agency decision under the Administrative Procedure Act (APA), this Court reviews the superior court's order for errors of law. *Allen v. Dep't of Health & Hum. Servs.*, 155 N.C. App. 77, 80, 573 S.E.2d 565, 567 (2002) (citation omitted), *disc. review denied*, 357 N.C. 163, 580 S.E.2d 358 (2003). Where an

> appellant argues that the agency's decision was based on an error of law, then de novo review is required. . . . This Court's scope of review is the same as that utilized by the [superior] court.
>
> De novo review requires a court to consider a question anew, as if not considered or decided by the agency. In conducting de novo review, the court may freely substitute its own judgment for that of the agency.

Allen, 155 N.C. App. at 80–81, 573 S.E.2d at 567–68 (citations, internal quotation marks, and brackets omitted). "The proper allocation of the burden of proof is purely a question of law." *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 703, 635 S.E.2d 442, 447 (2006) (citing *Lindsay v. Brawley*, 226 N.C. 468, 471, 38 S.E.2d 528, 530 (1946)), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 445 (2007).

B. Conclusion that defendant-petitioner did not "abuse" D.L.

Plaintiff-respondent first contends that the superior court erred as a matter of law by concluding that defendant-petitioner did not "abuse" D.L. because "controlling case law from this Court in *Allen v. Dep't of Health & Hum. Servs.* . . . indicate[s] that evidence of physical harm, pain, or mental anguish does not have to be admitted at hearing to support a finding of abuse." We agree.

The definition of abuse that the North Carolina General Assembly has adopted for the purposes of the Registry reads as follows:

> *Abuse is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.* Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being.

> Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish. It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology. Willful, as used in this definition of abuse, means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm.

42 C.F.R. § 488.301 (2021); *see* 10A N.C. Admin. Code 13O.0101(1) (2021) (" 'Abuse' is defined by 42 C.F.R. Part 488 Subpart E which is incorporated by reference, including subsequent amendments."). Citing this definition, in the contested case at bar, the ALJ stated that "[t]he second part of the definition of 'abuse' only becomes relevant once the willfulness prong is satisfied, and requires that 'physical harm, pain, or mental anguish' result. . . . Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress, [r]espondent failed to prove that [p]etitioner 'abused' D.L." We consider de novo whether the superior court and the ALJ applied an incorrect definition of "abuse" in this context. *See Allen*, 155 N.C. App. at 84, 573 S.E.2d at 570 (noting that de novo review is appropriate when considering whether, "as a matter of law, [the] petitioner's statement to [a patient was] not sufficiently egregious to constitute abuse" for purposes of the Registry).

We believe plaintiff-respondent is correct in its assertion that the definition of "abuse" employed by the lower tribunals in this case conflicts with the holding in *Allen*, an appeal in which this Court addressed the issue raised by plaintiff-respondent and which is therefore binding in our resolution of this question here. *See In re Appeal from Civil Penalty*, 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.").

In *Allen*, the petitioner, a certified nurse aide working at a nursing home, was overheard to say to an uncooperative and combative patient, "If you kick me, I will knock the f–king hell out of you." *Id.* at 78–79, 573 S.E.2d at 566 (alteration in original). During the ensuing investigation of the incident, the petitioner denied making that remark and instead testified that she had actually told the patient either "You've kicked the hell out of my hand and, if you kick me again, I'm going to have to pinch your foot off" or "If you kick me in the face, little girl, I just don't know what I might have to do to you." *Id.* at 79–80, 573 S.E.2d at 567.

After concluding that the "petitioner verbally abused [the patient] by stating, 'You've kicked the hell out of me and if you do it again I'll have to pinch your foot off,' DHHS notified the petitioner that an allegation of abuse had been substantiated against her, and that the substantiated allegation would be entered into the . . . Registry."[2] *Id.* at 80, 573 S.E.2d at 567. The petitioner filed a petition for a contested case, and the ALJ upheld the Agency decision, as did the superior court upon judicial review. *Id.*

In considering the petitioner's appeal from the superior court order, this Court considered, *inter alia*, whether the petitioner's statement to the patient was "sufficiently egregious to constitute abuse" under the definition provided in 42 C.F.R. § 488.301 (" 'Abuse' means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish")—the same definition as we consider in this appeal. *Id.* at 84, 573 S.E.2d at 569–70. This Court began by noting that, "in the context of this extremely regulated profession and the patient's dependency on a person in the trusted position of nurse aide, the definition of abuse may fairly be understood to reach behavior short of more flagrant forms dealt with in other settings." *Id.* at 85, 573 S.E.2d at 570 (citation and quotation marks omitted). Although it appears that there was no evidence introduced at any level of the proceedings regarding the impact of petitioner's remark on the patient—whether physical or emotional—the Court held:

> Though the record discloses various accounts of the exact statement made to [the patient] by [the] petitioner, the evidence is uncontroverted that [the] petitioner made some statement of a threatening nature to her patient . . . . *While there was no evidence of record that petitioner's threats resulted in physical harm or pain to* [*the patient*], [the] petitioner's threat to do violence to the elderly Alzheimer's patient is certainly sufficient evidence from which a rational factfinder could determine it was such as to cause that patient "mental anguish."

Id. at 88, 573 S.E.2d at 572 (emphasis added). "Accordingly, [the Court] conclude[d] that DHHS properly determined that [the] petitioner's

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2. The petitioner in *Allen*, as a nurse aide, was subject to potential findings in both the Nurse Aide Registry and the Health Care Personnel Registry. *Id.* at 78–79, 573 S.E.2d at 567. Defendant-petitioner here, a health care technician, contests only a finding being noted in the Health Care Personnel Registry. However, both Registries incorporate the same definition of "abuse" as found in 42 C.F.R. § 488.301. *See* 10A N.C. Admin. Code 13O.0101.

actions constituted abuse within the meaning of 42 C.F.R. § 488.301 (as incorporated by reference at 10 [N.C. Admin. Code] 3B.1001(1))." *Id.* In other words, even in the absence of direct evidence of any harm sustained by a patient, the "willful infliction of injury" by a health care professional to a patient was held sufficient to sustain an inference that mental anguish would have been suffered by the patient as a result and therefore to substantiate abuse for purposes of an entry in the Registry.

We find this binding precedent controlling in our resolution of this matter. Defendant-petitioner acknowledges that *Allen* "is on point" but emphasizes that it does not stand for the proposition that a factfinder "must find abuse as a matter of law." We agree that nothing in *Allen requires* a conclusion of abuse in the absence of evidence of the specific harms noted in the pertinent definition; however, under *Allen*, in such absence, the defined harms *may be inferred*. Yet, the ALJ in its Conclusion of Law 11 twice stated that evidence of the listed harms is required to prove abuse for purposes of the Registry:

> [t]he second part of the definition of "abuse" . . . *requires that "physical harm, pain, or mental anguish" result from the acts of the Petitioner*. In this case, there was no evidence presented at hearing proving that Petitioner's kicking and/or scooting of D.L.'s body resulted in physical harm, pain, mental anguish, or emotional distress to D.L. . . . *Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress*, Respondent failed to prove that Petitioner "abused" D.L. on December 4, 2019 in violation of 10A [N.C. Admin. Code] 13O.0101 and 42 C.F.R. Part 488[.301] Subpart E.

(Emphasis added.) This conclusion misstates the law, as under *Allen*, even where there is "no evidence of record that petitioner's threats resulted in physical harm or pain to [the patient], [the] petitioner's [willful infliction of injury] is certainly sufficient evidence from which a rational factfinder *could* determine it was such as to cause that patient 'mental anguish.' " *Id.* at 88, 573 S.E.2d at 572 (emphasis added). Because the ALJ in this case appears to have acted under a misapprehension of the law regarding what *must* be shown to prove abuse for purposes of an entry in the Registry, we cannot know whether the ALJ *could* have inferred mental anguish or some other listed harm to D.L. if the ALJ had understood that such an inference was permitted. This legal error is particularly concerning here in light of the ALJ's findings that D.L. is non-verbal and thus it was difficult to determine whether his observed behavioral changes after the incident at issue were caused

by the incident and given that defendant-petitioner agreed that she had "more or less" threatened D.L. during the incident.

In turn, in its review, the superior court compounded this error by failing to recognize the import of *Allen* as precedent on this point. We therefore must reverse the superior court's order and remand the matter to the superior court for further remand to the ALJ to reconsider defendant-petitioner's petition under the proper legal authorities and precedent, and to make the appropriate findings of fact under the controlling law on which the court can then base conclusions of law.[3]

C. Burden of proof

While our resolution of plaintiff-respondent's first argument requires that we reverse the superior court's order and remand for legally correct proceedings by the ALJ, we briefly address plaintiff-respondent's contention that the superior court erred in its Conclusion of Law 14 when it rejected plaintiff-respondent's "argument that the ALJ improperly placed the burden of proof upon [plaintiff-respondent] to . . . provide evidence supporting this second prong of the definition of 'abuse' " in an effort to prevent the recurrence of this additional error on remand. *See State v. Womble*, 277 N.C. App. 164, 183, 858 S.E.2d 304, 318 (2021), *appeal dismissed and disc. review denied*, 380 N.C. 679, 868 S.E.2d 865 (2022).

Beginning at the initial source of this error of law, in her final decision, the ALJ made several conclusions of law concerning the abuse allegation, noting the two prongs of abuse as defined in 42 C.F.R. § 488.301: (1) a "willful infliction of injury, unreasonable confinement, intimidation, or punishment" that (2) results in "physical harm, pain, or mental anguish." While the ALJ agreed with plaintiff-respondent that the first prong was satisfied in that "[defendant-p]etitioner willfully inflicted intimidation and punishment on D.L. to get him to get off the floor when he did not wish to do so," as noted above in Conclusion of Law 11, the ALJ stated that the second prong was not satisfied because "there was no evidence presented at the hearing proving that [defendant-p]etitioner's kicking and/or scooting of D.L.'s body resulted in physical harm, pain, mental anguish, or emotional distress" and as a result, "[*plaintiff-r*]*espondent failed to prove that* [*defendant-p*]*etitioner 'abused' D.L. . . .*"

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3. While fully equipped to consider and resolve arguments of errors of law upon appeal, this Court does not find facts. S*ee Pharr v. Atlanta & C. Air Line Ry. Co.*, 132 N.C. 418, 423, 44 S.E. 37, 38 (1903) (holding that appellate courts "cannot find facts").

While we generally assume that judges know and follow the law, *see State v. Bell*, 166 N.C. App. 261, 266, 602 S.E.2d 13, 16–17 (2004) (holding that an appellate court is "bound by the record before it," and where the record is void of anything indicating otherwise, we will assume the trial judge correctly applied the law and ruled appropriately) (quoting *State v. Williams*, 304 N.C. 394, 415, 284 S.E.2d 437, 451 (1981), *cert. denied*, 456 U.S. 932 (1982)), this explicit statement by the ALJ in her final decision that she placed the burden on *respondent* to prove abuse by petitioner against D.L. is directly counter to relevant provisions of the APA as set forth by the legislature.

The APA provides that in a contested case the *petitioner* must "state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency[, *inter alia*, e]xceeded its authority or jurisdiction." N.C. Gen. Stat. § 150B-23(a)(1) (2021). Further, "[e]xcept as otherwise provided by law or by this section, *the petitioner in a contested case has the burden of proving the facts alleged in the petition* by a preponderance of the evidence." N.C. Gen. Stat. § 150B-25.1(a) (2021) (emphasis added). *See also House of Raeford Farms, Inc. v. N.C. Dep't of Env't & Natural Res.*, 242 N.C. App. 294, 304, 774 S.E.2d 911, 918, *disc. review denied*, 368 N.C. 429, 778 S.E.2d 92 (2015) and *Overcash*, 179 N.C. App. at 704, 635 S.E.2d at 447.[4]

In its petition for judicial review by the superior court as provided in N.C. Gen. Stat. § 150B-43, plaintiff-respondent noted the ALJ's failure to comply with § 150B-25.1(a) in regard to the placement of the burden of proof in the contested case. The APA provides that on judicial review, an agency's final decision may be reversed or modified "if the reviewing court determines that the petitioner's substantial rights may have been prejudiced because the agency's . . . conclusions" fall into one of the six categories listed in N.C. Gen. Stat. § 150B-51(b) (2021), one of which is being "[i]n excess of the statutory authority or jurisdiction of the agency or administrative law judge." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658–59, 599 S.E.2d 888, 894 (2004) (quoting N.C. Gen. Stat. § 150B-51(b)(2)). Such considerations, including "[t]he proper allocation of the burden of proof," are questions of law to be considered de novo. *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 447; *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

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4. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." N.C. Gen. Stat. § 150B-29(a) (2021).

In its order on judicial review, the superior court noted that plaintiff-respondent had raised the issue that "the ALJ improperly placed the burden of proof" on plaintiff-respondent and addressed this contention in Conclusion of Law 14. Conclusion of Law 14 reads, in its entirety:

> As to [plaintiff-respondent's] argument that the ALJ improperly placed the burden of proof upon [plaintiff-respondent] to show D.L. suffered physical harm, pain, mental anguish, or emotional distress, the [*c*]*ourt finds it illogical for* [*defendant-petitioner*] *to have to provide evidence supporting this second prong of the definition of "abuse." The* [*c*]*ourt also finds it illogical for the ALJ to require* [*defendant-petitioner*] *to have to prove a negative*, *i.e.*, that D.L. did *not* suffer physical harm, pain, mental anguish, or emotional distress. The [c]ourt finds and concludes [plaintiff-respondent]'s argument as to this burden of proof issue is meritless.

(First two emphases added.)

Regardless of the superior court's opinion on the matter, the legislature has specifically directed that "the petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence." N.C. Gen. Stat. § 150B-25.1(a). The ALJ failed to follow this explicit directive, therefore exceeding her statutory authority, and the superior court then compounded this error by substituting its own belief about the proper allocation of the burden of proof and rejecting plaintiff-respondent's appellate argument on that basis, thereby violating N.C. Gen. Stat. § 150B-51(b). On remand, the ALJ should take care to place the burden of proof in accord with the applicable authority.

III. Conclusion

The superior court's order upholding the ALJ's final decision is reversed, and the matter is remanded to the superior court for further remand to the ALJ for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED.

Judge CARPENTER concurs.

Judge HAMPSON concurs in result only.

STATE v. BORLASE

[292 N.C. App. 54 (2024)]

STATE OF NORTH CAROLINA,
v.
TRISTAN NOAH BORLASE, DEFENDANT

No. COA22-985

Filed 2 January 2024

Sentencing—first-degree murder—juvenile defendant—life without parole—two consecutive sentences—propriety of sentences imposed

After defendant was convicted of two counts of first-degree murder for killing his parents one month before turning eighteen years old, the trial court did not err in imposing two consecutive sentences of life without parole (LWOP) after conducting a hearing, in which it considered evidence concerning defendant's youth and other mitigating factors. First, the court's sentencing procedure conformed with Eighth Amendment requirements and did not violate the federal prohibition against "cruel and unusual punishments." Second, the court complied with N.C.G.S. § 15A-1340.19B (requiring a hearing on whether to impose LWOP upon a juvenile convicted with first-degree murder) by considering each of the mitigating factors enumerated in the statute and by entering detailed written findings on each factor that were supported by the evidence. Third, given the court's finding that defendant had demonstrated "irreparable corruption and permanent incorrigibility without the possibility of rehabilitation," defendant's consecutive sentences of LWOP did not violate the prohibition against "cruel and unusual punishments" expressed in Article 1, Section 27 of the state constitution.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 3 March 2022 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Heidi M. Williams, for the State.

Law Office of Lisa Miles, by Lisa Miles, for defendant.

DILLON, Judge.

Defendant Tristan Noah Borlase was convicted of two counts of first-degree murder for killing his parents one month before turning eighteen years of age and was sentenced by the trial court to two life sentences without the possibility of parole, to run consecutively. He appeals his sentence. For the following reasons, we conclude Defendant received a fair trial, free from reversible error.

I. Background

On 10 April 2019, Defendant brutally killed his father and mother in separate attacks at their home near Boone. Evidence at trial showed as follows:

On the morning of 10 April 2019, Defendant attended his Civics and Economics class at school. The lesson that day focused on how juveniles are punished differently than adults in the criminal justice system. Specifically, the lesson instructed that juveniles could not receive the death penalty for murder.

In the afternoon, Defendant's father surprised Defendant by picking him up from high school after receiving a call from school personnel informing him that Defendant's grades had been slipping and that he was at risk of not graduating. Once home, Defendant's parents informed him that they were disciplining him by taking his car keys and cell phone and by prohibiting him from participating on the school's track team for the remainder of the season, including participating in the track meet that afternoon.

Later that evening, Defendant was inside the home with his mother while his father was outside engaged in yardwork. While alone with his mother, Defendant inflicted multiple stab wounds on her with a large knife. He also inflicted blunt force injuries on his mother and strangled her. He then went outside, approached his father from behind, and inflicted a stab wound. He chased and subdued his father, riding his father's back until he fell to the ground, and inflicted several more stab wounds in a violent fashion. When he finished the attack, he walked away with his father still alive. He looked back towards his father and saw him on his knees, struggling to get up. His father then collapsed to the ground, and Defendant continued to walk away. He did not render aid to either parent.

Defendant spent the next two hours attempting to conceal his actions, hiding the bodies of his deceased parents and attempting to clean the crime scene. He hosed down the front porch and the living room area. To dispose of his mother's body, he tied a rope around her

feet to drag her from the house. When this was unsuccessful, he resorted to carrying her, but he repeatedly dropped her. He hid his mother's body in the bed of a pickup truck, under a blanket and bags of mulch, in the woods on the family's property. He stole his father's wallet from his body but left the body in place and covered it with a hammock (which his sister would find later that night while searching for her parents).

Defendant then drove to his grandmother's home to pick up his youngest brother, rather than requiring his grandmother to bring his brother home. That brother described Defendant as "overly happy" and "kinda upbeat" when Defendant picked him up. The grandmother described Defendant as being "just in a really good mood" and said that he "smiled and laughed a bit."

After bringing his brother home, Defendant then left to smoke marijuana with friends, leaving his twelve-year-old brother alone and scared in a home covered with blood, worried about his missing parents. As he was returning home a few hours later, he saw his grandmother's car, whereupon he turned off his headlights and drove away. He stayed at a friend's house overnight and attempted to flee the state the next morning but was caught shortly after crossing the border into Tennessee.

At the time of the killings, Defendant was 17 years, 11 months old, a senior in high school, and had been accepted to attend a state university in South Carolina, with plans to join the school's track team as a pole vaulter.

While in jail, Defendant repeatedly showed a lack of remorse for his crimes. And a few weeks after the killings, Defendant even hosted a birthday gathering for himself, with his friends attending, at the jail.

Approximately three years later, on 2 March 2022, a jury found Defendant guilty of two counts of first-degree murder based on premeditation and deliberation.

The following day, on 3 March 2022, the trial court held a hearing to consider the appropriate sentence, as Defendant was a minor when he committed the two murders. At the conclusion of the hearing, the trial court entered a written sentencing order with its two judgments, sentencing Defendant to two life sentences without the possibility of parole, to run consecutively. Defendant appeals.

II. Analysis

Defendant's sole argument is that the trial court erred by sentencing him to two consecutive life sentences without parole. In making his argument, Defendant contends that the trial court did not comply

with Section 15A-1340.19B of our General Statutes, which provides the procedure for considering a sentence of life without the possibility of parole ("LWOP") for a juvenile offender. He further contends that he was sentenced in violation of the Eighth Amendment to the federal constitution and Article 1, Section 27 of our state constitution.

A. Federal Constitution – Eighth Amendment Jurisprudence

In the present case, the sentencing judge held a hearing in which he heard evidence concerning Defendant's youth and upbringing. The judge exercised discretion and determined two consecutive sentences of LWOP to be appropriate. For the reasoning below, we conclude the procedure employed in sentencing Defendant conformed with the Eighth Amendment of the federal constitution.

The Eighth Amendment to our federal constitution bars the imposition of "cruel and unusual punishments." U.S. Const. amend. VIII. The Eighth Amendment applies to states by virtue of the Fourteenth Amendment. *See Harmelin v. Michigan*, 501 U.S. 957, 962 (1991).

A LWOP sentence is "the second most severe [punishment] known to the law." *Id.* at 996. But as a LWOP sentence is markedly different than a death sentence, *Furman v. Georgia*, 408 U.S. 238, 306 (1972), a LWOP sentence is permissible under the Eighth Amendment for *adult* offenders, even for many non-violent crimes, such as simply possessing a large amount of cocaine, *Harmelin*, 501 U.S. at 996, and may be imposed on *adult* offenders even without ever considering mitigating factors or the "particularized circumstances of the crime and of the criminal." *Id.* at 962.

However, the United States Supreme Court has determined that the Eighth Amendment is more restrictive on the ability of a trial court to impose a LWOP sentence on a defendant who was a minor when he committed his crimes. For instance, in 2010, the Court held that the Eighth Amendment bars the imposition of a sentence of LWOP for a juvenile *nonhomicide* offender. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

In 2012, the Court held that a sentencing scheme which *requires* a sentencing judge to impose a LWOP sentence on a juvenile homicide offender violates the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (holding that "the Eighth Amendment forbids a sentencing scheme that mandates [LWOP] for juvenile offenders."). In so holding, the Court reasoned that a sentencing scheme must afford a sentencing judge or jury "the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.*

at 489. The Court quoted earlier cases to reiterate the "great difficulty [for the sentencing judge] of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender *whose crime reflects* irreparable corruption.' " *Id.* at 479 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2004), and *Graham*, 560 U.S. at 68) (emphasis added).

Four years later, the Court explained that *Miller* "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016).

Courts across our country have grappled with the proper interpretation of these decisions, specifically whether or not the Eighth Amendment prohibits a judge from sentencing a juvenile homicide offender to LWOP without expressly finding that the offender was permanently incorrigible (or at least that his crime reflected incorrigibility). *See Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021) (recognizing a "disagreement in state and federal courts about how to interpret *Miller*").

In 2021, in *Jones v. Mississippi*, the Court clarified that the Eighth Amendment does not require a sentencing judge to make any finding regarding the juvenile offender's permanent incorrigibility or otherwise to provide a "sentencing explanation with an implicit finding of permanent incorrigibility" before imposing a sentence of LWOP. *Id.* at 1318-19, 1321. Rather, the Eighth Amendment merely requires that the sentencing judge be afforded the "discretion to consider the mitigating qualities of youth and impose a lesser punishment." *Id.* at 1314.

In the present case, the sentencing judge held a hearing, considered evidence concerning Defendant's youth, and in his discretion determined two LWOP sentences to be appropriate. The procedure employed by the sentencing judge met the requirements of the Eighth Amendment as articulated by the United States Supreme Court in *Jones* and was at least as robust as the procedure employed by the Mississippi judge in *Jones*, which that Court held to be constitutionally sufficient.

Specifically, in *Jones*, the trial court held a hearing, allowed the defendant to introduce "any evidence relevant to the factors discussed in *Miller*[,]" including five factors touching on the defendant's youth, his upbringing, the circumstances of the offense, his competence, and the possibility of rehabilitation. *Jones v. State*, 285 So.3d 626, 632-33 (Miss. Ct. App. 2017), *aff'd*, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). The judge made an oral ruling in which he "did not specifically discuss on the record each and every factor mentioned in the *Miller* opinion," but

in which he did state that he "considered each of the *Miller* factors." Id. at 634. In sum, he "recognized the correct legal standard ('the *Miller* factors'), his decision was not arbitrary, and his findings of fact [were] supported by substantial evidence." *Id.*

In the present case, the sentencing judge entered a written order in which he considered similar factors with much more articulation as to each factor than that provided by the sentencing judge in *Jones*. He exercised discretion to determine an appropriate punishment. His decision was not arbitrary. And for the reasoning in the next section, we conclude his findings are supported by substantial evidence. Accordingly, we conclude the sentence does not violate the Eighth Amendment.

B. North Carolina's Sentencing Scheme

In 2012, in response to *Miller*, our General Assembly enacted a statute which affords a judge discretion whether to sentence a juvenile homicide offender to LWOP. *See* N.C. Gen. Stat. § 15A-1340.19B (2022). The statute requires the sentencing judge to hold a hearing and allows the State and the defendant to present evidence "as to any matter that the court deems relevant to sentencing." *Id.* § 15A-1340.19B(b). The statute also allows a defendant to offer evidence of mitigating factors, including, but not limited to, eight specific factors which touch on the defendant's youth. *Id.* § 15A-1340.19B(c). Our Supreme Court has held that this sentencing scheme "facially conform[s] to the federal constitutional case law." *State v. Conner*, 381 N.C. 643, 666, 873 S.E.2d 339, 354 (2022).

It may be that our sentencing statute provides more limits than that required by *Miller* and *Jones*. However, as stated in *Jones*, states are free to impose "additional sentencing limits in cases involving defendants under 18 convicted of murder." *Jones*, 141 S. Ct. at 1323.

We now turn to Defendant's contentions in his brief on this issue.

1. Permanent Incorrigibility and Potential for Rehabilitation

Defendant challenges that the evidence did not support the trial court's finding that he was "permanently incorrigible" and "beyond rehabilitation." We note that there is nothing in our sentencing statute which requires the trial court to expressly find a juvenile homicide offender to be permanently incorrigible in order to sentence him to LWOP; however, the statute does require the sentencing judge to consider the "[l]ikelihood that the defendant would benefit from rehabilitation in confinement." N.C. Gen. Stat. § 15A-1340.19B(c)(8). In any event, here, the trial court determined that his "crimes and other [behavior] demonstrate a

condition of irreparable corruption and permanent incorrigibility without the possibility of rehabilitation." We conclude the trial court made several findings supporting its determination and that these findings are supported by the evidence.

Specifically, the trial court made extensive findings concerning Defendant's crimes, his intelligence, his devious calculations made during the crimes, his lack of sincere remorse for those crimes, his manipulative behaviors during and after his crimes and other behaviors, and other relevant factors to determine that there was insufficient evidence concerning the statutory mitigating factor of the likelihood of rehabilitation. While Defendant argues that "the record as a whole" suggests otherwise, our review is not a "whole record test" review. The trial court considered all the evidence, and there was substantial evidence to support the trial court's determination.

2. Defendant's Age

The statute requires the trial court to consider evidence concerning the offender's "[a]ge at the time of the offense" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(1). Here, the trial court found Defendant was one month shy of his eighteenth birthday when he murdered his parents. Defendant takes issue with the failure by the trial court to indicate in its order whether it considered Defendant's age to be a mitigating factor. We disagree. Though the trial court did not expressly state that it did not consider Defendant's age to be a mitigating factor, it is apparent from the section in the order concerning Defendant's age and from the order as a whole that the trial court did not consider Defendant's age as a mitigating factor. For example, the court pointed out that Defendant "reached the age of adulthood only one month after committing these homicides." Accordingly, we conclude that the trial court did not err in its consideration of this factor.

3. Immaturity

The statute requires the trial court to consider evidence concerning Defendant's "[i]mmaturity" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(2). Defendant takes issue with the trial court's handling of this factor. The trial court gave some weight to Defendant's immaturity as a mitigating factor but did not find the factor "to be a significant mitigating factor[.]" In so determining, the trial court recognized that juveniles in general are immature but that there was no evidence to suggest that Defendant was more immature than someone of his age. We conclude that the trial court did not err in considering this factor.

4. Ability to Appreciate Risks and Consequences

The statute requires the trial court to consider evidence concerning Defendant's "[a]bility to appreciate the risks and consequences of [his] conduct" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(3). The trial court found no mitigating value as to this factor, noting Defendant's actions in planning the murders, his attempts to cover up his crimes, and his flight from the crime scene. Defendant merely notes in his brief concerning this factor that his attempt to clean up the crime scene was sloppy at best. Nonetheless, we conclude that the trial court did not err in its consideration of this factor.

5. Intellectual Capacity

The statute requires the trial court to consider evidence concerning Defendant's "[i]ntellectual capacity" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(4). The trial court found Defendant's IQ to be 128 (placing him in the 97th percentile) and that he had no intellectual limitations and, accordingly, determined Defendant's intellectual capacity not to be a mitigating factor. Defendant argues that the trial court should have considered Defendant's high intellectual capacity as a mitigating factor. We conclude that the trial court did not err in its consideration of this mitigating factor.

6. Familial or Peer Pressure

The statute requires the trial court to consider evidence concerning "[f]amilial or peer pressure exerted upon [D]efendant" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(7). Concerning this factor, the trial court found that Defendant had a positive home environment with loving parents and did not experience any significant peer pressure. There was evidence to support this finding. For instance, Defendant's forensic psychologist testified regarding his conversations with Defendant about his father. In those conversations, Defendant "talked about wanting to be like his father and that his father was a role model for him. Talked about how his father taught him how to play the guitar, and how proud his father was, how proud he was when he came to his track meets and would put his arms around his son." During his testimony at trial, Defendant characterized his mother as "a good mom" and "understanding[.]" One of Defendant's sisters testified that their mother had a "soft spot" for Defendant.

Defendant points to evidence suggesting that his relationship with his parents was strained, causing him emotional harm. The trial court did note that Defendant disagreed with some of the decisions his

parents made concerning discipline. There was other evidence to support the trial court's findings. We conclude the trial court did not err by determining that Defendant's evidence was not credible or otherwise had any impact on his decision to murder his parents.

Defendant takes issue with the trial court's "myopic focus on the" murders committed by Defendant. We note that the trial court did not focus *exclusively* on the murders but considered other evidence concerning Defendant when determining the appropriate sentence. In any event, we conclude that it was not error for the trial court to give significant consideration to the circumstances of the murders themselves. Indeed, a major focus of the analysis by the United States Supreme Court in the cases cited above in determining the appropriateness of a LWOP sentence is on whether the "crime" committed by the juvenile offender "reflects irreparable corruption." *Jones*, 141 S. Ct. at 1315 (citations omitted).

In sum, the sentencing judge considered the evidence presented concerning mitigating factors, including those enumerated in the sentencing statute. We conclude that the trial court complied with N.C. Gen. Stat. § 15A-1340.19B in sentencing Defendant.

B. North Carolina Constitution – Article I, Section 27

Defendant contends the trial court violated his rights under Article I, Section 27 of our state constitution, a provision which prohibits "cruel and unusual punishments," in sentencing him to two consecutive sentences of LWOP. N.C. Const. art. I, § 27.

Our Supreme Court recently held that this state constitutional provision "offers protections distinct from, and in [the context of sentencing juvenile offenders] broader than, those provided under the Eighth Amendment" of the federal constitution. *State v. Kelliher*, 381 N.C. 558, 579, 873 S.E.2d 366, 382 (2022). Further, the Court held that "sentencing a juvenile who can be rehabilitated to [LWOP] is cruel within the meaning of article 1, section 27." *Id.* at 585, 873 S.E.2d at 386. The Court reiterated this principle in another opinion decided the same day. *See Conner*, 381 N.C. 643, 669, 873 S.E.2d at 355-56 (2022) (holding that sentencing a juvenile offender whom the court finds not to be "incorrigible or irredeemable" to LWOP violates "the even more protective provisions of article 1, section 27" of our state constitution).

In both *Kelliher* and *Conner*, the sentencing judge found the juvenile offender *not* to be permanently incorrigible. Our Supreme Court held in each case that it was a violation of our state constitution to

sentence a juvenile offender to LWOP where the sentencing court found the offender not to be permanently incorrigible. However, here, the sentencing judge made no finding that Defendant was not permanently incorrigible. Rather, the trial court expressly found that "it did not believe that there is a likelihood of rehabilitation in confinement" and that Defendant's crimes "demonstrate a condition of irreparable corruption and permanent incorrigibility."

In what is arguably *dicta*, our Supreme Court further stated in *Kelliher* and *Conner* that even if the trial court does not find the juvenile offender not to be permanently incorrigible, the Court considered it a violation of our state constitution for a judge to sentence a juvenile offender to LWOP unless the judge affirmatively found the offender permanently incorrigible. *See*, *e.g.*, *Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387 (noting that "unless the trial court expressly finds that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated, he or she cannot be sentenced to [LWOP]" under our state constitution). That is, where the federal constitution does not require an express finding by a sentencing judge that the juvenile offender is or his crime reflects permanent incorrigibility, *see Jones v. Mississippi*, *supra*, our Supreme Court expressed the view that such a finding is required under our state constitution.

However, even if these statements in *Kelliher* and *Conner* are not *dicta*, we conclude the trial court complied with the holding when it expressly found that there was no likelihood that Defendant would be rehabilitated during confinement. Accordingly, we conclude the trial court did not violate Defendant's rights under our state constitution in sentencing him to two consecutive sentences of LWOP for the murder of his parents.

III. Conclusion

The trial court did not err in sentencing Defendant to two consecutive sentences of LWOP. We, therefore, conclude Defendant received a fair trial, free of reversible error.

NO ERROR.

Judge GORE concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that the trial court did not err in sentencing defendant to two consecutive sentences of life without the possibility of parole. The majority's opinion not only misreads the record, but it also ignores and calls into question our Supreme Court's precedent regarding a sentencing judge's "duty to find a statutory mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible." *State v. Spears*, 314 N.C. 319, 321 (1985) (citing *State v. Jones*, 309 N.C. 214, 219–20 (1983)). This duty of the trial court "is at the heart of the factfinding function[,]" and by allowing the trial court to ignore credible evidence, the majority renders meaningless the requirement that it consider the statutory factors under N.C.G.S. § 15A-1340.19B. *Jones*, 309 N.C. at 219–20.

Such blatant disregard for precedent demands justification, but the majority offers none. Instead, it wrongly concludes that the sentencing judge considered the evidence presented and complied with the statute. Moreover, rather than acknowledge defendant's evidence, the majority concentrates on excusing the trial court for its "significant consideration" of the crime when sentencing defendant—"despite the fact that the case law warns against such a focus[.]" *State v. Ames*, 268 N.C. App. 213, 225 (2019). In the process, the majority diminishes longstanding concerns surrounding the sentencing of juveniles and the importance of "considering an offender's youth and attendant characteristics before imposing a life-without-parole sentence." *Miller v. Alabama*, 567 U.S. 460, 483 (2012) (cleaned up).

I would vacate and remand for resentencing because the trial court violated N.C.G.S. § 15A-1340.19 as well as its duty under *Jones* in the face of credible evidence alone. However, by refusing to consider relevant mitigating evidence—despite such evidence being manifestly credible under North Carolina law—the trial court also violated defendant's constitutional rights under the Eighth Amendment and Article 1, Section 27 of the North Carolina Constitution.[1] *See Eddings v. Oklahoma*, 455 U.S. 104, 104 (1982).

The majority implies defendant murdered his parents because they took "his car keys and cell phone" and "prohibit[ed] him from

1. Because "our Supreme Court 'historically has analyzed [Eighth Amendment] claims by criminal defendants the same under both the federal and state Constitutions[,]' " my analysis applies to both. *See State v. Seam*, 263 N.C. App. 355, 365 (2018), *aff'd*, 373 N.C. 529 (2020) (quoting *State v. Green*, 348 N.C. 588, 603 (1998)).

participating on the school's track team[.]" The record before us, however, tells a much different story.

I. Background

Defendant's convictions arise from the killing of his parents in spring of 2019 at the family's home in Deep Gap, a remote area near Boone, North Carolina. At the time, defendant was seventeen years old and a senior in high school. Defendant's parents had eight children, four biological and four adopted. Defendant was the youngest of the biological children. The addition of the adopted children created many challenges for the family. Two of defendant's adoptive siblings had to leave the household due to family conflict. Specifically, one was sent to a psychiatric hospital before permanently ending up in foster care while another was sent to a home for troubled children in Missouri.

Defendant's parents were described as loving and committed to their children. They were also deeply religious, particularly defendant's mother. These religious views strained defendant's relationship with his mother and became a source of conflict. Defendant described discipline in the household as harsh. Defendant testified to being awakened in the middle of the night by his mother sometimes as many as "four out of five school nights[,]" so his mother could lecture him on religion, school, and girls for several hours. Defendant's adoptive siblings also described being awakened by their mother and taken to a place referred to as "the nest"—the place in the house where these late-night confrontations occurred. Some of these conflicts lasted several hours and escalated to screaming.

Before relocating to Deep Gap, the family lived in Mooresville, North Carolina. In 2017, the family physically separated when defendant's mother and two of the siblings moved to Deep Gap, leaving defendant, defendant's father, and another sibling in an apartment in Mooresville.

At the end of defendant's junior year, they joined his mother and siblings in Deep Gap, where the home was unfinished and not yet approved for occupancy. At one point, defendant testified that out of fear that building inspectors would discover them living in the structure, the family took down or moved everything in it that made it "look[ ] like people were living inside." Defendant testified that during this period, his sleeping arrangements varied from staying with his grandmother to sleeping in his car or a goat pen that was on the property.

Although athletically gifted and highly intelligent, defendant struggled academically. He was frequently absent or late to class and failed

to finish assignments. While in class, defendant would listen to music and not pay attention. During his senior year of high school, defendant testified to frequently using marijuana and nicotine and having sex with multiple partners. In 2018, defendant was suspended from school after being found with a knife during a search for vaping paraphernalia by school administrators. That same month, defendant participated in outpatient counseling "due to concerns regarding poor judgment and impulsive decision-making within the home and school environments[.]" Moreover, defendant suffered from depression and anxiety. Before his arrest, he engaged in self-harm by cutting his forearms. He also testified to contemplating suicide and attempting it in 2018.

On 10 April 2019, defendant's English teacher called defendant's mother because defendant "wasn't turning in a lot of assignments and . . . was having a hard time staying awake in class." In response to the call, defendant's parents pulled defendant out of class. The majority suggests that because it was discussed in his civics class that day that juveniles could not receive the death penalty for murder, the lecture somehow fueled defendant's actions. This suggestion has no support in the record and is mere speculation—in fact, the record reflects defendant's lack of attention and interest in the classroom, specifically on the day of the civics class lecture.

After his parents picked him up from school, defendant testified that they went home and discussed his shortcomings, such as being tardy "almost 30 . . . out of . . . 40-some days of school[,]" and his risk of not graduating high school. At some point, defendant's mother had him take a drug test. Defendant and his father then went to Lowe's Home Improvement to purchase mulch. After the three of them completed some household chores, surveillance cameras, which defendant had helped his father install around the home, showed defendant's father walking toward his truck in the driveway to start unloading pallets of mulch at 6:31 p.m. One minute later, defendant was seen walking out of the home toward the driveway before returning to the door and reentering the house.

According to defendant, his father had asked him to help him with the mulch, but his mother told him that he "needed to figure out some stuff for school." While defendant sent an email to a teacher regarding his class performance, which was dictated by his mother, defendant testified that they started arguing about religion. When he was at the table typing another email, defendant stated that the argument intensified to a point where he said, "Fuck you, that's not what Christianity is about." According to defendant, his mother stated that he "was about to

be talking to God or Jesus, whether [he] wanted to or not" before putting her arm around his neck and applying pressure.

Defendant testified that he responded by twisting around and elbowing her, after which, his mother retrieved a pair of scissors and approached him. Defendant stated that he then grabbed a kitchen knife and stabbed her to defend himself but that she kept coming toward him. Defendant testified that while they were pressed up against each other, he stabbed her again in a "reactive frenzy" while he was "trying to get outside[.]" According to the forensic pathologist, her death was caused by stab wounds to her torso. The autopsy results also found that defendant's mother "had been asphyxiated by some type of pressure to the neck prior to death."

At 6:35 p.m., the driveway surveillance camera showed defendant running toward his father in the driveway with a knife and stabbing him in the upper torso. Defendant's father is then seen running away from defendant. Another camera then showed defendant's father running down a hill adjacent to the house while defendant pursued him. While running, defendant's father appeared to trip and fall on the ground, at which point defendant started attacking his father with the knife.

According to defendant, after he went outside, he started yelling for his father "want[ing] to tell him what happened[.]"[2] Defendant recalled colliding with his father in the driveway but not stabbing him at that point. Defendant testified that when running after his father, he saw his father reach for something in his pocket, believing it could have been a pocketknife or phone. Defendant testified, "I was trying to talk to him. And either I was talking or my thoughts were screaming very loudly in my own head, but I thought I was audibly talking and trying to talk to him." Defendant further testified that when he caught up with his father, he started stabbing him. Then, according to defendant, the knife dropped to the ground and defendant's father picked it up after a brief scuffle. In response, defendant testified that he knocked the knife out of his father' hand with a rock before retrieving it and stabbing his father again. The forensic pathologist found that defendant's father died from stab wounds to his torso.

Dr. James Hilkey ("Dr. Hilkey"), defense counsel's expert witness and forensic psychologist, reported that "the encounter between [defendant] and his mother was a highly disturbing and emotionally arousing

2. The surveillance cameras did not record audio.

event; a culmination of years of conflict." The report found that defendant's actions "in killing his father after the assault on his mother was a continuous event and consistent with individuals experiencing a depersonalization/derealization disorder[,]" which involves "experiences of unreality or detachment with respect to surroundings[.]"

Defendant testified that, after killing his father, he went back to the house and vomited in the toilet before returning to his father where he got the knife and his father's phone and wallet. From 6:41 to 6:56 p.m., surveillance footage showed defendant retrieving the knife, hosing down the front porch, and dragging his mother into the driveway. Although there is no surveillance footage, defendant testified that he loaded his mother's body in the back of a truck, covered her with a blanket, and drove the truck toward the barn. According to defendant, he then took a shower, packed some clothes, and at some point, covered his father's body with a hammock and leaves.

Around 8:30 p.m., defendant picked up his younger brother from their grandmother's house and brought his brother back to the house. When defendant's brother asked him where his parents were and why there was blood in the house, defendant told him that their parents were in Wilkesboro and that the blood was from him cutting himself while doing dishes. After telling his brother to go upstairs and play video games, defendant drove to the high school to see friends and smoke marijuana. Defendant testified that after leaving the school, he went to pick up his other brother from work, but his brother had already left. Defendant then drove back to the house, but upon seeing several cars in the driveway, he left and ultimately ended up staying the night with a friend after telling her he had gotten into an argument with his family.

In the morning, defendant told his friend that he wanted to run away, so they left her apartment, got some breakfast at McDonalds, and purchased some toiletries and a pillow at Walmart. The friend told defendant that he could stay at her father's house who lived nearby in Tennessee and defendant agreed. As they crossed the border into Tennessee, police pulled the car over and arrested defendant.

Defendant was indicted with two counts of first-degree murder on 30 September 2019 to which defendant later entered pleas of not guilty. On 2 March 2022, a jury found defendant guilty on both counts of first-degree murder.

Pursuant to N.C.G.S. § 15A-1340.19, a sentencing hearing was held on 3 March 2023. During the hearing, the trial court first allowed the State and family members to be heard. In addition to family members

providing victim impact statements, the State introduced letters from other family members and two written statements that were previously read in court. The State concluded with the following statement:

> Your, honor, I will just say very briefly, I don't have the words to express what this family has been through. They have articulated it much better than I ever could. I will say, Your Honor, over the three years that this case has been pending, I and my staff have been truly honored and humbled to get to know them, to see the resilience and strength of this family. The way they have come together and supported one another in this loss has been truly inspiring for I and my staff, Your Honor, and I think that that along with the words that they've expressed here today truly shows the Court what kind of people that Jeff and Tanya were and what their family was all about.
>
> Your Honor, this community, this family has lost – has suffered an incomprehensible loss. On behalf of the State of North Carolina, Your Honor, given the gravity of this loss and all the other evidence that this Court has heard over the course of this trial, we would argue that the weight of the evidence, the weight of this loss would overcome any mitigating factors that the defense might present, and that the sentence for [defendant] should be life without the possibility of parole for the death of Tanya Maye Borlase and another sentence of life without the possibility of parole in the death of Jeffrey David Borlase, and that those two sentences should run consecutively, Your Honor. Thank you.

Defendant then introduced several sentencing exhibits, including (1) Dr. Hilkey's trial report; (2) Dr. Hilkey's report of psychological forensic evaluation addressing §15A-1340.19's mitigating factors; (3) a letter from Susan Schall ("Ms. Schall"), defendant's 11th grade Honors English teacher; (4) a letter from Cindy Wilkinson ("Ms. Wilkinson"), a mother who had spent a week as defendant's group leader during a church camp in 2017; and (5) a letter from Rachel Chrane regarding defendant's health issues. Defendant provided copies of the exhibits to the State.

Dr. Hilkey's trial report described a strict, chaotic household and a highly dysfunctional relationship between defendant and his mother. Specifically, the report included an interview with defendant's sibling,

who described being "summoned to 'the nest' " and lectured to "for hours at a time and at times until 3:00 in the morning." The sibling stated that "punishments delivered were often done in isolation and away from other siblings." Dr. Hilkey's report additionally explained that due to defendant's "emotionally reserved nature and his discomfort expressing strong emotions[,] he can come across to others as calloused and unfeeling."

The report also included an interview with defendant's ex-girlfriend who stated that she "often hear[d] defendant's mother screaming while she was on the phone with [defendant and had informed the investigator] that [defendant's] mother was very strict and did not feel [defendant] could 'do anything right.' " She further stated that "[t]oward the end, [defendant] quit trying to please and just wanted to make it through each day."

Additionally, the report described a "deeply religious" household where defendant reported that his mother "held to a literal translation of the Bible." According to defendant, it was "not uncommon for his mother to reference receiving instructions from God and removing African and West Indian objects of art from the home believing they were demonic, and at times, screaming at them."

Lastly, the report described significant conflicts between defendant's parents and adoptive siblings, including the removal of two of the siblings from the family. It was reported that before one was removed to a group home, the sibling had attacked his brother, grandmother, father, and mother.

In the letter from Ms. Schall, she described conversations she had with defendant about his "strict religious upbringing" and him "feeling confined by his family's choices and values." In 2018, Ms. Schall was asked to write a letter about defendant to the high school administration. In the letter, Ms. Schall states:

> Currently [defendant], his dad, and one adopted brother live in an apartment in Mooresville (his parents just sold their home this semester) while his mother and the rest of the children live in Boone. This arrangement is partly due to the Borlases building a house in Boone . . . and because [defendant's] brother is so violent that his mother cannot live with him until they work out some issues. This puts an undue burden on [defendant] to help parent his brother.[3]

3. The omitted portion consists of a note Ms. Schall added in a email excerpting the letter. The note is as follows: **{I now know they were renovating a home. [Defendant]**

Moreover, when interviewed by Dr. Hilkey, Ms. Schall reported that defendant "was frequently late for class and appeared physically fatigued." Defendant related to her "chaos in the home, separation of family members, and [moving] concerns[.]"

In Ms. Wilkinson's letter, she described a time during church camp in Myrtle Beach in 2017 where she was defendant's small group leader. According to Ms. Wilkinson, she learned that defendant was sent to the weeklong camp "with only a pair of shorts and a tee shirt" as punishment. In response, Ms. Wilkinson purchased some clothing and toiletries for defendant from Walmart. Ms. Wilkinson "sensed that he needed mothering and felt his emotional rawness and talked through some of the pain privately and in the group." Ms. Wilkinson further stated that defendant "was in despair and showed multiple signs of suicide risk: depression, sense of hopelessness, despair, withdrawal, isolation, worthlessness, saw no way out, fatigue, confusion, and talked about how broken he felt in group time."

Finally, Dr. Hilkey's report of psychological forensic evaluation, which addressed the §15A-1340.19's mitigating factors, stated that although defendant's parents "were law-abiding parents and attempted to provide a safe home consistent with their moral values[,]" defendant's "offense behavior was influenced by [his] conflicted relationship with his mother[.]"

After defense counsel and defendant made their closing statements regarding sentencing, the State declined to make any further argument. In the sentencing order, the trial court concluded that "[d]efendant's crimes and condition reflect a condition of irreparable corruption and permanent incorrigibility without the possibility of rehabilitation" and sentenced defendant to two terms of life without the possibility of parole. Defendant gave oral notice of appeal in open court following sentencing.

II. Discussion

On appeal, defendant argues that the trial court erred by sentencing him to two consecutive life without parole sentences. With regard to the trial court's findings on the mitigating factors enumerated in N.C.G.S. § 15A-1340.19B(c), defendant challenges six of them for either failing to establish whether the factor was mitigating or failing to find mitigating factors despite evidence that they existed. Defendant also argues that the trial court violated defendant's constitutional rights because it

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told me on more than one occasion that it was illegal for them to be living in the home due to the lack of upgrades, electrical and otherwise}.

"refuse[d] to consider" relevant mitigating evidence in violation of the Eighth Amendment. Before addressing each argument in turn, I first review federal and state law on the punishment of juvenile offenders.

A. Statutory and case law on the punishment of juvenile offenders

In *Miller v. Alabama*, the United States Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " 567 U.S. at 465. "Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476. Thus, "the case for retribution is not as strong with a minor as with an adult" because their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

The Supreme Court also stated in *Miller* that because of "children's diminished culpability and heightened capacity for change," sentencing juveniles to life without parole will be an uncommon occurrence. 567 U.S. at 479. This is especially the case "because of the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " *Id.* at 479–80, 183 (citations omitted); s*ee also Graham v. Florida*, 560 U.S. 48, 72 (2010) (explaining that "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is [permanently] incorrigible.").

Thus, in making such rare finding, "the trial court should be satisfied that in 25 years, in 35 years, in 55 years—when the defendant may be in his seventies or eighties—he will likely still remain incorrigible or corrupt, just as he was as a teenager, so that even then parole is not appropriate." *State v. Sims*, 260 N.C. App. 665, 683 (2018) (Stroud, J., concurring); *see also State v. James*, 371 N.C. 77, 96–97 (2018) ("*Miller* and its progeny indicate that life without parole sentences for juveniles should be exceedingly rare and reserved for specifically described individuals[.]").

Moreover, "almost all of the cases" subjecting juveniles to a sentence of life without parole "arose from heinous and shocking crimes[.]" *State v. May*, 255 N.C. App. 119, 130 (2017) (Stroud, J., concurring). However, *Miller* and its progeny "dwell[ ] on the danger in focusing the sentencing inquiry on the nature of the offense." *State v. Ames*, 268 N.C. App. 213, 221 (2019) (citing *Miller*, 567 U.S. at 472); *see also Roper*, 543 U.S. at 553

("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course[.]").

Nine years after *Miller*, in *Jones v. Mississippi*, the United States Supreme Court held "that a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18." 209 L. Ed. 2d 390 (2021). Although parts of *Jones* could be seen as in conflict with *Miller*, our Supreme Court clarified *Jones*'s meaning in *State v. Kelliher*. 381 N.C. 558 (2022).

Specifically, the *Kelliher* Court explained that although *Jones* does not require a separate finding of incorrigibility "under a discretionary sentencing scheme like North Carolina's[,]" the substantive Eighth Amendment rule announced in *Miller* and its progeny remains undisturbed: *Id.* at 576. *Miller* forbids sentencing courts "from sentencing redeemable juveniles to life without parole." *Id.*

In response to *Miller*, our General Assembly enacted what is now codified as N.C.G.S. § 15A-1340.19B, which requires trial courts to "conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole . . . or a lesser sentence of life imprisonment with parole" whenever a juvenile is convicted of first-degree murder. § 15A-1340.19B(a)(2). In determining whether the sentence will be life without parole or life with parole, § 15A-1340.19B requires the sentencing court to consider mitigating factors including (1) age at the time of offense, (2) immaturity, (3) ability to appreciate the risks and consequences of the conduct, (4) intellectual capacity, (5) prior record, (6) mental health, (7) familial or peer pressure exerted upon the defendant, (8) likelihood that the defendant would benefit from rehabilitation in confinement, and (9) any other mitigating factor or circumstance. § 15A-1340.19B(c).

B. Mitigating factors under § 15A-1340.19

Regarding the trial court's findings for the factors enumerated in § 15A-1340.19B(c), defendant argues that the trial court erred in that it (1) failed to establish whether defendant's age was mitigating or not and (2) failed to find mitigating factors for defendant's familial pressure and immaturity. I agree.

After the hearing required by § 15A-1340.19B, the trial court must enter a sentencing order that "include[s] findings on the absence or presence of any mitigating factors[.]" § 15A-1340.19C(a). The sentencing court must also "expressly state the evidence supporting or opposing

those mitigating factors[.]" *State v. Santillian*, 259 N.C. App. 394, 403 (2018) (citations omitted). "To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists[.]" *State v. Canty*, 321 N.C. 520, 524 (1988) (citing *State v. Michael*, 311 N.C. 214 (1984)).

1. Failure to establish whether defendant's age was mitigating

In its sentencing order, the trial court found "that [d]efendant was 17 years and 11 months old on the offense date" and that "[h]e reached the age of adulthood only one month after committing these homicides[.]" Nothing further was stated. Defendant argues that "the court made no indication that it considered any mitigating value that [defendant's] age might have provided."

North Carolina statute requires that the trial court's sentencing order "include findings on the absence or presence of any mitigating factors[.]" § 15A-1340.19C(a). Here, the trial court violated the statute by neither expressly nor impliedly stating whether defendant's age was mitigating or not. The majority states "it is apparent" from the sentencing order "that the trial court did not consider Defendant's age as a mitigating factor" because it found "[d]efendant was a month shy of his 18th birthday" at the time of the offense. This is hardly the case. Although the trial court's statement that defendant reached the age of adulthood *only one* month after committing these homicides could indicate that it found no mitigating value as to age, it could also mean that it found mitigating value, just not a significant amount. *See Sims*, 260 N.C. App. at 675 (finding that defendant's age—seventeen years and six months at the time of the offense—was not a considerable mitigating factor, but still a mitigating one nonetheless). This ambiguity is insufficient to satisfy the requirements of § 15A-1340.19C(a).

Certainly, a defendant who is fourteen at the time of an offense may receive more mitigation value for the age factor as compared to if they were seventeen. However, United States Supreme Court precedent makes clear: the relevant distinction is between children and adults, not between defendants who are fourteen and seventeen. *See Miller*, 567 U.S. at 460 ("*Roper* and *Graham* establish that children are constitutionally different from adults for sentencing purposes."); *see also Matter of Monschke*, 197 Wash. 2d 305, 313, 482 P.3d 276, 280–81 (2021) (extending the age range in *Miller* to defendants who are eighteen to twenty years old). Because it is unclear whether the trial court found an "absence or presence of" mitigation with respect to defendant's age, it violated the statutory mandate. § 15A-1340.19C(a).

2. Failure to find credible evidence of familial pressure

With respect to the enumerated factor "familial or peer pressure exerted upon the defendant," the trial court's sentencing order states:

> In *Miller v. Alabama*, the majority placed emphasis on the negative family, home, environmental and peer influences a juvenile faced while growing up. The specific situations addressed in that and following cases included growing up exposed to a troubled childhood, lack of parental care and involvement, exposure to drugs and even violence. This would also include a situation in which the juvenile was not the "trigger-man" or his involvement in the killing was only tangential. None of the factors are present in this case. In fact, the very opposite is true. Defendant had the benefit of very loving, caring and nurturing parents. He benefited from being raised by parents who deeply loved him and all his siblings and who sacrificed beyond even reasonable measure to provide for their children's health, welfare, happiness, needs and even wishes. While the Defendant may have genuinely disagreed with the form of discipline (*taking of privileges and interactive discussions*), even he seemingly admits in his testimony that both his parents had his best interests and his very future at heart throughout. As to any tangential involvement in murders, that is clearly not the case here. Defendant killed both parents separately by his own hand. *There is no credible evidence before the Court to support any finding of mitigation as to this factor*[.] (emphasis added).

Defendant argues the trial court erred in finding "no credible evidence" to support this mitigating factor and in relying "on the fact that [defendant] was raised in a loving home[.]"

Our Supreme Court has established that the sentencing judge has a duty to find statutory mitigating factors when the evidence in support of such factors is "uncontradicted, substantial and manifestly credible." *Spears*, 314 N.C. at 321 (citation omitted). Thus, to give proper effect to § 15A-1340.19B, "we must find the sentencing judge in error if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible." *State v. Jones*, 309 N.C. 214, 220 (1983).

In *Jones*, our Supreme Court acknowledged that "[i]t is easier to determine from a record on appeal whether evidence of a particular fact is uncontradicted than it is to determine" the credibility of the evidence.

Id. However, the *Jones* Court discussed situations in which courts have considered "credibility to be manifest[.]" *Id.* Two of those situations occur (1) when "the controlling evidence is documentary and [the] non-movant does not deny the authenticity or correctness of the documents[,]" and (2) when "there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions." *Id.* (citations and internal quotation marks omitted).

Here, defendant offered considerable evidence of familial pressure, conflict, and dysfunction that went well beyond the "taking of privileges and interactive discussions[,]" particularly with respect to religion. Such evidence included but was not limited to (1) defendant being summoned to "the nest" in the middle of the night multiple days out of the week; (2) defendant's mother screaming at art objects in the home in front of defendant because she believed they were demonic; (3) defendant needing to sleep in his car or in a goat pen because of the family's chaotic living arrangement; (4) reports of significant familial conflicts with his adoptive siblings, which involved violence at times and put an undue burden on defendant to help parent his siblings; (5) reports of defendant being sent to a weeklong church camp without a change of clothes or toiletries as a form of punishment; and (6) Dr. Hilkey's report that defendant's "offense behavior was influenced by [his] conflicted relationship with his mother[.]" Defendant's evidence also tends to support that defendant was regularly pressured by his mother in that he felt he could not "do anything right" and "just wanted to make it through each day."

Such evidence was not contradicted by the State. Specifically, nothing in the State's evidence spoke to these conflicts or pressures, and after defendant introduced such evidence for sentencing, the State declined to make any further argument. Moreover, under *Jones*, defendant's evidence is presumed credible. Specifically, the evidence was largely documentary, and the State did not deny the authenticity or correctness of the reports or letters.[4] Although the State's evidence supports the fact that defendant's parents loved and cared about him deeply—love and conflict are not mutually exclusive; rather, both can exist in a family simultaneously. Although the majority cites this evidence, such as defendant's idolization of his father, the majority again fails to highlight

4. Nor did the State "point to specific areas of impeachment and contradictions" with respect to defendant's oral testimony about being awakened in the middle of the night by his mother sometimes as many as "four out of five school nights" or needing to sleep in a car or goat pen as the result of the family's dysfunctional living arrangement. *Jones*, 309 N.C. at 220.

anything that refutes or contradicts the substantial evidence of familial conflict discussed in part I.

Further, nothing in *Miller* states that a defendant must lack parental care or be exposed to violence and drugs for the mitigating factor to have value, which the trial court's sentencing order wrongly suggests. Rather, *Miller* considers "the family and home environment that surrounds [the defendant]—and from which he cannot usually extricate himself—no matter how brutal or *dysfunctional*." *Miller*, 567 U.S. at 477 (emphasis added).

"When evidence in support of a particular mitigating . . . factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate" the statute. *Jones*, 309 N.C. at 218–19. Accordingly, the trial court erred in ignoring the evidence of familial disfunction and the mother's irrational behavior while finding no credible evidence regarding the familial pressure exerted upon defendant.

3. Failure to find credible evidence of immaturity

With respect to the enumerated factor "immaturity," the sentencing order states:

> Dr. Hilkey's report cites various general studies tending to indicate that the juvenile brain tends to develop slowly and that the brain does not become fully developed until later in adulthood. While undoubtedly true, there is no credible, specific evidence before the Court that Defendant suffered from any specific immaturity that would act to mitigate his decisions and conduct in this case. Accordingly, the Court does not find this factor to be a significant mitigating factor in this case[.]

Defendant argues that the trial court erred in this finding because there was "credible, specific evidence before the Court that [d]efendant suffered from . . . specific immaturity that would" have mitigated his decisions.

Here, Dr. Hilkey's report stressed that because defendant was only "seventeen on the date of his offense . . . the frontal cortex of his brain was not yet fully developed." Additionally, Dr. Hilkey reported "evidence supporting [defendant's] clinical depression and a significant degree of physiological arousal . . . activating hormonal chemicals in [his] brain. When coupled with the adolescent brain phenomenon, these factors would have impacted his ability to make sound decisions and fully appreciate the impact of his behaviors when he killed his parents."

Defendant's previous participation in outpatient counseling "due to concerns regarding poor judgment and impulsive decision-making within the home and school environments" corroborate Dr. Hilkey's findings regarding immaturity. *See Miller*, 567 U.S. at 471 (explaining that children's "lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking." (cleaned up)). Defendant's "shirking class time on his phone, vaping and smoking weed, and [being] sexually active with more than one partner" acts to further underscore his immaturity.

In addition to being specific, defendant's evidence was credible. In fact, by acknowledging and agreeing with the science of juvenile brain development in its order, the trial court emphasized its credibility. Moreover, the evidence was "documentary[,]" and the State never "den[ied] the authenticity or correctness of [the findings]." *See Jones*, 309 N.C. at 220.

By stating there was "no credible, specific evidence" in its order, the trial court thus disregarded its duty. *See Spears*, 314 N.C. at 321 ("The sentencing judge has a duty to find a statutory mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible."). Accordingly, the trial court again erred in finding no credible evidence that defendant suffered from immaturity.

C. Violation of the State and Federal Constitutions

Defendant argues that the trial court violated defendant's constitutional rights under the Eighth Amendment in that it refused to consider "relevant mitigating evidence" involving his "family life as a source of pressure." I agree.

"Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 104 (1982). In *Eddings*, the trial court refused to consider the mitigating circumstances of the juvenile defendant's turbulent family history because it "found that *as a matter of law* he was unable even to consider the evidence." *Id.* at 113. Because the "sentence was imposed without 'the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases,' " the Supreme Court reversed and required on remand the trial court's consideration of the defendant's home life. *Id.* at 105 (quoting *Lockett v. Ohio*, 438 U.S. 586, 606 (1978)); *see also Jones v. Mississippi*, 209 L. Ed. 2d 390 (2021) (listing a series of its capital cases requiring "the sentencer to consider mitigating circumstances when deciding whether to impose the death penalty.").

Although these cases involved the death penalty, the Supreme Court expressly acknowledged in *Jones v. Mississippi* that these cases

> recognize a potential Eighth Amendment claim if the sentencer expressly refuses as a matter of law to consider relevant mitigating circumstances . . . . By analogy here, if a sentencer considering life without parole for a murderer who was under 18 expressly refuses as a matter of law to consider the defendant's youth (as opposed to, for example, deeming the defendant's youth to be outweighed by other factors or deeming the defendant's youth to be an insufficient reason to support a lesser sentence under the facts of the case), then the defendant might be able to raise an Eighth Amendment claim under the Court's precedents.

209 L. Ed. 2d 390 n.7 (2021). I find this analogy relevant because "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham*, 560 U.S. at 69, 176 L. Ed. 2d 825. Although no execution takes place, "the sentence alters the offender's life by a forfeiture that is irrevocable" and "deprives [them] of the most basic liberties without giving hope of restoration[.]" *Id.* at 69–70.

"Life without parole is an especially harsh punishment for a juvenile[,]" who "will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* at 70, 176 (citations omitted). Even more, in the case *sub judice*, the trial court sentenced defendant to two consecutive life sentences. Because "[t]his reality cannot be ignored[,]" *id.* at 71, I agree with defendant that "logic dictates that th[e] Eighth Amendment condition [under *Eddings*] apply with equal force when considering the ultimate punishment for a juvenile."

Here, the trial court refused as a matter of law to consider relevant mitigating evidence when it determined there was "no credible evidence before the Court to support any finding of mitigation as to [the familial pressure] factor." The current edition of Black's Law Dictionary defines "matter of law" as "[a] matter involving a judiciary inquiry into the applicable law." Black's Law Dictionary (11th ed. 2019). As discussed in part II.B., determining whether mitigating evidence is credible involves a judicial inquiry into the law. *See Jones*, 309 N.C. at 220–21; *see also N. Carolina Nat. Bank v. Burnette*, 297 N.C. 524, 533 (1979) (explaining that credibility of the evidence was "manifest as a matter of law."). Specifically, if the "evidence is documentary and the non-movant does

not deny the authenticity or correctness of the documents," then courts should deem it manifestly credible. *Jones*, 309 N.C. at 220–21 (cleaned up). Likewise, oral testimony should be deemed manifestly credible if "there are only latent doubts as to [its] credibility . . . and the opposing party has to 'failed to point to specific areas of impeachment and contradictions.' " *Id.* (citations omitted).

Thus, like in *Eddings*, when the trial court here found "no credible specific evidence . . . that [d]efendant suffered from any specific immaturity" or familial pressure that would support mitigation, it expressly declined as a matter of law not to consider it. Yet, as discussed in part II.B., under *Jones*, considerable credible and relevant evidence was proffered by defendant at the sentencing hearing as to both factors.

Accordingly, I would hold that the trial court violated defendant's constitutional rights under the Eighth Amendment by "refus[ing] to consider, as a matter of law, [the] relevant mitigating evidence" regarding defendant's family life and immaturity. *Eddings*, 455 U.S. at 104. Because our Supreme Court " 'historically has analyzed [Eighth Amendment] claims by criminal defendants the same under both the federal and state Constitutions[,]' " I would also hold that the trial court violated defendant's constitutional rights under Article 1, Section 27 of the North Carolina Constitution. *See State v. Seam*, 263 N.C. App. 355, 365 (2018), *aff'd*, 373 N.C. 529 (2020) (quoting *State v. Green*, 348 N.C. 588, 603 (1998)).

III. Conclusion

For the foregoing reasons, I dissent from the majority opinion and would remand for a new sentencing hearing with respect to defendant's first-degree murder convictions.

STATE OF NORTH CAROLINA
v.
DINO LAMONT THOMPSON

No. COA22-1036

Filed 2 January 2024

1. Appeal and Error—appellate jurisdiction—criminal case—Rule 4—judgment "rendered"

The Court of Appeals had jurisdiction to hear defendant's appeal from his convictions for first-degree forcible rape and other related offenses where, although the trial court's written judgments were neither file-stamped nor certified by the clerk of court, the judgments were signed by the judge, defendant's notice of appeal was file stamped the next day, and the parties did not dispute that the judgments had in fact been entered for purposes of Appellate Rule 4 (allowing an appeal from a judgment that is "rendered" in a criminal case).

2. Criminal Law—motion for mistrial—rape prosecution—victim as witness—alcohol consumption before testifying

In a prosecution for first-degree forcible rape and other related offenses, where the State informed the trial court on the fourth day of trial that the victim (who was testifying for the State) was seen in possession of alcohol and had possibly consumed alcohol that morning, the trial court did not abuse its discretion by denying defendant's motion for a mistrial after noting—on the record and outside of the jury's presence—that the victim had taken a portable breathalyzer test that day with "a 0.0 outcome." Further, although the victim later admitted to consuming alcohol that morning and the day before, the court did not err in declining to declare a mistrial sua sponte, since the court took immediate measures to address the victim's behavior, including ordering her to refrain from consuming any impairing substances, requiring her to remain in the courtroom until she needed to testify again, and advising her that a member of the district attorney's office would stay with her while she was not testifying to ensure her compliance.

Appeal by Defendant from Judgment rendered 21 March 2022 by Judge Alyson A. Grine in Chatham County Superior Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi L. Regina, for the State.

Christopher J. Heaney for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Dino Lamont Thompson (Defendant) appeals from Judgment rendered 21 March 2022 upon jury verdicts finding him guilty of First-Degree Forcible Rape, First-Degree Kidnapping, Sexual Battery, and Assault of a Female. The Record before us tends to reflect the following:

On 28 October 2019, Defendant was indicted for First-Degree Forcible Rape, First-Degree Kidnapping, and Assault on a Female. On 12 July 2021, the grand jury issued a superseding indictment for First-Degree Kidnapping, Assault on a Female, and a new count of Sexual Battery. Defendant pleaded not guilty to all charges.

The matter came on for trial on 14 March 2022. The State called Victim to testify. Victim testified to the following:

On 3 April 2019 at approximately 2:00 p.m., Defendant came to Victim's house and offered her crack cocaine. Victim and Defendant both smoked crack cocaine. Defendant then left Victim's home but returned around 8:00 p.m. with more crack cocaine, an unidentified powdered substance, and orange-colored alcohol. Victim tried the unidentified powder, which made her feel "weird" and unlike herself. Victim told Defendant she needed to go take a shower, and attempted to go up the stairs to the second floor of her home when Defendant grabbed her. Victim and Defendant went into Victim's bedroom, where Victim grabbed a screwdriver from the dresser beside her bed for protection. Defendant forced Victim to have vaginal intercourse with him against her will. Defendant repeatedly punched Victim while she was on the bed. Victim attempted to fight back and kick Defendant off of her; eventually, she was able to run into her bathroom and locked the door. Victim found her cellphone in the bathroom and called 911.

During Victim's testimony, defense counsel requested to be heard outside the presence of the jury. Defense counsel took issue with Victim's testimony, describing it as "a streamed sort of consciousness." The State was also heard on the issue and requested to be allowed to ask more leading questions on direct examination. The State conducted voir dire regarding Victim's mental health issues to allow the trial court

to determine whether it would be appropriate for the State to ask more leading questions. These issues were ultimately disclosed to the jury: Victim had been diagnosed with either Bipolar or Borderline Personality Disorder; Victim had been diagnosed with Post-Traumatic Stress Disorder and a substance use or abuse disorder; and Victim had recently relapsed and gotten out of rehab the week before trial. Victim also disclosed that she takes Gabapentin for fibromyalgia, chronic pain, anxiety, agitation, and as a sleep aid and Seroquel for Borderline Personality Disorder.

On the fourth day of trial, the State informed the trial court Victim was observed in possession of alcohol, and the bailiffs believed she had consumed some alcohol earlier that morning. Defense counsel moved for a mistrial. The trial court noted, on the record, outside the presence of the jury, Victim took a portable breathalyzer test with "a 0.0 outcome." The trial court denied Defendant's Motion for a Mistrial. When asked whether Victim had taken any impairing substances that day, Victim disclosed she had "a sip of vodka" because her "nerves are bad." Victim also informed the trial court that she took a breathalyzer test twice, and both results were "0." The trial court reminded Victim she is under subpoena and ordered Victim to remain in the courtroom until the time that she is needed as a witness again. The trial court also ordered Victim "not to consume any substances that are impairing, no alcohol, no controlled substances." The trial court advised Victim a member of the District Attorney's Office would stay with her while she was not testifying to ensure her compliance. Before Victim was called to testify again, the trial court stated on the record:

> when [Victim] came in this morning, she appeared coherent to the Court. She was responding rationally to the questions posed to her; seemed to be in control of her faculties. And I believe the parties agree that the best use of time is to go ahead and proceed with cross-examination of [Victim].

On recross-examination, defense counsel asked Victim if she had consumed alcohol that morning, to which she replied, "I sure did." Victim disclosed to the jury that she took a shot of alcohol that was in her purse upon arriving to the courthouse. When asked if she consumed alcohol the previous day, Victim initially replied that she did not. The State later informed the trial court that soon after Victim was released from testifying, Victim reported to the State that she consumed "a beer at lunch" the day before. Defense counsel stated, "I think the jury needs to understand and hear that." Victim was called to testify again and corrected her testimony about not consuming alcohol the day before, disclosing to the jury she had a beer at lunch.

On 21 March 2022, the jury returned verdicts finding Defendant guilty of First-Degree Forcible Rape, First-Degree Kidnapping, Sexual Battery, and Assault on a Female. The trial court sentenced Defendant to 110-144 months of imprisonment for First-Degree Kidnapping and Assault on a Female and to 292-411 months of imprisonment for First-Degree Forcible Rape. The trial court arrested judgment on the Sexual Battery charge. Defendant timely filed written Notice of Appeal on 22 March 2022.

Appellate Jurisdiction

[1] The trial court rendered Judgment and sentenced Defendant on 21 March 2022. The Record also reflects written Judgments signed by the trial court on 21 March 2022, but these Judgments are neither file-stamped nor certified by the Clerk.[1] Rule 4 of the North Carolina Rules of Appellate Procedure provides that appeal from a judgment *rendered* in a criminal case must be given either orally at trial or by filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment. N.C. R. App. P. 4. Here, the Record reflects the written Judgments were signed by Judge Alyson A. Grine on 21 March 2022, and Defendant's written Notice of Appeal was file-stamped the next day, 22 March 2022. There is no dispute between the parties that Judgments were in fact entered and Defendant's written Notice of Appeal was timely. Therefore, this Court has appellate jurisdiction over this appeal.

Issue

[2] The dispositive issue on appeal is whether the trial court abused its discretion by not declaring a mistrial.

Analysis

Defendant contends the trial court erred in denying Defendant's Motion for a Mistrial. We disagree.

"[A] judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2021). However, "[i]t is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position

1. Indeed, as a whole, the Record fails to include any file-stamped documents. We admonish both parties to pay greater attention in compiling the Record on Appeal.

to determine whether the degree of influence on the jury was irreparable." *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997) (citation omitted). As such, "[o]ur standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Dye*, 207 N.C. App. 473, 482, 700 S.E.2d 135, 140 (2010) (citation and quotation marks omitted). "An abuse of discretion occurs 'only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014) (quoting *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996)).

In the case *sub judice*, the State informed the trial court—outside the presence of the jury—Victim was observed in possession of alcohol, and the bailiffs believed she had consumed some alcohol earlier that morning. Defense counsel moved for a mistrial. The trial court noted, on the record, outside the presence of the jury, Victim took a portable breathalyzer test and had a "0.0 outcome." The trial court denied Defendant's Motion for a Mistrial and inquired further into the matter as discussed below. Thus, given the trial court's knowledge and consideration of the result of the breathalyzer test, we cannot conclude the trial court abused its discretion in denying Defendant's Motion for a Mistrial.

Defendant also contends the trial court erred in failing to declare a mistrial *sua sponte*. We, again, disagree.

"[U]pon his own motion, a judge may declare a mistrial if . . . [i]t is impossible for the trial to proceed in conformity with law[.]" N.C. Gen. Stat. § 15A-1063(1) (2021). "This statute allows a judge . . . to grant a mistrial where he could reasonably conclude that the trial will not be fair and impartial." *State v. Ramirez*, 156 N.C. App. 249, 253, 576 S.E.2d 714, 718 (2003) (alteration in original) (citation and quotation marks omitted). "It is appropriate for a trial court to declare a mistrial only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Bowman*, 349 N.C. 459, 472, 509 S.E.2d 428, 436 (1998) (citation and quotation marks omitted).

The Record demonstrates the trial court took immediate measures to address Victim's behavior, ordering her to refrain from consuming any impairing substances and to remain in the courtroom until she is needed to testify again. With regard to Victim's behavior Defendant characterizes as "so emotionally sympathetic" and prejudicial, the trial court was in the best position "to investigate any allegations of misconduct, question witnesses and observe their demeanor[,] and make appropriate

findings." *State v. Washington*, 141 N.C. App. 354, 376, 540 S.E.2d 388, 403 (2000) (citation and quotation marks omitted). In light of the immediate and reasonable steps taken by the trial court to address Victim's behavior, the trial court's decision to: (1) deny Defendant's Motion for a Mistrial; and (2) not declare a mistrial sua sponte was the result of a reasoned decision.[2]

Thus, the trial court did not abuse its discretion in not declaring a mistrial. Therefore, Defendant received a fair trial free from error. Consequently, we affirm the trial court's ruling.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial.

NO ERROR.

Judges MURPHY and WOOD concur.

TOWN OF FOREST CITY, Plaintiff
v.
FLORENCE REDEVELOPMENT PARTNERS, LLC, Defendant

No. COA23-401

Filed 2 January 2024

1. Cities and Towns—contract to sell property—lack of pre-audit certificate—no expense incurred in first year

In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, the trial court erred by granting summary judgment to the town (and denying defendant's motion for summary judgment) on the town's claim that the contract was void as a matter of law for lack of a pre-audit certificate as required by N.C.G.S. § 159-28(a). Where the parties entered into the contract five days prior to the end of the fiscal year and the town was not obligated to satisfy a financial obligation during that short window, a pre-audit certificate was not required. Although the

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2. Defendant also contends defense counsel was ineffective in failing to renew the Motion for a Mistrial. Given our decision the trial court did not abuse its discretion, we need not reach Defendant's ineffective assistance of counsel claim.

property closing technically could have occurred within those five days, no matter how improbable, no expense was actually incurred.

2. Contracts—contract to purchase town property—terms of contract—automatic termination—waiver by continued performance

In a contract dispute between a town and a prospective buyer (defendant) of a historic property, the trial court erred by granting summary judgment to the town (and denying defendant's motion for summary judgment) on the town's claim that the contract automatically terminated pursuant to its own terms when defendant failed to timely deliver a "Notice of Suitability." Although the contract had "time is of the essence" and "no waiver" provisions, the town's acceptance of defendant's notice of suitability twenty-eight days after the deadline specified in the contract and continued interactions with defendant about the property for more than a year after that point constituted a waiver of the contract's notice deadline.

3. Immunity—governmental—contract to purchase town property—waiver

In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, in which the town asserted governmental immunity as a bar to defendant's counterclaims (for breach of contract, breach of the covenant of good faith and unfair dealing, unjust enrichment, and declaratory judgment), the trial court erred by granting summary judgment to the town on those counterclaims, where the town waived immunity when it entered into the contract and where the appellate court had determined that there was no merit to the town's argument that the contract was void.

4. Unjust Enrichment—contract to purchase town property—validity of contract—claim inapplicable

In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, the town properly granted summary judgment in favor of the town on defendant's counterclaim for unjust enrichment because, where the appellate court had determined that a valid contract existed between the parties, the doctrine of unjust enrichment was inapplicable.

5. Appeal and Error—abandonment of issues—failure to cite legal authority

In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, defendant's argument on

appeal that the trial court erred by granting summary judgment in favor of the town on one of the town's claims and on three of defendant's counterclaims was deemed abandoned because defendant failed to support its argument with any legal citations as required by Rule of Appellate Procedure 28(b)(6).

Appeal by Defendant from order entered 12 September 2022 by Judge Bradley B. Letts, and orders entered 16 May and 29 July 2022 by Judge Peter Knight, in Rutherford County Superior Court. Heard in the Court of Appeals 18 October 2023.

Parker Poe Adams & Bernstein LLP, by Daniel E. Peterson, Anthony A. Fox, and Jasmine N. Little, for Plaintiff-Appellee.

Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak, for Defendant-Appellant.

COLLINS, Judge.

Florence Redevelopment Partners, LLC, ("Florence") appeals from an order granting the Town of Forest City ("Town") summary judgment and denying Florence summary judgment on claims arising from a contract dispute. Florence also appeals orders denying its motions to amend and revise its complaint. We affirm in part and reverse in part the summary judgment order and remand for further proceedings. We need not address Florence's arguments regarding the remaining orders.

I. Background

In 2018, the Town solicited proposals from developers to rehabilitate the Florence Mill building ("Mill"), a historic property in the Town. After a series of open session meetings, the Town entered into a contract ("Contract") with Florence to purchase the Mill. The Contract established a timeline for an inspection period as follows:

> 10. **Inspection Period.**
>
> a. Duration. The period of time beginning with the Effective Date, and ending at 11:59 p.m. on that date which is ninety (90) days after the effective date of this Contract, is hereinafter referred to as "the Inspection Period."
>
> . . . .
>
> c. Notice of Suitability. The results of all inspections, tests, examinations and studies of the Property performed during

> the Inspection Period must be suitable to [Florence], in its sole discretion. Prior to the expiration of the Inspection Period, [Florence] may notify [the Town] that such results are suitable to [Florence] by delivering to [the Town] a written Notice of Suitability. If [Florence] does not deliver to [the Town] a valid Notice of Suitability on or before the date of expiration of the Inspection Period, then this Contract shall automatically terminate on that date. . . .

The Contract also provided that "Closing shall be held on or before thirty (30) days after [Florence] provides the Notice of Suitability . . . ." In addition, the Contract provided that "[t]he following conditions must be satisfied prior to Closing, and this Agreement and the performance of [the Town] and [Florence] hereunder is expressly contingent upon satisfaction of the following:"

> a. The Parties' (sic) agree to work in good faith to identify adequate parking within a reasonable distance of the Property to accommodate the anticipated uses by [Florence] prior to the end of the Inspection Period. . . .
>
> . . . .
>
> d. [The Town's] and [Florence's] obligation's (sic) hereunder are contingent upon [the Town] and [Florence] successfully negotiating and entering into a Development Agreement providing for the redevelopment of the Property in accordance with the Master Plan provided by [Florence] to [the Town] . . . .
>
> e. [The Town's] obligation to sell the property is specifically contingent upon [the Town] and [Florence] agreeing on the provisions of a Master Declaration of Easements, Encroachments and Conditions . . . . The Master Declaration of Easements, Encroachments and Conditions shall include the necessary restrictions, covenants, conditions and easements being placed upon the Property . . . . Any such restrictions, covenants, conditions and easements required by [the Town] for the Property shall be agreed upon prior to the expiration of the Inspection Period.

The Contract also contained "Standard Provisions" stating:

> b. TIME IS OF THE VERY ESSENCE in the occurrence of all events, the satisfaction of all conditions and the performance of all obligations hereunder.

> . . . .
>
> i. Any failure or delay of [Florence] or [the Town] to enforce any term of this Contract shall not constitute a waiver of such term, it being explicitly agreed that such a waiver must be specifically stated in a writing delivered to the other party in compliance with Section 16 above. Any such waiver by [Florence] or [the Town] shall not be deemed to be a waiver of any other breach or of a subsequent breach of the same or any other term.

The "effective date" of the Contract was 25 June 2019, the date on which the Contract was duly signed. Thus, the 90-day Inspection Period ran from 25 June 2019 through 23 September 2019. Florence failed to deliver the Notice of Suitability within the inspection period, and instead delivered it on 21 October 2019.

Despite the untimely delivery of the Notice of Suitability, the parties continued their dealings for over a year. Between 21 October 2019 and 4 November 2020, the Town and Florence maintained consistent communication with each other. During this time, the Town provided draft term sheets for the Development Agreement and, through a series of emails and phone calls between July and October 2020, the parties negotiated the remaining sale terms to be included in the term sheets. Also during this period, the parties agreed on matters related to electrical, sewer, and water infrastructure for the Mill. However, the parties did not enter into a Development Agreement or agree on a Master Development of Easements, Encroachments and Conditions.

During a meeting on 22 October 2020, Florence informed the Town that it was unable to secure financing from the United States Department of Housing and Urban Development as it had originally intended, and that it would take some time to obtain alternative financing. The Town sent Florence a letter on 4 November 2020 ("Notice of Termination") terminating the Contract:

> On behalf of the Town, please let this letter serve as notice of the Town's termination of the Purchase Contract for failure of the conditions precedent to close on the purchase and sale of the property subject to the Purchase Contract. The Town appreciates the efforts made by [Florence] to explore the redevelopment of the [Mill].
>
> By signing this letter on behalf of [Florence] and the Town, respectively, each party acknowledges and agrees the Purchase Contract is terminated and neither party has any

> claims whatsoever against the other . . . of any right, title, interest, loss, or damage arising out of or related directly or indirectly to the Purchase Contract.

Florence refused to acknowledge the Notice of Termination or agree to the Town's decision to terminate the Contract.

On 13 April 2021, the Town filed a complaint for declaratory judgment on the following issues: (1) Florence breached the Contract by failing to close on the Mill; (2) the Contract had automatically terminated because Florence failed to deliver the Notice of Suitability on or before 23 September 2019; and (3) the Contract was void because it lacked a pre-audit certificate required by State law. The Town prayed for a declaration that the Contract is null and void, distribution of the escrow funds to the Town, and an award of costs and attorney's fees.

Florence filed an answer and asserted counterclaims for: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) unjust enrichment, and (4) declaratory judgment in their favor "as to the claims asserted by the Town" – essentially that the Town breached the Contract and Florence did not. Florence prayed for judgment in its favor, declaratory judgment in its favor, damages or specific performance, and an award of costs and attorney's fees.

The Town answered Florence's counterclaims, denying the substantive allegations and asserting various affirmative defenses, including governmental immunity. Florence filed a motion for leave to amend to assert additional counterclaims, which the trial court denied. Shortly thereafter, Florence filed a "Motion for Revision and/or Reconsideration of Order" arguing that the trial court should reconsider its order denying Florence's motion for leave to amend. The trial court also denied this motion.

Florence moved for summary judgment on the Town's three claims and on its own first, second, and fourth counterclaims. The Town moved for summary judgment on all of its claims and all of Florence's counterclaims. After a hearing, the trial court entered an order on 12 September 2022, deciding as follows:

- granting the Town, and denying Florence, summary judgment on the Town's second claim (Contract termination for untimely Notice of Suitability) and third claim (Contract void for lack of pre-audit certificate);
- granting the Town, and denying Florence, summary judgment on Florence's four counterclaims;

- denying Florence summary judgment on the Town's first claim (Florence breached the Contract); and
- determining the Town's motion for summary judgment on its first claim to be moot.

Florence timely appealed.

II. Standard of Review

Florence argues that the trial court erred by granting the Town, and denying Florence, summary judgment.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . 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. Gen. Stat. § 1A-1, Rule 56(c) (2022). The standard of review of a trial court's order granting or denying summary judgment is de novo. *Butterfield v. Gray*, 279 N.C. App. 549, 553, 866 S.E.2d 296, 300 (2021). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 245, 846 S.E.2d 540, 544 (2020) (quotation marks and citation omitted).

III. Discussion

A. Pre-audit Certificate (the Town's third claim)

[1] Florence first argues that the trial court erred by granting the Town, and denying Florence, summary judgment on the Town's request for a declaration that the Contract was void because it lacked a pre-audit certificate. Florence specifically argues that a pre-audit certificate was not required because the Town had no financial obligation due under the Contract within the fiscal year that the Contract was formed.

Pursuant to N.C. Gen. Stat. § 159-28 governing town budgetary accounting for appropriations,

> [n]o obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year.

N.C. Gen. Stat. § 159-28(a) (2022). "If an obligation is reduced to a written contract . . . requiring the payment of money, . . . the written contract . . . shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with subsection (a) of this section." *Id.* § 159-28(a1) (2022). "An obligation incurred in violation of subsection (a) or (a1) of this section is invalid and may not be enforced." *Id.* § 159-28(a2) (2022).

"The purpose of the pre-audit certificate is to ensure that a town has enough funds in its budget to pay its financial obligations." *Myers v. Town of Plymouth*, 135 N.C. App. 707, 713, 522 S.E.2d 122, 126 (1999). "The language of the statute makes the pre-audit certificate a requirement when a town will have to satisfy an obligation in the fiscal year in which a contract is formed." *Id.* (emphasis omitted). Such "a contract for payment that has not been preaudited is invalid and unenforceable." *Id.* (citations omitted); *see also Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247 (2001). However, "a contract that is signed in one year but results in a financial obligation in a later year will not violate § 159-28(a)." *Myers*, 135 N.C. App. at 714, 522 S.E.2d at 126.

In *Myers*, the plaintiff entered into an employment contract with the town of Plymouth two months before the end of its fiscal year. *Id.* at 709, 522 S.E.2d at 123. The contract provided for a severance package by which Plymouth would pay the plaintiff certain compensation upon his termination. *Id.* The plaintiff was fired a day before he completed his first year of employment, and Plymouth refused to pay the severance compensation. *Id.* at 709, 522 S.E.2d at 123-24. The plaintiff sued Plymouth for breach of contract. *Id.* at 709, 522 S.E.2d at 124.

On appeal, Plymouth claimed that the employment contract was invalid because it did not include a pre-audit certificate. *Id.* at 713, 522 S.E.2d at 126. Plymouth argued that a pre-audit certificate was required because, if the plaintiff had been fired during the first two months of his employment, the contract would have imposed a financial obligation on Plymouth within its current fiscal year. *Id.* at 714, 522 S.E.2d at 126. This Court rejected Plymouth's argument and held that the employment contract was valid:

> Presumably, neither [the plaintiff] nor [] Plymouth thought that [the plaintiff] would be fired within a mere two months after the contract was signed, and indeed he was not fired within that time. We recognize that the improbability of termination did not mean that termination was *impossible*

> during that two-month period. However, we will not invalidate the contract due to its lack of a pre-audit certificate when the mere *possibility* of an expense in the first year never in fact resulted in an obligation.

Id.

Here, the Town entered into the Contract with Florence on 25 June 2019, five days before the Town's fiscal year ended on 30 June 2019. The Contract did not require the Town to satisfy a financial obligation during this timeframe. Furthermore, the Town does not argue, and the record does not show, that the Town incurred any expense under the Contract before the end of the 2019 fiscal year.

The Town argues that, had the parties closed on the Contract in the five days before the end of the fiscal year, the Town could have had to pay for deed preparation, closing costs, attorney's fees, liens, and taxes. We recognize that the improbability of closing during that five-day period did not mean that closing was *impossible* during that period. *See id.* However, as in *Myers*, "we will not invalidate the [C]ontract due to its lack of a pre-audit certificate when the mere *possibility* of an expense in the first year never in fact resulted in an obligation." *Id.*

The Town also argues that because the Contract gave the Town the option to repurchase the Mill if Florence did not secure a construction loan, a pre-audit certificate was required. However, the Town's option to repurchase the Mill was not triggered until "after a period of twenty-four (24) months from the Closing" and could not have resulted in an expense in the fiscal year in which the Contract was executed.

Because a pre-audit certificate was not required, the Contract was not void as a matter of law for a lack of pre-audit certificate. Accordingly, the trial court erred by granting the Town summary judgment and by denying Florence summary judgment on this claim.[1]

B. Automatic Termination (the Town's second claim)

[2] Florence next argues that the trial court erred by granting the Town, and denying Florence, summary judgment on the Town's request for a declaration that the Contract had automatically terminated because Florence failed to deliver the Notice of Suitability on or before 23 September 2019. Florence specifically argues that the Town waived the Contract's Notice of Suitability deadline, the "time is of the essence"

1. In light of this conclusion, we need not address Florence's arguments that the trial court erred by denying its motion to amend and motion to revise.

provision, and the "no waiver" provision by continuing to perform under the Contract.

It has long been the law in North Carolina that "[t]he provisions of a written contract may be modified *or waived* . . . by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived." *42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 511, 722 S.E.2d 1, 6-7 (2012) (quoting *Whitehurst v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 636, 32 S.E.2d 34, 39 (1944)). Our Supreme Court has held that "a party may waive the breach of a contractual provision or condition without consideration or estoppel . . . by continuing to perform or accept the partial performance of the breaching party." *Wheeler v. Wheeler*, 299 N.C. 633, 639, 263 S.E.2d 763, 767 (1980).

This holding applies equally to a contract's "no waiver" provision "based on the view that the nonwaiver clause itself, like any other term of the contract is subject to waiver by agreement or conduct during performance." *42 East*, 218 N.C. App. at 511, 722 S.E.2d at 7 (quotation marks and citation omitted). Likewise, "[o]ur Supreme Court has specifically applied this reasoning with respect to a contract providing both that 'time is of the essence' and that substantial modifications of the contract must be in writing." *Id.* (citing *Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957)). "Waiver is a matter of law to be determined by the court where the facts are not disputed." *Johnson v. Dunlap*, 53 N.C. App. 312, 316, 280 S.E.2d 759, 762 (1981) (citation omitted).

Here, the undisputed facts show the following: The Town accepted Florence's Notice of Suitability approximately 28 days after the deadline specified in the Contract. After accepting the late Notice, the Town continued to perform and accept Florence's performance *for more than a year after the deadline*. After the 23 September 2019 deadline passed, the Town and Florence maintained consistent communication with one another. The parties exchanged emails and phone calls and negotiated matters related to electrical, sewer, and water infrastructure for the Mill, and the Town provided draft term sheets for the Development Agreement.

It was not until 4 November 2020, over one year after the Town accepted the untimely Notice of Suitability, that the Town sent Florence a Notice of Termination. The Notice of Termination does not allege that the Contract terminated because of the untimely Notice of Suitability, but instead alleges the "failure of the conditions precedent to close on the purchase and sale of the property" as the reason for termination.

The undisputed facts establish conduct that naturally would lead Florence to believe that the Town had dispensed with its right to insist that the Notice of Suitability be delivered by 23 September 2019. Accordingly, the trial court erred by granting the Town summary judgment and denying Florence summary judgment on this claim.

C. Governmental Immunity (Florence's first, second, and fourth counterclaims)

[3] Florence argues that the trial court erred by granting the Town summary judgment on Florence's first, second, and fourth counterclaims because governmental immunity does not apply. The Town argues that governmental immunity bars these claims.[2]

> It is a fundamental rule that sovereign immunity renders this state, including counties and municipal corporations herein, immune from suit absent express consent to be sued or waiver of the right of sovereign immunity. Furthermore, counties and municipal corporations within this state enjoy governmental immunity from suit for activities that are governmental, and not proprietary, in nature. Nonetheless, a governmental entity may waive its governmental immunity, for instance, where the entity purchases liability insurance. Additionally, where the entity enters into a valid contract, the entity "implicitly consents to be sued for damages on the contract in the event it breaches the contract.

Data Gen. Corp., 143 N.C. App. at 100, 545 S.E.2d at 246 (citations omitted).

The Town argues that no valid contract was formed because a pre-audit certificate was required. However, as analyzed above, no pre-audit certificate was required. As the Contract was not invalid for lack of a pre-audit certificate, and the Town makes no argument that the Contract was otherwise invalid, the Town waived governmental immunity by entering into a valid contract.[3]

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2. Although the trial court gave no rationale for granting summary judgment in the Town's favor on these claims, the parties' only argument for and against summary judgment at both the hearing and on appeal relates to governmental immunity.

3. In light of this conclusion, we need not address whether the Town was acting in a governmental or a proprietary capacity with regard to the redevelopment project.

The trial court thus erred by granting the Town summary judgment on Florence's first, second, and fourth counterclaims based on governmental immunity.

D. Unjust Enrichment (Florence's third counterclaim)

[4] Florence argues that the trial court erred by granting the Town summary judgment on Florence's third counterclaim for unjust enrichment. Florence makes this argument in the event we conclude that the lack of a pre-audit certificate rendered the Contract invalid.

It is true that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56 (1988) (brackets and citation omitted). However, "[t]he doctrine of unjust enrichment is based on 'quasi-contract' or contract 'implied in law' and thus will not apply here where a contract exists between two parties." *Atlantic & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 753, 594 S.E.2d 425, 429 (2004) (citation omitted). Because no pre-audit certificate was required, there was a valid contract between the parties and Florence cannot maintain an action for unjust enrichment.

The trial court did not err by granting the Town, and denying Florence, summary judgment on this counterclaim.

E. Contract Claims (the Town's first claim and Florence's first, second, and fourth counterclaims)

[5] Florence argues that the trial court erred by denying Florence summary judgment on the Town's first claim and Florence's first, second, and fourth counterclaims. This argument is deemed abandoned.

Under our Rules of Appellate Procedure, an appellant's brief must include "[a]n argument, to contain the contentions of the appellant with respect to each issue presented." N.C. R. App. P. 28(b)(6). "The body of the argument . . . shall contain citations of the authorities upon which the appellant relies." *Id.* "Issues . . . in support of which no reason or argument is stated, will be taken as abandoned." *Id.*

This Court has routinely held an issue to be abandoned where an appellant presented argument without citations to the authorities upon which the appellant relied. *See, e.g.*, *K2HN Constr. N.C., LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 213-14, 832 S.E.2d 559, 564 (2019) ("Each argument in Plaintiff's brief violates Rule 28(b)(6). For example, Plaintiff's arguments that genuine issues of material fact exist concerning its breach of contract, unjust enrichment, fraud, and unfair and

deceptive trade practices claims cite no authority establishing: (1) what the elements of those claims are; or (2) how the evidence demonstrates the existence of any genuine issue of material fact pertinent to those elements or any of Defendants' defenses pled and argued below. Plaintiff has, as a result, abandoned these arguments."); *see also Fairfield v. WakeMed*, 261 N.C. App. 569, 575, 821 S.E.2d 277, 281 (2018) ("Plaintiffs do not cite any legal authority in support of this argument as required by the North Carolina Rules of Appellate Procedure. Therefore, we deem this issue to be abandoned." (citation omitted)).

Florence fails to cite a single legal authority in its argument, or anywhere else in its brief, to establish, at a minimum, the elements of the claims or how the evidence demonstrates the existence of any genuine issue of material fact pertinent to those elements. This argument is deemed abandoned, N.C. R. App. 28(b)(6), and the portion of the trial court's order denying Florence summary judgment on the Town's first claim and Florence's first, second, and fourth counterclaims is affirmed.

IV. Conclusion

For the foregoing reasons, we conclude as follows:

The trial court erred by granting the Town summary judgment, and denying Florence summary judgment, on the Town's third claim–declaratory judgment that the Contract was void because it lacked a pre-audit certificate. This portion of the judgment is reversed and remanded to the trial court for entry of summary judgment in Florence's favor. In light of this conclusion, we need not address Florence's arguments that the trial court erred by denying its motion to amend and motion to revise.

The trial court erred by granting the Town summary judgment, and denying Florence summary judgment, on the Town's second claim–declaratory judgment that the Contract had automatically terminated based on Florence's failure to timely deliver the Notice of Suitability. This portion of the judgment is reversed and remanded to the trial court for entry of summary judgment in Florence's favor.

The trial court erred by granting the Town summary judgment on Florence's first, second, and fourth counterclaims based on governmental immunity. This portion of the order is reversed.

The trial court did not err by granting the Town summary judgment, and denying Florence summary judgment, on Florence's third counterclaim–unjust enrichment. This portion of the order is affirmed.

The portion of the trial court's order denying Florence summary judgment on the Town's first claim–declaratory judgment that Florence

breached the Contract by failing to close on the Mill–and Florence's first, second, and fourth counterclaims is affirmed.

This matter is remanded to the trial court for further proceedings on the Town's first claim and Florence's first, second, and fourth counterclaims.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges GORE and FLOOD concur.

TOWN OF LA GRANGE, NORTH CAROLINA, PETITIONER
v.
COUNTY OF LENOIR, NORTH CAROLINA, AND
COPART OF CONNECTICUT, INC., RESPONDENTS

No. COA23-495

Filed 2 January 2024

1. Zoning—land use classification—planning board's decision—standard of review by superior court

In reviewing a town's challenge to the county planning board's decision to classify a business owner's intended property usage as "Auction Sales" rather than "Junk/Salvage Yard," the trial court correctly applied the whole record test in evaluating the town's assertion that the planning board's decision was unsupported by evidence and the de novo standard of review to the legal question of whether the town's junkyard ordinance was applicable to the intended land use. Based on these standards, the court's conclusion that "Auction Sales" was the correct classification was supported by the evidence, including that the business took possession but not ownership of the vehicles, the vehicles were only stored temporarily on the property, the vehicles were sold on behalf of various entities via online action, the sales included both damaged and undamaged vehicles, and no vehicles were dismantled or demolished on the property.

2. Zoning—land use classification—ordinance definitions—record evidence

In reviewing a town's challenge to the county planning board's decision to classify a business owner's intended property usage as "Auction Sales" rather than "Junk/Salvage Yard," the trial court

did not err by concluding that the planning board reached the correct decision, where, although the zoning ordinance did not define "Auction Sales," the evidence of the intended property use aligned more closely with the plain and ordinary meaning of "auction" than with the zoning ordinance's definition of "Junk/Salvage Yard." Evidence demonstrated that the business sold vehicles through an online auction system, temporarily stored the vehicles on the property prior to auction, sold both damaged and undamaged vehicles, did not dismantle or demolish vehicles on the property, and did not store or accumulate abandoned vehicles, scrap metals, vehicle parts, or other waste materials.

Appeal by petitioner from order entered on 28 December 2022 by Judge Imelda J. Pate in Lenoir County Superior Court. Heard in the Court of Appeals 28 November 2023.

Cauley Pridgen, P.A., by Gabriel Du Sablon, James P. Cauley, III, and Emily C. Cauley-Schulken, for petitioner-appellant.

Morningstar Law Group, by Keith P. Anthony and William J. Brian, Jr., for respondent-appellee-Copart of Connecticut, Inc.

Sumrell Sugg, P.A., by David B. Baxter, Jr. and James H. Ferguson, III, for respondent-appellee-County of Lenoir, North Carolina.

FLOOD, Judge.

The Town of La Grange (the "Town") appeals from the trial court's affirmation of the Lenoir County Planning Board's (the "Planning Board") determination that Copart of Connecticut Inc.'s ("Copart") land was correctly classified as "Auction Sales" under Lenoir County's (the "County") Zoning Ordinance. For the reasons discussed below, we affirm.

I. Facts and Procedural Background

The pertinent facts of the case before us arise from a land use dispute between the Town, Copart, and the County. The Town is situated within the County, and Copart owns a 151-acre tract of land (the "Property") that abuts the Town's highest-producing public water supply wellhead. The Property is not located within the Town's municipal limits. An existing junkyard is located across the street.

Copart is in the business of selling damaged and undamaged vehicles on behalf of insurance companies, licensed dealers, financial

institutions, charities, and municipalities. Copart receives these vehicles from all over the country, and upon delivery at Copart's facility, each vehicle is inspected, photographed, and catalogued in preparation for sale. The vehicles are then sold by auction through an online website. The vehicles are "never stacked and remain in short-term storage for an average of only [fifty] to [sixty] days." While Copart charges a fee to the organization on behalf of which it is selling the vehicle, Copart itself never holds the title to any vehicle on its lot.

On 29 December 2020, a zoning official for the County issued a certificate of zoning compliance to Copart, concluding Copart's intended use of its land aligned most closely with "Auction Sales," which is a permitted use of right within the County's Commercial District. Upon learning of the zoning official's determination that Copart's land use most closely conformed with "Auction Sales," the Town appealed the determination to the Planning Board.

In its appeal to the Planning Board, the Town argued Copart's intended use of the Property is more akin to a "Junk/Salvage Yard" as defined by the Zoning Ordinance, and that such a use is not permitted within the County's Commercial District. The Town further argued that Copart's proposed use violated the County's separate "Ordinance Regulating Junkyards and Automobile Graveyards" (the "Junkyard Ordinance").

On 19 July 2022, following a lengthy evidentiary hearing, the Planning Board unanimously affirmed the determination by the zoning official that the Property was appropriately classified as "Auction Sales" and that the "Junkyard Ordinance [was] inapplicable to the intended use" of the Property.

On 17 August 2022, the Town filed a petition for writ of certiorari to the Lenoir County Superior Court, contending the Planning Board made errors of law, made findings of fact that were unsupported by substantial evidence in the whole record, and had acted in an arbitrary and capricious manner.

On 28 December 2022, the trial court entered an order affirming the Planning Board's classification of the Property as "Auction Sales." In its order, the trial court made, in pertinent part, the following conclusions:

> 20. [The Town's] first claim raised . . . is whether the Planning Board[']s decision to affirm Copart's intended use as permitted under the Zoning Ordinance was supported by competent evidence in the record.
>
> . . . .

22. In particular, the Planning Board's findings in the written [o]rder based upon the evidence presented and testimony found that Copart's intended use of the Property was correctly classified as "Auction Sales" under the Zoning Ordinance. The Planning Board made findings, supported by the record evidence that:

- Copart's automobiles are only temporarily stored on the Property prior to auction. (R. Ex.1, p.2 ¶ 9)
- Copart's automobiles temporarily stored on the Property are sold to the highest bidder. (R. Ex. 1, p. 2 ¶ 10).
- Copart's use does not involve dismantling, demolition, or abandonment of automobiles on the Property. (R. Ex. 1, p. 2 ¶ 11).
- Copart does not intend to place or store scrap metals, waste paper, rags, or other scrap materials or used building materials on the Property. (R. Ex. 1, p.2 ¶ 12).
- Copart's automobiles will be parked in an organized fashion and [are] not stacked or placed in piles. (R.Ex.1, p.2 ¶13).
- Copart's automobiles vary in condition with some automobiles having no damage or minor damage while others hav[e] more damage. (R. Ex. 1, p.3 ¶19).
- The majority of Copart's automobiles will be sold to end-users and will be restored to operation. (R. Ex.1, p.3 ¶ 20).
- Copart's intended use did not pose the same environmental and safety concerns as a junkyard poses to the community. (R.Ex.1, p.3 ¶¶ 22-23).

23. [The Town's] second claim . . . is whether the Planning Board properly interpreted the County's relevant ordinances when it found Copart's intended use was more similar to auction sales or automobile sales than a "junkyard."

. . . .

25. The Zoning Ordinance defines a "Junk/Salvage Yard" as "[t]he use of more than [] (600) square feet of any lot for storage, keeping or accumulation of material, including scrap [sic] metals, waste paper, rags, or other scrap [sic]

> materials, or used building materials, or for the dismantling, demolition or abandonment of automobiles or other vehicles or machinery or parts thereof.
>
> 26. The term "auction" is given its ordinary meaning, a sale of property to the highest bidder.
>
> . . . .
>
> 29. Considering the entirety of the record evidence, the [c]ourt concludes that the Planning Board's Findings of Fact in the written [o]rder were supported by competent, material and substantial evidence and the Board's findings supported the Board's Conclusions of Law in the written [o]rder wherein the [Planning] Board concluded Copart's intended use of the Property as "Auction Sales" and that the "Junkyard" Ordinance is inapplicable to the intended use by Copart.
>
> 30. [The Town's] third claim . . . is that the Board's decision was arbitrary and capricious because the decision was not based [o]n "fair and careful consideration." The [trial c]ourt applies the whole record test to this claim, examining all record evidence.

Ultimately, the trial court concluded that the Planning Board's decision was "supported by competent, material, and substantial evidence[,]" and that the Town could not establish that the Planning Board's decision was arbitrary and capricious. The Town timely appealed.

II. Jurisdiction

This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) as the trial court's order affirming the Planning Board's decision was a final judgment on the merits. *See* N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Analysis

On appeal, the Town argues the trial court (A) applied incorrect standards of review and (B) erred by upholding the decision of the Planning Board. On both points, we disagree.

A. Trial Court's Standard of Review as to Planning Board's Decision

[1] The Town argues the trial court applied the incorrect standard of review to the issues on appeal from the Planning Board's decision.

1. Standard of Review

As to appellate review of a superior court order regarding an agency decision, "[t]he process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118–19 (1994) (citations omitted). Ultimately, upon review, it is this Court's duty to conclude whether the trial court applied the correct standard of review, and if so, whether the appropriate conclusion under the standard was reached. *See Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

2. Superior Court's Standard of Review of Planning Board's Decision

"When the Superior Court grants certiorari to review a decision of the Board, it functions as an appellate court rather than a trier of fact." *Hopkins v. Nash Cnty.*, 149 N.C. App. 446, 447, 560 S.E.2d 592, 593–94 (2002) (citation omitted).

When a petitioner "questions (1) whether [a board's] decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *In re Appeal by McCrary*, 112 N.C. App 161, 165, 435 S.E.2d 359, 363 (1993)). "When utilizing the whole record test . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (internal quotation marks omitted). "The 'whole record' test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

If, however, "a petitioner contends the [b]oard's decision was based on an error of law, de novo review is proper." *Mann Media, Inc.*, 356 N.C. at 13, 565 S.E.2d at 17 (citation and internal quotation marks omitted). "Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board['s] [] conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011).

i. The Whole Record Test

In its appeal to this Court, the Town states that the trial court's "glossing over most of [the Town's] contentions[ ] is evidence that the [t]rial [c]ourt nevertheless applied the improper scope of review to its meager analysis." To support its argument, the Town points to the language used in the trial court's conclusions. The Town states that the trial court's use of the phrases, "considering the entirety of the record evidence," and "were supported by competent, material, and substantial evidence" in Conclusion of Law 29 evinces the trial court's failure to apply a *de novo* standard of review.

The correct standard of review, however, is the "whole record test," given the allegations made by the Town in its petition for writ of certiorari stated that the Planning Board's decision was "unsupported by [] competent, material, and substantial evidence in view of the entire record." *See ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392 (stating that the "whole record test" is applied when the issue at bar is whether an agency's decision was supported by substantial evidence).

Here, under a "whole record test" review, the trial court had to show that it examined "all competent evidence (the whole record) in order to determine whether the agency decision [was] supported by substantial evidence." *Mann Media, Inc.*, 356 N.C. at 14, 565 S.E.2d at 17 (internal quotation marks omitted). Evidence that the trial court reviewed the whole record before determining the Planning Board's decision was supported by substantial evidence can be found throughout its order, but particularly in its conclusions of law. Conclusion of Law 22 lists pieces of evidence and testimony that support the Property's classification as "Auction Sales," indicating the trial court considered the "whole record" when determining the Planning Board's decision was supported by substantial evidence.

In Conclusion of Law 22, the trial court highlighted evidence found throughout the record that shows: Copart's vehicles are sold *via* online auction; the vehicles are only stored temporarily on the Property and are never dismantled, demolished, or abandoned; some vehicles have no damage or minor damage; and the vehicles are never stacked or placed in piles.

For those reasons, our review of the trial court's order concludes the trial court applied the whole record test and reached the correct conclusion that the Planning Board's decision was supported by substantial evidence. *See ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392.

ii. *De Novo* Review

The Town further argues the trial court failed to apply a *de novo* standard of review to the question of whether the "Junkyard Ordinance" was applicable to Copart's intended land use. To support this contention, the Town suggests the language used in Conclusion of Law 29, in which the trial court references "record evidence" being "competent, material and substantial," evidences use of the "whole record test" rather than a *de novo* review. When read in context with the surrounding conclusions of law, however, it is clear the trial court intended to convey that it had reviewed all of the evidence in the Record and that the evidence supported the legal conclusions.

As stated above, Conclusion of Law 22 recites several findings regarding Copart's use of the Property. Further, Conclusion of Law 25 restates the Zoning Ordinance's definition of "Junk/Salvage Yard" as being a lot for "the dismantling, demolition, or abandonment of automobiles or other vehicles or machinery or parts[,]" while Conclusion of Law 26 states that "[t]he term 'auction' is given its ordinary meaning, a sale of property to the highest bidder."

For those reasons, we conclude the trial court applied the correct *de novo* standard of review to the questions of law raised by the Town and ultimately reached the correct conclusion. *See Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

B. Trial Court's Determination as to Planning Board's Decision

[2] The second argument the Town makes on appeal is that the trial court erred by upholding the decision of the Planning Board because (1) it incorrectly concluded Copart's land use was appropriately classified as "Auction Sales" and (2) taken *in pari materia*, under both the Zoning Ordinance and Junkyard Ordinance, Copart's use more closely conformed with a "Junk/Salvage Yard," or "Automobile Graveyard." With respect to the Town's first argument, we disagree; accordingly, we need not address the Town's second argument.

1. Standard of Review

This Court reviews questions of law presented in challenges to zoning decisions *de novo*. *See Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013). When interpreting a local ordinance, the basic rule is to "ascertain and effectuate the intention of the municipal legislative body." *Darbo v. Old Keller Farm Prop. Owners' Ass'n*, 174 N.C. App 591, 594, 621 S.E.2d 281, 284 (2005) (citation omitted). Undefined terms are given their ordinary

meaning and significance. *See Morris Commc'n Corp.*, 365 N.C. at 157, 712 S.E.2d at 872. When the question of law involves interpretation of an ordinance, this Court applies basic principles of statutory construction, so that "words and phrases of a statute may not be interpreted out of context, but . . . as a composite whole so as to harmonize with [the] other statutory provisions and effectuate legislative intent." *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706 (1984). Additionally, when issues of statutory construction arise, "the construction adopted by those who execute[d] and administer[ed] the law in question" should be given great consideration. *Darbo*, 174 N.C. App at 594, 621 S.E.2d at 283.

Finally, "the law favors uninhibited free use of private property over governmental restrictions." *Byrd v. Franklin City*, 237 N.C. App. 192, 201, 765 S.E.2d 805, 811 (2015) (Hunter, J., concurring in part). The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property. *See Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *see City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983).

2. Superior Court's Conclusion that Copart's Business is Auction Sales

On appeal, the Town does not challenge any findings of fact, but rather argues that by concluding Copart's business and land use is more closely aligned with "Auction Sales," rather than a "Junk/Salvage Yard," the trial court "has elevated form over substance, ignoring the manner in which the land itself was to be used." The Town claims that because the term "Auction Sales" is not defined within the Zoning Ordinance, it should be given its ordinary and plain meaning, which here, should be taken to mean a place "where goods are sold to the public who are assembled in one place for the auction." In essence, the Town argues that Copart's land use cannot be accurately described as "Auction Sales" because the buyers of Copart's vehicles do not physically assemble in one place to bid. This argument cherry-picks one understanding of the term "auction" while excluding the even further simplified definition—"a sale of property to the highest bidder." *Auction*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2022).

Under our *de novo* review, while applying the basic principles of statutory construction, this Court seeks to ascertain the intention of the legislative municipal body, while also favoring the uninhibited free use of property. *See Darbo*, 174 N.C. App at 594, 621 S.E.2d at 283; *see Byrd*, 237 N.C. App. at 201, 765 S.E.2d at 811. Here, the Town does not challenge

the sufficiency of the trial court's findings of fact regarding Copart's land use; rather, the Town challenges the conclusion that Copart's proposed use was classified as "Auction Sales," rather than a "Junk/Salvage Yard."

While the term "Auction Sales" is undefined in the Zoning Ordinance, the term "Junk/Salvage Yard" is defined as,

> [t]he use of more than [] (600) square feet of any lot for the storage, keeping or accumulation of material, including scrap metals, waste paper, rags, or other scrap materials, or used building materials, or for the dismantling, demolition or abandonment of automobiles or other vehicles or machinery or parts thereof. **ALL Junk/Salvage Yards must also comply with Lenoir County's Junkyard and Automobile Graveyard Ordinance**.

The Junkyard Ordinance defines a "junkyard" as "an establishment or place of business, which is maintained[,] operated[,] or used for storing[,] keeping[,] buying[,] or selling junk[,] or for the maintenance of an automobile graveyard." Further, an "automobile graveyard" is defined as,

> [a]ny establishment or place of business which is maintained[,] used[,] or operated for storing[,] keeping[,] buying[,] or selling wrecked[,] scrapped[,] ruined[,] dismantled[,] or inoperable motor vehicles and which are not being restored to operation regardless of the length of time which individual motor vehicles are stored or kept at said establishment or place of business.

The facts in the Record tend to show Copart: sells vehicles through an online auction system; temporarily stores the vehicles on the Property prior to auction; sells vehicles that are both damaged and undamaged; and does not dismantle, demolish, or abandon any vehicles on the Property. Conspicuously absent from the Record are any facts to indicate Copart intends to use the Property to keep or accumulate scrap metals, waste papers, rags or building materials. Further, no facts in the Record tend to show that Copart intends to use the Property to store abandoned vehicles or parts of vehicles.

Our *de novo* review of the Record reveals a mismatch between the Zoning Ordinance's definition of "Junk/Salvage Yard" and how Copart intends to use the Property. Given the facts in the Record, we conclude that Copart's business model—selling vehicles with varying degrees of damage via online auction and their removal within sixty days—aligns more closely with the common definition of "auction" than the Zoning Ordinance's definition of a "Junk/Salvage Yard." Further, even if

we considered the Zoning Ordinance and Junkyard Ordinance *in pari materia*, we still reach the same conclusion, because the facts in the Record do not demonstrate Copart used the Property to accumulate abandoned vehicles that are not being restored to operation.

We therefore hold that both the Planning Board and the trial court correctly upheld the zoning official's classification of Copart's intended use of the Property as "Auction Sales." Having concluded the Planning Board and trial court were correct in upholding the zoning official's determination that Copart's land use was appropriately classified as "Auction Sales," we need not address the Town's second argument.

IV. Conclusion

For the aforementioned reasons, we hold the trial court applied the correct standards of review, made the correct conclusion under the standards of review, and did not err when upholding the Planning Board's determination. The trial court's order is affirmed.

AFFIRMED.

Judges TYSON and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JANUARY 2024)

DAVIS v. HAYES HOFLER, P.A. No. 22-1028	Durham (21CVS1592)	Reversed and Remanded
IN RE B.O.R. No. 23-434	Wilkes (20JA126)	Vacated and Remanded in Part; Affirmed in Part.
IN RE C.H. No. 22-476-2	Durham (21SPC2564)	Affirmed
IN RE C.L.S. No. 23-507	Haywood (21JA35)	Affirmed in Part; Dismissed in Part.
IN RE E.O.N. No. 23-352	Forsyth (21J85) (21J86)	Affirmed in Part, Vacated in Part, and Remanded
IN RE E.T.P. No. 23-394	Henderson (21JT16-17)	Affirmed
IN RE G.J.W.L. No. 23-458	Surry (22JB136)	Reversed and Remanded
IN RE J.U. No. 20-812-2	Cumberland (19JB477)	Affirmed
IN RE N.R.W. No. 23-440	Buncombe (19JT229) (19JT252)	Affirmed
IN RE R.B. No. 23-426	Union (20JA178)	Affirmed
IN RE S.C.M. No. 23-678	New Hanover (22JT66)	Affirmed
IN RE S.W. No. 23-160	Johnston (21JA122)	Affirmed
JOHNSON v. BUTLER No. 23-692	Wake (20CVS14359)	Affirmed
JOHNSON v. BUTLER No. 23-693	Wake (20CVS14392)	Affirmed
JOHNSON v. BUTLER No. 23-694	Wake (20CVS14098)	Affirmed

LOWE v. LOWE No. 23-80	Clay (20CVD81)	Affirmed
POIMBOEUF v. MERRITT No. 23-229	Orange (20CVS1358)	No Error
SHAY v. SHAY No. 23-330	Cabarrus (22CVD1605)	Affirmed
SPENCER v. GOODYEAR TIRE & RUBBER CO. No. 23-430	N.C. Industrial Commission (18-017149)	Affirmed
STATE v. FORD No. 23-374	Buncombe (21CRS84572) (21CRS87417-19)	No Error
STATE v. FORREST No. 22-1005	Wake (20CRS209043) (20CRS209180)	No Error
STATE v. PARSONS No. 23-200	Watauga (21CRS50660-61)	No prejudicial error
STATE v. REVELS No. 23-148	Robeson (16CRS55641)	No Error.
STATE v. WILLIAMS No. 23-408	Wilkes (20CRS50468) (21CRS50107) (21CRS50114)	Affirmed
TANGER PROPS. LTD. P'SHIP v. LEGACY LIBATIONS CORP. No. 23-415	Watauga (22CVD464)	Affirmed

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