293 N.C. App.—No. 1 Pages 1-183

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 23, 2024

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

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OF

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COURT OF APPEALS

CASES REPORTED

FILED 19 MARCH 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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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

BUILDERS MUTUAL INSURANCE COMPANY, PLAINTIFF
v.
DANIEL R. NEIBEL, INDIVIDUALLY AND D/B/A
DAN THE MAN CONSTRUCTION, DEFENDANT

No. COA23-240

Filed 19 March 2024

1. Process and Service—service by publication—due diligence—attempts to serve personally—subsequent money judgment not void

In plaintiff insurance company's action seeking to renew a prior money judgment entered against defendant, the trial court properly granted summary judgment in plaintiff's favor where, because plaintiff complied with Civil Procedure Rule 4(j1) in serving defendant its original complaint by publication, the money judgment entered in the original lawsuit was not void for lack of personal jurisdiction and therefore could be renewed. Before serving defendant by publication in Watauga County, North Carolina—the last known county where defendant resided—plaintiff exercised reasonable due diligence in attempting to personally serve defendant at each of his known addresses, making two attempts at each of defendant's two addresses in Watauga County, and one attempt at defendant's Indiana address on file with the Licensing Board for General Contractors. Although defendant argued that plaintiff should have taken additional steps to locate him, he failed to forecast evidence at summary judgment that these other steps would have been fruitful.

2. Process and Service—service by publication—defendant's last known county of residence—reasonable belief defendant was there

In plaintiff insurance company's action seeking to renew a prior money judgment entered against defendant, the trial court properly granted summary judgment in plaintiff's favor where, because plaintiff complied with Civil Procedure Rule 4(j1) in serving defendant its original complaint by publication in Watauga County, North Carolina, the money judgment entered in the original lawsuit was not void for lack of personal jurisdiction and therefore could be renewed. Although the original lawsuit was filed in Wake County and defendant had addresses listed in Watauga County and in Indiana, plaintiff's service by publication solely in Watauga County was still proper because it was reasonable for plaintiff to believe defendant was located there since: all of plaintiff's dealings with defendant occurred there, defendant's last known residence was there, plaintiff's insurance records for defendant indicated that defendant only conducted business in North Carolina, and defendant worked with plaintiff through a Watauga County insurance agent.

Judge GORE dissenting.

Appeal by Defendant from Judgment entered 22 July 2022 by Judge Margaret P. Eagles in Wake County District Court. Heard in the Court of Appeals 31 October 2023.

Stuart Law Firm, PLLC, by William A. Piner, II, for Plaintiff-Appellee.

Buckmiller, Boyette & Frost, PLLC, by Joseph Z. Frost, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Daniel R. Neibel, individually and d/b/a Dan the Man Construction (Defendant) appeals from Summary Judgment granting a money judgment in favor of Builders Mutual Insurance Company (Plaintiff) renewing a prior judgment entered against Defendant. The Record before us tends to reflect the following:

On 10 March 2021, Plaintiff filed a Complaint in Wake County District Court alleging Plaintiff had previously obtained a judgment in Wake County on 11 March 2011 (2011 Judgment). The Complaint

alleged the 2011 Judgment remained unsatisfied and sought entry of a renewed judgment for: (1) the principal sum of $4,343.81 with judgment interest accruing from 14 August 2009; (2) the principal sum of $200.00 with judgment interest accruing from 12 August 2009; and (3) court costs. On 10 June 2021, Defendant filed an Answer asserting affirmative defenses, including that the underlying 2011 Judgment was void for lack of personal jurisdiction, insufficient process, and insufficient service of process.

On or about 27 May 2022, Plaintiff filed a Motion for Summary Judgment. Defendant served a Memorandum of Law in Opposition to Motion for Summary Judgment on Plaintiff on 19 July 2022. The trial court heard Plaintiff's Motion for Summary Judgment on 21 July 2022.

At the summary judgment proceedings, Plaintiff asserted it filed a verified complaint in the underlying lawsuit on or about 25 January 2010 seeking to collect unpaid insurance premiums in the total amount of $4,543.81 related to Defendant's business (the 2010 Complaint). Defendant submitted his own Affidavit opposing summary judgment and other documents, including the 2010 Complaint, as exhibits attached to his Memorandum of Law opposing summary judgment. Attached as exhibits to the 2010 Complaint were billing records and insurance applications for policies purchased through an insurance agency in Boone, North Carolina, reflecting Defendant's address in Sugar Grove, North Carolina. Defendant also submitted a Certificate of Assumed Name for his construction business to do business in Watauga County. The Certificate reflected addresses in Valle Crucis and Vilas, North Carolina. Defendant also submitted documentation reflecting his address on file with the North Carolina Licensing Board for General Contractors was in Paragon, Indiana.

Following unsuccessful attempts to personally serve Defendant with the 2010 Complaint, Plaintiff served Defendant by publication on 21 December 2010 in Watauga County, North Carolina. The Affidavit of Service by Publication filed in that underlying suit reflected in January 2010, Plaintiff attempted to serve the 2010 Complaint and summons on Defendant via certified mail at Defendant's Sugar Grove address. The summons was returned unclaimed. In April 2010, Plaintiff then attempted to serve the 2010 Complaint and alias and pluries summons at Defendant's Paragon, Indiana address. The summons was again returned unclaimed. In June 2010, Plaintiff again attempted service via alias and pluries summons by certified mail at an address in Vilas, North Carolina which was also unsuccessful. Finally, in August 2010, Plaintiff yet again attempted

service of process on Defendant by Watauga County Sheriff again at the addresses in Vilas and Sugar Grove. This alias and pluries summons was not served because Defendant could not be located at those addresses by the Sheriff's office. Ultimately, on or about 13 October 2010, Plaintiff caused Notice of Service of Process by Publication to be published in The Watauga Democrat newspaper as Watauga County was Defendant's last known residence. Following publication of the Notice Service of Process by Publication, Plaintiff moved for summary judgment and obtained the 2011 Judgment on 11 March 2011.

At the hearing on summary judgment in the case *sub judice*, Defendant contended the 2011 Judgment was void for lack of personal jurisdiction—and should not be renewed—arguing Plaintiff failed to comply with the requirements for service by publication of the 2010 Complaint. Defendant asserted Plaintiff failed to exercise reasonable diligence in attempting to personally serve Defendant prior to resorting to service by publication and by publishing the Notice of Service by Publication only in Watauga County and not in Paragon, Indiana and/or Wake County, North Carolina where the action was pending. Defendant's own Affidavit averred that while he was currently a resident of Watauga County, he did not reside and was not present in Watauga County between March 2009 and September 2012. Instead, Defendant claimed during that time he lived in Gosport, Indiana. As such, he further asserted he was not served and did not have actual notice of the 2010 Complaint or 2011 Judgment.

On 22 July 2022, the trial court entered Summary Judgment in favor of Plaintiff and against Defendant for the full amounts in the 2011 Judgment. Defendant, however, was not served nor provided a copy of the trial court's Summary Judgment until 5 December 2022. Defendant timely filed Notice of Appeal on 21 December 2022. *See* N.C. R. App. P. 3(c)(2) ("In civil actions . . . a party must file and serve a notice of appeal . . . within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period" prescribed by Rule 58 of the North Carolina Rules of Civil Procedure).

Issues

The issues on appeal are whether the trial court properly entered Summary Judgment for Plaintiff renewing the 2011 Judgment where: (I) service by publication of the 2010 Complaint was utilized following multiple attempts by Plaintiff to personally serve Defendant at multiple addresses in Watauga County and Indiana; and (II) Notice of Service of Process by Publication was published in Watauga County.

Analysis

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). A grant of summary judgment "is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party." *Erthal v. May*, 223 N.C. App. 373, 378, 736 S.E.2d 514, 517 (2012) (citations and quotation marks omitted).

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). When ruling on a motion for summary judgment, all inferences of fact "must be drawn against the movant and in favor of the party opposing the motion." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation and quotation marks omitted).

On appeal in this case, Defendant argues Summary Judgment was improperly entered for Plaintiff, and, instead, should have been entered in favor of Defendant. Specifically, Defendant contends the 2011 Judgment was, itself, void because of defects in Plaintiff's service of process by publication. As such, Defendant asserts the trial court had no jurisdiction to enter the underlying 2011 Judgment against him in the first place, and the 2011 Judgment could not, therefore, be renewed in the present action.

" 'A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void.' " *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003) (quoting *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980)). "Service of process by publication is in derogation of the common law. Therefore, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Id.* (citation and quotation marks omitted).

Service by publication is governed by Rule 4(j1) of the North Carolina Rules of Civil Procedure. "Rule 4(j1) permits service by publication on

a party that cannot, through due diligence, otherwise be served." *Id.* Rule 4(j1) of the North Carolina Rules of Civil Procedure provides in relevant part:

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.

N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2023).

I. Due Diligence

[1] Defendant first contends Plaintiff failed to exercise due diligence in attempting to locate Defendant before resorting to service by publication of the 2010 Complaint. Defendant asserts Plaintiff should have utilized other avenues to locate Defendant beyond the attempts Plaintiff made to serve Defendant either in Watauga County or Indiana. We disagree.

"Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Fountain*, 44 N.C. App. at 587, 261 S.E.2d at 516 (citations omitted). However, "there is no 'restrictive mandatory checklist for what constitutes due diligence' for purposes of service of process by publication; '[r]ather, a case by case analysis is more appropriate.' " *Jones v. Wallis*, 211 N.C. App. 353, 358, 712 S.E.2d 180, 184 (2011) (quoting *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980)). "Further, a plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of 'due diligence.' This is particularly true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful." *Id.* at 359, 712 S.E.2d at 185.

Here, Defendant offers two suggestions for additional steps. First, Defendant suggests Plaintiff should have attempted service at a Post Office Box in Watauga County. Second, Defendant suggests Plaintiff should have made repeated attempts at service to the Paragon, Indiana address on file with the North Carolina Licensing Board for General Contractors. Defendant also suggests Plaintiff should have tried simply contacting him by telephone to ascertain an address for service of the lawsuit against him.

Defendant, however, fails to identify any indication in the Record that these steps would have been fruitful. To the contrary, Defendant's entire factual basis for his argument is that he did not live and was not present in Watauga County at the time—necessarily defeating his suggestion that service at a Watauga County Post Office Box would have borne fruit. Likewise, Defendant casually ignores the fact that the attempt at service at the Paragon, Indiana address was returned unclaimed and offers no indication further attempts would have been successful. Defendant also makes no effort to argue telephone calls would have resulted in successful service of the 2010 Complaint.

Defendant cites *Barclays American/Mortgage Corporation v. BECA Enterprises*, 116 N.C. App. 100, 446 S.E.2d 883 (1994), as supportive of his argument. In *Barclays*, the "sole attempt at personal service of Notice . . . consisted of a certified letter mailed to the business address . . ., a postal box number." *Id.* at 103, 446 S.E.2d at 886. We concluded, on the facts of that case, this was insufficient to constitute due diligence where the record reflected other addresses including a personal address that had been used previously to contact the defendant. *Id.* at 104, 446 S.E.2d at 886-87.

This case is a far cry from *Barclays*. Here, Plaintiff utilized their own records and the public record to attempt service on Defendant at business and residential addresses in Watauga County. Moreover, Plaintiff attempted service at the Indiana address on file with the Licensing Board for General Contractors. On the facts of this case, we conclude Plaintiff exercised due diligence in making multiple attempts to personally serve Defendant with the 2010 Complaint. This is particularly so where Defendant has not forecast that any other attempts would have been fruitful. *See Jones*, 211 N.C. App. at 358, 712 S.E.2d at 184.

II. Publication in Watauga County

[2] Defendant further contends Notice of Service by Publication of the 2010 Complaint in Watauga County was insufficient to meet the requirements of N.C. R. Civ. P. 4(j1). In relevant part, Rule 4(j1) requires:

> a notice of service of process by publication . . . in a newspaper . . . circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.

N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2023). Instead, Defendant contends Plaintiff was required to serve him by publication in Indiana and/or Wake County, North Carolina, or, possibly, in Indiana, Wake County, *and* Watauga County. Defendant contends Plaintiff either reasonably believed Defendant was located in Watauga County or Indiana and should have served him by publication in both locations. Alternatively, Defendant contends Plaintiff had no reliable information about his whereabouts and, as such, should have served Defendant in Wake County (where the action was pending) and Watauga County and/or Indiana. Defendant, however, offers no case law supporting his alternative and conflicting positions.[1]

In *Winter v. Williams*, this Court concluded service by publication was proper in Wake County—where the action was pending—where (a) plaintiff had made diligent attempts to serve defendant at addresses in Wake County and Granville County, North Carolina; (b) the only other information plaintiff received about defendant's location was "defendant may be out west, possibly California,"; (c) inquiries to the California Department of Motor Vehicles revealed no information; and, importantly, (d) the defendant's last known address was also in Wake County. 108 N.C. App. 739, 743-45, 425 S.E.2d 458, 460-61 (1993). We concluded there the plaintiff had no reliable information concerning the defendant's location. *Id.* at 745, 425 S.E.2d at 461.

Subsequently, in *Chen v. Zou* this Court observed where a trial court's findings "demonstrate that [p]laintiff had reliable information (from [d]efendant herself) that [d]efendant was living in New York City . . . service by publication in Mecklenburg County—where the action was pending—was ineffective." 244 N.C. App. 14, 19, 780 S.E.2d 571, 575 (2015). We noted "*Winter* is distinguishable from the present case because [p]laintiff had reliable information from [d]efendant and several other individuals that [d]efendant was in New York City, an area significantly smaller and more precise than 'out West,' or 'possibly California.' " *Id.*

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1. Indeed, to be fair, our dissenting colleague provides a far more thoughtful analysis in making Defendant's case for him.

Here, Defendant appears to effectively concede service by publication in Watauga County itself was not improper. Indeed, it was entirely reasonable for Plaintiff to believe Defendant would be located in Watauga County. Plaintiff's dealings with Defendant all occurred in Watauga County. Defendant's last known residence was in Watauga County. Plaintiff's records of insuring Defendant all reflected Defendant's business was conducted only in North Carolina. Defendant's purchase of insurance products from Plaintiff was through a Watauga County insurance agent. Indeed, Defendant's own affidavit submitted in the present action admits he was a resident and conducting business in Watauga County until 2009 and then returned to Watauga County in 2012—indicating he had not permanently severed all ties with Watauga County and underscoring the reasonableness of Plaintiff's belief as to Defendant's likely location.

Rather, Defendant—again without citing authority—contends Plaintiff was required to do more. Defendant contends Plaintiff was required to serve Defendant by publication in Indiana, arguing Plaintiff had reason to believe Defendant was located there because of the address on file with the Licensing Board for General Contractors. However, Plaintiff attempted service at this address and was unsuccessful, and the Record provides no further indication Plaintiff had any other reason to believe Defendant was located in Indiana. *See Winter*, 108 N.C. App. at 745, 425 S.E.2d at 461. This is particularly so given Plaintiff's dealings with Defendant, which all occurred exclusively in Watauga County. Therefore, we conclude on the facts of this case that Plaintiff had no reason to believe Defendant was located in Indiana. Thus, Plaintiff was not required to serve Defendant with notice of the 2010 Complaint by publication in Indiana.

Defendant further contends that, alternatively, Plaintiff had no reliable information whatsoever about Defendant's location. Thus, Defendant asserts, Plaintiff was required, as a matter of law, to serve Defendant in Wake County where the action was pending. We disagree.[2]

Ultimately, the test for the constitutional validity of service "is not whether defendants received [a]ctual notice but whether the notice was of a nature [r]easonably calculated to give them actual notice and the opportunity to defend." *Royal Bus. Funds Corp. v. S.E. Dev. Corp.*, 32 N.C. App. 362, 369, 232 S.E.2d 215, 219 (1977). Here, it is apparent that

2. This single point is where our dissenting colleague and we, respectfully, part ways.

service by publication in Wake County—of the three options available—was the option least reasonably calculated to give Defendant notice of the 2010 Complaint and an opportunity to defend.

Defendant's argument boils down to a contention that because Plaintiff could not obtain service of him at his Watauga County addresses, then Plaintiff necessarily did not believe Defendant was in Watauga County. Indeed, this is the analysis employed by the dissenting opinion here. This contention, however, misses the point. If Plaintiff had been able to effectuate personal service on Defendant at those addresses, service by publication would not be necessary. But it cannot logically follow that just because personal service was not effectuated in a county where Defendant was last known to reside and conduct business related to the lawsuit, Defendant was no longer located in that county—or more to the point, that Plaintiff could not reasonably believe Defendant would be located in that county for purposes of publication.

Indeed, the dissent's analysis here functionally eviscerates the protections for defendants afforded by Rule 4(j1). Under the dissent's analysis, if a plaintiff is unable to serve a defendant personally at their last known location, publication of the notice cannot—as a matter of law—occur in that county. This cannot be so. The purpose of the notice of publication is to provide as meaningful an opportunity for a defendant to receive notice of the lawsuit as possible under the circumstances. Publication in the county where the suit is pending is the last resort. *See*, *e.g.*, *Zou*, 244 N.C. App. at 19, 780 S.E.2d at 575 (publication of notice inadequate in Mecklenburg County where plaintiff had information defendant had moved to New York).

Here, there is no dispute publication in Wake County would have provided practically zero chance of notice to Defendant. Meanwhile, it is not unreasonable for Plaintiff to believe Defendant would be located in Watauga County where he had resided, where his business was located, and where Defendant conducted business with Plaintiff through a local insurance agency. This is much different than the generalized assertion a defendant was "out west, possibly California." *See Winter*, 108 N.C. App. at 745, 425 S.E.2d at 461. The test is not whether Defendant was, in fact, located in Watauga County—but whether in 2010 Plaintiff reasonably believed Defendant was located in Watauga County based on what reliable information it had at the time.

Defendant's own affidavit underscores the reasonableness of Plaintiff's belief Defendant would be located in Watauga County. Defendant admits he resided and operated his business in Watauga

County, except for a temporary absence when he left to go to Indiana to care for his ailing father, returning to Watauga County after his father's death. As such, we conclude Defendant has failed to establish Plaintiff was required to publish notice of service of process by publication of the 2010 Complaint in Wake County where the action was pending.

Thus, in the case *sub judice*, Defendant has failed to forecast evidence Plaintiff failed to exercise due diligence in attempting personal service or that service by publication in Watauga County was invalid. Therefore, the trial court had personal jurisdiction over Defendant to enter the 2011 Judgment. Consequently, in this action, the trial court did not err in granting Summary Judgment to Plaintiff renewing the 2011 Judgment.

Conclusion

Accordingly, for the foregoing reasons, the trial court's 22 July 2022 Summary Judgment is affirmed.

AFFIRMED.

Judge STROUD concurs.

Judge GORE dissents with separate opinion.

GORE, Judge, dissenting.

The majority opinion seeks to mitigate the tough consequences of an inadequate application of the stringent service by publication requirements, however, I believe a correct application of Rule 4(j1) requires remand and consequently to vacate the prior judgment, therefore I respectfully dissent.

Rule 4(j) of the North Carolina Rules of Civil Procedure states:

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in

> accordance with G.S. 1-597 and G.S. 1-598 and *circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.*

N.C. R. Civ. P. 4(j1) (2023) (emphasis added).

The majority is satisfied with plaintiff's reliance upon evidence of its prior dealings with defendant to establish it reasonably believed defendant was located in Watauga County. The evidence is dated a year or more prior to the filing of the prior judgment action, and evidence obtained through attempts to serve defendant during the lawsuit contradicted this reasonable belief. I agree with the majority that plaintiff demonstrated service by publication was proper in this case. But I disagree with the majority's generous reading of what qualifies as a reasonable belief that defendant was located in Watauga County. Case law demonstrates the Courts must strictly apply service by publication requirements. *See Henry v. Morgan*, 264 N.C. App. 363, 365 (2019) (discussing how our Courts must strictly construe whether the party properly served the defendant under Rule 4(j1) because this type of service is a "derogation of the common law."); *Dowd v. Johnson*, 235 N.C. App. 6, 10 (2014) (cleaned up) ("Because service by publication is a derogation of the common law, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute.").

The majority argues that my application of Rule 4(j1) "functionally eviscerates the protections for defendants." I am not suggesting that a failure to personally serve defendant at their last known address equates as a matter of law in ruling that service by publication is not proper in that county. I am merely pointing to the facts of this case and comparing it with prior decisions by this Court that utilize the available facts to determine whether the serving party properly published in the area where the serving party believed the defendant was located. Given the strict requirements of service by publication, the purpose is not to determine whether defendant would actually get notice by publication in a certain county, although this is certainly a desired outcome as this equates to personal jurisdiction, but instead it is the proper application of Rule 4(j1). I agree with the majority, that it is likely in this case defendant would not receive notice through publication in the county where the case was pending, after all he was in Indiana at the time of the lawsuit. But we are not given the luxury of applying the law based on how

we think it should turn out, but rather by interpreting the law as articulated by the General Assembly and previously applied by the Courts.

In *Winter v. Williams*, the defendant argued the service by publication in the county in which the action was pending was improper because the serving party had some information defendant could be out west in California. 108 N.C. App. 739, 744–45 (1993). The *Winter* Court held that service by publication "in the county in which the action was pending" was proper. *Id.* at 745. The Court reasoned that the "defendant's last known address was in Wake County and despite reasonable efforts, [the] plaintiff had no 'reliable information' as to the defendant's whereabouts." *Id.*

Conversely, in *Chen v. Zou*, a later decision by this Court addressing the same application of Rule 4(j1), we discussed why service by publication in the location in which the action was pending was "inadequate." 244 N.C. App. 14, 19 (2015). The *Chen* Court determined the serving party did not "exercise due diligence" in attempting to serve the defendant, because the plaintiff had "reliable information" defendant was in New York City. *Id.* The effect of this inadequate service by publication was to recognize the prior divorce judgement was void and order it set aside. *Id.* at 20.

In both cases, the *Winter* Court and the *Chen* Court diverged in the application of Rule 4(j1) based upon evidence obtained during the legal proceedings. In *Winter*, the information obtained while attempting service demonstrated the plaintiff lacked reliable information of the defendant's whereabouts, because he received notice from a failed service attempt that the defendant could be located out in California. 108 N.C. App. at 743. The *Winter* Court determined the plaintiff only knew of the defendant's prior address and lacked reliable information as to where the defendant was located, therefore, publication was proper in the location where the action was pending. *Id.* at 745. Whereas, in *Chen*, the information the plaintiff had about the defendant during the legal proceedings (by talking to and texting the defendant) demonstrated the plaintiff had reliable information of where the defendant was located. 244 N.C. App. at 18–19. Therefore, the *Chen* Court stated it was improper to publish in the location where the action was pending, because he had reliable information from the defendant of her location. *Id.* at 19.

Plaintiff made the following attempts to serve defendant: (1) by certified mail to Sugar Grove, North Carolina, but it was returned unclaimed; (2) by certified mail to Paragon, Indiana, but it was returned unclaimed; (3) by certified mail to Vilas, North Carolina, but it was returned unclaimed;

and (4) by personal service through the Watauga County Sheriff to both Vilas, North Carolina, and Sugar Grove, North Carolina, but the sheriff told plaintiff that defendant could not be located at either address, and there was no forwarding information. It appears plaintiff used due diligence to obtain the Indiana address and attempt service there. While I would not impute a requirement for further attempts at the Indiana address beyond the service attempted, it does raise suspicion as to plaintiff's reliable information and reasonable belief of defendant's location.

Plaintiff made multiple attempts of service and each time received information that defendant could not be located at those addresses. Plaintiff also received notice prior to the hearing that stated defendant moved from the address in Watauga County. This evidence altogether, casts doubt upon plaintiff's reliance of prior dealings with defendant for where it believed defendant was located. When I consider the key differences between proper service by publication and improper service by publication in *Winter* and *Chen*, it becomes evident that the prior dealings of plaintiff with defendant were not enough to strictly comply with the requirements of Rule 4(j1). The requirement of service by publication in the location in which the action is pending, is a last resort, but it is necessary when the serving party reveals it lacks reliable information of defendant's location. Further, while it is not required, plaintiff could have published in more than one county when the evidence raised a question of whether plaintiff properly believed defendant was located in Watauga County, and whether that belief was based upon reliable information of defendant's location.

I am not suggesting defendant's lack of knowledge is determinative of the proper application of service by publication requirements, instead, I merely suggest the evidence admitted, without dispute, casts great doubt upon the majority's determination service by publication was proper in Watauga County. In applying both *Winter* and *Chen* to the present case, I would consider the evidence obtained during the legal proceedings and let that guide the determination as to whether plaintiff had reliable information of defendant's location. In this case, because the evidence casts doubt on plaintiff's reliable information of defendant's location, I would determine the service by publication should have been issued in the county in which the case was pending, and therefore, service was improper and the judgment should be vacated for lack of personal jurisdiction. Therefore, I respectfully dissent.

GERALD COSTANZO, ET AL., PLAINTIFFS
v.
CURRITUCK COUNTY, NORTH CAROLINA, ET AL., DEFENDANTS

No. COA22-699

Filed 19 March 2024

Counties—expenditures—scope of authority—net proceeds of occupancy tax—amendment to authorizing session law

In a declaratory judgment action to determine the scope of a county's authority to use the net proceeds of an occupancy tax for various purposes, where the legislature amended the law that granted counties authority to collect an occupancy tax by eliminating portions of the law and by providing greater specificity in certain definitions regarding how funds could be used, there was a clear legislative intent to narrow the scope of counties' discretion in making certain expenditures from those funds. The trial court's order granting summary judgment for the county on all claims was reversed as to plaintiffs' claim challenging past expenditures on general public safety services since those services did not meet the newly adopted definition of "tourism-related expenditures," and plaintiffs were entitled to summary judgment on that claim. The trial court's order was vacated as to the remaining claims, and the matter was remanded for further proceedings.

Judge HAMPSON concurring in a separate opinion.

Appeal by plaintiffs from order entered 28 December 2021 by Judge Wayland J. Sermons, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 8 February 2023.

Fox Rothschild L.L.P., by Troy D. Shelton and Robert H. Edmunds, Jr., for the plaintiffs-appellants.

Womble Bond Dickinson (US) L.L.P., by Christopher J. Geis, for the defendants-appellees.

STADING, Judge.

Gerald Costanzo, et al., ("plaintiffs") appeal an order granting summary judgment for Currituck County, et al., ("the County"). For the

reasons set forth below, we reverse the order in part, vacate in part, and remand for further proceedings.

I. Background

Currituck County is North Carolina's northernmost coastal county containing a strip of land that is part of the Outer Banks. The town of Corolla, situated on this strip of land, is a tourist destination. This area generates most of the County's occupancy tax revenue from lodging facilities. Although comprising approximately one-tenth of the County's land, this area also contributes to more than half of the County's property tax base. The property tax, sales tax, and other tax revenue generated in this area feeds into the County's General Fund allocated for public purposes throughout the County under N.C. Gen. Stat. §§ 153A-149, 153A-151, and 105-113.82 (2023).

In 1987, the General Assembly gave the County authority to collect an occupancy tax on rentals of rooms and other lodgings ("the Session Law"). *See* 1987 N.C. Sess. Laws 209, § 1(a). The Session Law required that "at least seventy-five percent (75%) of the net proceeds" of the occupancy tax levied be used "only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e). The County then had to deposit the remaining net proceeds of the occupancy tax into its General Fund, which could "be used for any lawful purpose." *Id*. In 1999, the Session Law was modified, and the County was permitted to levy an "[a]dditional occupancy tax" under its subsection 1(a1). N.C. Sess. Law 1999-155, H.B. 665 § 1(a1). The County could use the net proceeds of taxes levied under this subsection for the Currituck Wildlife Museum. N.C. Sess. Law 1999-155, H.B. 665 § 1(a1); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

In 2004, the General Assembly amended the Session Law ("the Amendment"), narrowing the scope of how the County may use occupancy tax proceeds. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). In contrast to the Session Law, the Amendment deleted the phrase "tourist related purposes," opting instead for "tourism-related expenditures, including beach nourishment." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 §§ 1(a2), 2(e). Moreover, the Amendment removed the language that authorized the County to make certain expenditures, "including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C.

Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

Even so, after the Amendment's enactment, the County continued to allocate occupancy tax revenue to expenditures previously authorized under the Session Law. The County's continued allocation of these funds, in a manner not specifically authorized by the Amendment, prompted plaintiffs to file their complaint on 7 May 2019, suing for declaratory judgment and injunctive relief. Plaintiffs alleged that defendants "improperly and unlawfully diverted [tax levies] to purposes other than those purposes permitted by the [Amendment]." Specifically, plaintiffs sought relief as follows: (1) declaratory judgment that transfers of occupancy tax proceeds from the designated tourism development fund to the County's General Fund are unlawful, (2) declaratory judgment that the County's expenditures of occupancy tax proceeds for public safety services are unlawful, (3) declaratory judgment that the County's expenditures of occupancy tax proceeds for non-promotional operations and activities of the County's Economic Development Department are unlawful, (4) declaratory judgment that the County's expenditures of occupancy tax proceeds for two ongoing projects—park facility construction and historic building restoration—are unlawful, (5) declaratory judgment that the County's loan of occupancy tax proceeds to finance the construction of a water treatment facility is unlawful, (6) declaratory judgment that the County's expenditures of occupancy tax proceeds to fund special service districts are unlawful, (7) declaratory judgment that the aforementioned claims violate the Amendment and N.C. Gen. Stat. § 159-13(b)(4) (2023), which prohibits expenditures of revenue for purposes not permitted by law, (8) declaratory judgment that the County's use of occupancy tax proceeds violates the North Carolina Constitution, (9) preliminary injunction against the use of occupancy tax proceeds for public safety services and equipment, (10) permanent injunction against the transfer of occupancy tax proceeds to the County's General Fund, and the use occupancy tax proceeds for public safety services or any other unlawful purpose, (11) court construction of the term "tourism-related expense" under N.C. Gen. Stat. § 1-254 (2023), (12) permanent injunction requiring the County to restore and replace unlawfully used occupancy tax proceeds, and (13) inclusion of the County Manager in his individual capacity.

The County filed its answer and partial motion to dismiss plaintiffs' claims pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6) (2023). The motion to dismiss alleged that: (1) the Board of

Commissioners did not have the legal capacity to be sued,[1] (2) the County Manager was not a proper party,[2] and (3) plaintiffs' claim under the North Carolina Constitution was unavailable.[3] Plaintiffs then moved to preliminarily enjoin use of the funds for contested purposes, which the trial court later denied. Thereafter, plaintiffs moved for partial summary judgment as to their second cause of action concerning expenditures of occupancy tax proceeds "for public safety services, including police, emergency medical and fire services and equipment." The County moved for summary judgment as to all of plaintiffs' claims and requested the trial court to strike an affidavit submitted in plaintiffs' motion. The trial court held a hearing on the cross-motions in which it assessed "such weight and relevancy as it deem[ed] appropriate" to the contested affidavit, ordered summary judgment for the County on all claims, and denied plaintiffs' request for partial summary judgment. Plaintiffs timely entered their notice of appeal.

II. Jurisdiction

Jurisdiction is proper under N.C. Gen. Stat. § 7A-27(b)(1) (2023) since the trial court's order granting summary judgment is a final judgment.

III. Analysis

A. Tourism-Related Expenditures

The Session Law, enacted in 1987, allowed for three-quarters of the net proceeds of the tax levied under its subsection 1(a), to be spent "only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e). But, in 2004, the Amendment deleted this text and directed that the net proceeds of such tax levied under this subsection *shall* be used "only for tourism-related expenditures, including beach nourishment." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). The Amendment also removed the text directing the County to deposit the remainder of the net proceeds into its General Fund to "be used for any lawful purpose." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Additionally, the Amendment authorized a "Second Additional Occupancy Tax" under its

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1. The trial court dismissed the Board of Commissioners from the suit.

2. Plaintiffs filed a notice of voluntary dismissal of the County Manager in his individual capacity and the trial court granted a dismissal in his official capacity from the suit.

3. The trial court dismissed this cause of action from the suit.

subsection 1(a2) only if the County "also levies the tax under subsections (a) and (a1)."[4] N.C. Sess. Law 2004-95, H.B. 1721 § 1(a2). However, the Amendment modified how the County "may" use the net proceeds of tax levied under subsections (a1) and (a2) to "shall use at least two-thirds" of these funds "to promote travel and tourism and shall use the remainder . . . for tourism-related expenditures." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Moreover, the Amendment required the County to create a Tourism and Development Authority to "expend the net proceeds of the tax levied under this act." N.C. Sess. Law 2004-95, H.B. 1721 § 3.

Not only did the Amendment eliminate portions of the Session Law, but it also provided greater specificity with definitions to direct the use of funds. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Notably, the Amendment defined "tourism-related expenditures" as those that "in the judgment of the . . . Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county. The term includes tourism-related capital expenditures and beach nourishment." *Id.* And it defined expenditures that "promote travel and tourism" as those that "advertise or market an area or activity, publish and distribute pamphlets and other materials, conduct market research, or engage in similar promotional activities that attract tourists or business travelers to the area; the term includes administrative expenses incurred in engaging in these activities." *Id.* Language was also added to clarify the definition of net proceeds as "[g]ross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer, not to exceed three percent [ ] of the first five hundred thousand dollars [ ] of gross receipts collected each year." *Id.*

The parties do not dispute that the Amendment eliminated the term "tourism related purposes," which the 1987 Session Law defined to include "construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection and emergency services." Also, the parties do not dispute that the Amendment replaced the term "tourism related purposes" with "tourism-related expenditures." The dispute concerns whether the Amendment prohibits certain expenditures that the County has classified as tourism-related expenditures. Plaintiffs contend that the County acted *ultra vires* by using these funds to pay for general public services

4. Referencing 1987 N.C. Sess. Laws 209, § 1(a) and N.C. Sess. Law 1999-155, H.B. 665 § 1(a1).

because the General Assembly deauthorized such spending in the Amendment. However, the County points to language in the Amendment that allows for the "the judgment of the . . . Board of Commissioners," to determine which expenditures are categorized as tourism-related.

Questions of statutory interpretation are reviewed *de novo*. *In re Ernst & Young, L.L.P.*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citations omitted). "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 485, 687 S.E.2d 690, 694 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.* "Where . . . the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974). "If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction, including those above stated." *Id.* at 220, 210 S.E.2d at 203. With these principles in mind, we must consider whether the disputed expenditures are "designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

To the extent any ambiguity exists in the Amendment's use of the language "the judgment of the . . . Board of Commissioners" or "tourism-related expenditure," our analysis is guided by precedent which weighs against constructing the text as giving the Board of Commissioners unlimited discretion. "It is not consonant with our conception of municipal government that there should be no limitation upon the discretion granted municipalities. . . ." *Efird v. Bd. of Comm'rs for Forsyth Cnty.*, 219 N.C. 96, 106, 12 S.E.2d 889, 896 (1941) (citations omitted). "Counties . . . exist solely as political subdivisions of the State and are creatures of statute. They are authorized to exercise only those powers expressly conferred upon them by statute and those which are necessarily implied by law from those expressly given." *Davidson Cnty. v. High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987) (citations omitted). And, "[p]owers which are necessarily implied from those expressly granted are only those which are indispensable in attaining

the objective sought by the grant of express power." *Id.* (citation omitted). Furthermore, such statutorily granted powers are to be "strictly construed." *Id.* (citations omitted). Thus, total deference to the judgment of the Board of Commissioners defies strict construction of their statutorily granted powers under the Amendment. *See Nash-Rocky Mount Bd. of Educ.*, 169 N.C. App. 587, 589, 610 S.E.2d 255, 258 (2005).

We are also guided by the actions of the Legislature in their enactment of the Amendment. "[A] change in the language of a prior statute presumably connotes a change in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012). "Legislative history is a factor to consider in determining legislative intent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990) (citation omitted). The Amendment serves as "an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history." *Id.* (citations omitted). Here, we cannot ignore the Legislature's deliberate actions that eliminated some explicitly permitted uses of occupancy tax proceeds and crafted a definition of "tourism-related expenditures." N.C. Sess. Law 2004-95, H.B. 1721, § 2(e)(4). Likewise, it is difficult to overlook the Amendment's creation of a Tourism Development Authority "to expend the net proceeds of the tax levied under this act. . . ." N.C. Sess. Law 2004-95, H.B. 1721, § 3. *See Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 642, 870 S.E.2d 269, 277 (2022) ("[A] statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation.").

Our interpretation is correspondingly informed by the Amendment's title: "An Act to Allow an Increase in the Currituck County Tax and to Change the Purpose for Which the Tax may be Used." N.C. Sess. Law 2004-95, H.B. 1721; *see State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763-64 (1992) ("We therefore cannot, as defendant would have us do, ignore the title of the bill."). When "the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose." *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782 (1981); *see also Sykes v. Clayton*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968) (holding the title of a bill is "a legislative declaration of the tenor and object of the act"). Though not dispositive, the Amendment's title—which includes notating a change to the purpose for which the occupancy tax may be used—displays an intent by the Legislature to limit the scope of how occupancy tax expenditures may be used. *See, e.g.*, *In re FLS Owner II, LLC*, 244 N.C. App. 611, 616,

781 S.E.2d 300, 303 (2016); *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012); *State v. Flowers*, 318 N.C. 208, 215, 347 S.E.2d 773, 778 (1986).

Considering the Legislature's actions—the significant changes in the text and title of the Amendment—we can only conclude that their intent was to narrow the scope of how the County is permitted to use occupancy tax funds. While the County has discretion in deciding how to dispel occupancy taxes, it must do so within the directives set by the Legislature. *See Nash-Rocky Mount Bd. of Educ.*, 169 N.C. App. at 590, 610 S.E.2d at 258. Our *de novo* review leads us to conclude that although the County was permitted some discretion in determining the use of net proceeds from occupancy tax levies, the Legislature intentionally removed some previously permitted uses and provided a narrower definition with definitive parameters to prohibit some of the County's customary expenditures permitted by the Session Law.

B. The Trial Court's Order for Summary Judgment

Following the dismissal of plaintiffs' claim under the North Carolina Constitution and denial of a preliminary injunction, plaintiffs moved for partial summary judgment and the County moved for summary judgment as to the remaining claims. Among those remaining claims, plaintiffs requested that the trial court enter declaratory judgment that the County's expenditures of occupancy tax proceeds for the following purposes are unlawful: (1) public safety services and equipment, (2) non-promotional operations and activities of the County's Economic Development Department, (3) construction of a park and restoration of a building historically used as a jail, (4) loan of occupancy tax proceeds to finance the construction of a water treatment facility, and (5) funding of special service districts. Further, plaintiffs maintained that these disputed uses of occupancy tax proceeds violate the Amendment and N.C. Gen. Stat. § 159-13(b)(4) (2023), which prohibit expenditures of revenue for purposes not permitted by law and sought judgment declaring the transfer of these funds from the Tourism Development Authority Fund to the County's General Fund unlawful. Additionally, plaintiffs requested court construction of the term "tourism-related expense" under N.C. Gen. Stat. § 1-254 (2023). In view of the foregoing claims, plaintiffs requested a permanent injunction against the transfer of occupancy tax proceeds to the County's General Fund, used for any unlawful purpose, as well as a permanent injunction requiring the County to restore and replace unlawfully used occupancy tax proceeds. The parties presented the trial court with their cross-motions for summary judgment based on conflicting interpretations of the Amendment and its impact

on expenditures originally authorized under the Session Law. N.C. Sess. Law 2004-95, H.B. 1721; N.C. Sess. Law 1987, Chapter 209, H.B. 555. The trial court denied partial summary judgment for plaintiffs and granted summary judgment for the County as to all claims.

A trial court should grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action. . . . The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

Plaintiffs moved for summary judgment only as to their second cause of action, asserting an "impropriety of occupancy tax expenditures by the County on what [it] termed general public safety services." Plaintiffs characterized "general public safety services" to include police, fire, and emergency medical services and equipment. Further, plaintiffs maintained that other taxes, such as lodging and sales tax from tourists, are available to cover costs incidental to the impact of tourism with respect to these items. In support of their position, plaintiffs presented an affidavit citing documents and records of the County. The data displayed unrefuted instances of occupancy tax proceeds appropriated for the Currituck Outer Banks area's seasonal law enforcement and emergency medical services correlating to full annual costs. Moreover, the numbers showed that these funds covered the costs of equipment for law enforcement and a fire hydrant. The County does not dispute the expenditures alleged by plaintiffs. Rather, it moved the trial court for summary judgment as to the balance of the claims, arguing that "finances are just not relevant in this motion," and that the law "allow[ed] the County Board of Commissioners to determine what is a tourism-related expenditure." The record reveals no controversy as to the facts but as to the legal significance of those facts.

While plaintiffs' claim sought declaratory relief, this case is proper for summary judgment determining the applicability of the Amendment.

See Blades v. Raleigh, 280 N.C. 531, 545, 187 S.E.2d 35, 43 (1972) ("Here, there is no substantial controversy as to the facts disclosed by the evidence. The controversy is as to the legal significance of those facts. Such controversy as there may be in respect of the facts presents questions of fact for determination by the court."). The County does not dispute the actions of the Legislature and contents of the Amendment but contends that since tourists create an increased need for services, it is permitted to use occupancy tax dollars to offset such costs. However, our analysis of the text of the Amendment and the Legislature's intent leads us to a different conclusion. The expenditures of the occupancy tax proceeds in the "judgment" of the Board of Commissioners are reviewable and subject to the constraints contained in the law. *See Efird v. Bd. of Comm'rs for Forsyth Cnty.*, 219 N.C. at 106, 12 S.E.2d at 896. The constraints here are readily apparent from the plain language contained in the Amendment as the authority to expend these resources in this manner was neither expressly conferred upon the County nor necessarily implied from those expressly given. *See Davidson Cnty. v. High Point*, 321 N.C. at 257, 362 S.E.2d at 557. Moreover, any alleged ambiguity within the law is resolved by the title of the Amendment and the Legislature's removal of specific language. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. at 216, 388 S.E.2d at 141; *see State ex rel. Cobey v. Simpson*, 333 N.C. at 90, 423 S.E.2d at 763-64.

We conclude that the disputed expenditures in plaintiffs' second cause of action are not "designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities . . . by attracting tourists or business travelers to the county." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law" as to plaintiffs' second claim for relief. N.C. Gen. Stat. § 1A-1, Rule 56(c). Accordingly, we reverse the trial court's denial of partial summary judgment for plaintiff and vacate the trial court's grant of summary judgment for the County as to the remaining claims. We remand this matter for proceedings not inconsistent with this opinion.

IV. Conclusion

An application of guiding legal principles and precedent leads us to conclude that significant alterations to the original language contained in the Session Law and additions included in the Amendment convey an intent by the Legislature to narrow the scope of expenditures funded by the net proceeds of levied occupancy tax. The Amendment limits

the discretion of the Board of Commissioners and requires that such funds shall be spent only as permitted by strict construction of the term "tourism-related expenditures." Considering the evidence contained in the record, in a light most favorable to the County, we hold that the County did not act in accordance with the Amendment when spending occupancy tax proceeds for public safety services and equipment. This is not to say that the County has acted in bad faith, rather our determination is based on expenditures contained in the record which were no longer authorized after the Amendment was enacted. Therefore, we reverse the trial court's denial of summary judgment for plaintiffs and remand to the Superior Court for entry of summary judgment for plaintiffs as to the past expenditures in their second cause of action. We also vacate the trial court's grant of summary judgment for the County on the remaining claims. Furthermore, we remand this matter to the trial court for proceedings not inconsistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judge MURPHY concurs.

Judge HAMPSON concurs in a separate opinion.

HAMPSON, Judge, concurring.

I agree with the Opinion of the Court that (a) summary judgment was improperly entered for the County on the second claim for relief; (b) summary judgment as to the remaining claims should also be vacated; and (c) this matter should be remanded to the trial court for further proceedings. I write separately to emphasize that—in my view—the County's use of occupancy tax funds to fund law enforcement, emergency medical services, and fire protection might well be expenditures that, "in the judgment of the . . . Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county." 2004 N.C. Sess. Law 95, § 2(e)(4). Here, however, the Record does not disclose that in appropriating the proceeds of the occupancy tax, the County—through its Board of Commissioners—exercised its judgment, or discretion, in so doing.

The local legislation at issue provides a statutory mechanism whereby the County may enact occupancy taxes. *See* 1987 N.C. Sess. Laws 209, § 1(a); 2004 N.C. Sess. Law 95, § 1(a2). The Board of Commissioners

then exercises its judgment to determine what are tourism-related expenditures. 2004 N.C. Sess. Law 95, § 2(e). As Defendants note in their briefing, the 2004 amended act also required creation of the Currituck County Tourism Development Authority (TDA). The act further imposes the duty on the TDA to expend the occupancy tax revenue to "promote travel, tourism, and conventions in the county, sponsor tourist-related events and activities in the county, and finance tourist-related capital projects in the county." 2004 N.C. Sess. Law 95, § 3(1.1).

The Record here—including Defendants' own forecast of evidence—reflects, however, all occupancy tax revenue goes to the TDA, which keeps 1/3 of the funds for its tourism-related activities and submits the remaining 2/3 of the funds back to the County's general fund for spending by the County in the Commissioners' discretionary budgetary authority. Nowhere in this process is there any indication that the Board of Commissioners is exercising any judgment in determining what constitutes a tourism-related expenditure before funds are assigned to the general fund (or other special funds). In my view, while it facially appears the County is proceeding in good faith and there is no allegation the County's budgetary process does not conform to law, the County's appropriations of the occupancy tax is being performed under a misapprehension of the applicable law. *See Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) ("A discretionary ruling made under a misapprehension of the law, may constitute an abuse of discretion." (citations omitted)). Thus, I would conclude the County has abused its discretion in its appropriation of the occupancy tax revenues without exercising its judgment to determine it was expending those funds for tourism-related activities. Therefore, the trial court's order is properly reversed in part, vacated in part, and this matter remanded for further proceedings.

eDEALER SERVICES, LLC, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT
AND
VANGUARD DIRECT, INC., RESPONDENT-INTERVENOR

No. COA23-680

Filed 19 March 2024

1. Administrative Law—final agency decision—award of information technology contract—scope of review by superior court—standards of review

The superior court, acting as appellate court, used the correct standards of review to determine whether a final agency decision by the State Chief Information Officer correctly affirmed the award of an information technology contract to one of two competing bidders. The superior court correctly reviewed claims regarding procedural errors under a de novo standard of review, and substantive claims challenging the agency decision as arbitrary, capricious, and an abuse of discretion under whole-record review. Further, the superior court did not impermissibly engage in independent fact-finding when it considered the factual history of the case based on the official record, which included the proposed decision of an administrative law judge and the final agency decision.

2. Administrative Law—final agency decision—award of information technology contract—superior court review—procurement process not followed

Upon review of the final decision of the State Chief Information Officer that had confirmed the award of an information technology contract to one of two competing bidders, the superior court, acting as appellate court, correctly applied de novo and whole-record standards of review to alleged procedural and substantive errors, respectively, when it determined that the agency's evaluating committee failed to follow applicable law and the evaluation criteria of the procurement process when assessing the relative merits of the two bidders and, therefore, that the final agency decision should be vacated for being arbitrary and capricious and an error of law.

3. Administrative Law—final agency decision—award of information technology contract—arbitrary and capricious—scope of relief—trial court's authority

After determining that the final decision of the State Chief Information Officer confirming the award of an information technology contract to one of two competing bidders was arbitrary and capricious and an error of law, the superior court acted within the authority granted by section 150B-51(c) of the Administrative Procedure Act (APA)—the controlling statutory scheme—when it modified the final agency decision by vacating the contract to the bidder chosen by the agency and awarding the contract to the other bidder, and the court was under no obligation pursuant to the APA to remand for further findings of fact.

Appeal by respondent-appellant and intervenor-appellant from order entered 5 March 2023 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans and Special Deputy Attorney General Kathryne E. Hathcock, for respondent-appellant.

Stevens, Martin, Vaughn & Tadych, PLLC, by Michael J. Tadych and K. Matthew Vaughn, for respondent-intervenor-appellant.

Parker Poe Adams & Bernstein, LLP, by R. Bruce Thompson, II, Michael A. Goldsticker, and Catherine G. Clodfelter, for petitioner-appellee.

FLOOD, Judge.

The North Carolina Department of Transportation (the "NCDOT") and Vanguard Direct, Inc. appeal from the superior court's order and opinion vacating a contract the NCDOT had awarded to Vanguard. On appeal, the NCDOT and Vanguard argue the superior court erred by: (A) incorrectly applying the relevant standards of review by making independent findings of fact; and (B) reversing the Final Agency Decision and ordering the contract be awarded to eDealer Services, LLC instead of remanding to State Chief Information Officer Thomas Parish, IV (the "State CIO") for further findings. After careful review, we affirm.

I. Factual and Procedural Background

In 2019, the NCDOT and the North Carolina Department of Information Technology (the "NCDIT") issued a Request for Proposal (the "RFP"), seeking proposals from bidders to be the vendor for North

Carolina's ELT Solution. The ELT Solution is an electronic platform that tracks lien and title information between the NCDOT and the lienholder of a vehicle. The RFP used a "Best Value" procurement method that considered five criteria when evaluating bids:

> **Criterion A:** Substantial conformity to solicitation specifications and requirements
>
> **Criterion B:** Proposed project approach and schedule
>
> **Criterion C:** Corporate existence of similar size and scope and strength of references relevant to technology areas of specifications
>
> **Criterion D:** Explanations of the Statewide Technical Architecture Objectives
>
> **Criterion E:** Price

eDealer and Vanguard were the only vendors to submit proposals in response to the RFP. These two proposals were evaluated by the appointed Evaluation Committee (the "Committee") and subject matter experts for the NCDIT and the NCDOT. In the review process, the Committee evaluated the strengths and weaknesses of eDealer's and Vanguard's proposals and then compared and contrasted the proposals. Thereafter, the Committee determined Vanguard's proposal was the most advantageous and offered the "best value" to the State.

In June 2020, the NCDOT awarded Vanguard the contract. On 26 June 2020, eDealer filed a bid protest with the NCDOT and the NCDIT, arguing the Committee improperly applied the procurement rules and policies and improperly evaluated the competing proposals. On 8 September 2020, the NCDOT sent a written response to eDealer, affirming its decision to award the contract to Vanguard.

On 22 October 2020, eDealer sent a letter to the State CIO and requested a hearing on the bid protest. The State CIO applied to the Office of Administrative Hearings (the "OAH") requesting it preside over the bid protest. On 6 November 2020, the OAH issued a Notice of Contested Case and Assignment. After ten months of pre-hearing filings, the matter came before an Administrative Law Judge (the "ALJ") on 8 through 10 and 17 September 2021.

At the conclusion of the hearing, the ALJ issued a Proposed Decision recommending that the State CIO cancel the contract award to Vanguard and award the contract to eDealer. In its proposed decision,

the ALJ concluded that the Committee failed to use proper procedures, and Vanguard failed to meet "multiple" RFP requirements, rendering its proposal incomplete.

On 8 June 2022, the State CIO reviewed the ALJ's Proposed Decision and issued a Final Agency Decision (the "Final Decision"), concluding eDealer failed to meet its burden of showing the award to Vanguard was an error, rejecting the ALJ's Proposed Decision, and affirming the award to Vanguard.

On 8 July 2022, eDealer filed a Petition for Judicial Review with Wake County Superior Court, requesting the award to Vanguard be canceled and the contract be awarded to eDealer. On 5 March 2023, the superior court issued its Order and Opinion on Petition for Judicial Review (the "Order"), concluding the Final Decision contained procedural errors, and the award to Vanguard was "arbitrary and capricious." In lieu of remanding to the State CIO for further findings, the superior court vacated the award to Vanguard and awarded the contract to eDealer. The superior court concluded remand would be "futile" as the "only reasonable decision, justified by the entire record, was that eDealer's proposal provided the 'Best Value' to the State."

The NCDOT and Vanguard filed separate notices of appeal.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final judgment from a superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

The NCDOT and Vanguard present two issues on appeal: whether the superior court, sitting as an appellate court, erred by (A) failing to apply the proper standards of review and improperly making findings of fact and conclusions of law, leading to the vacatur of the award to Vanguard; and (B) exceeding its authority in ruling to reverse the Final Decision and order the contract be issued to eDealer, instead of remanding to the State CIO for further findings.

A. Standards of Review

[1] We first address the NCDOT and Vanguard's contention that the superior court misapplied the applicable standards of review. Specifically, the NCDOT and Vanguard argue the superior court did not apply the proper standards of review because it made new, independent factual findings when conducting its *de novo* and whole-record reviews. We disagree.

Under our review of a superior court's order entered upon review of an agency decision, we must first "determine whether the trial court exercised the appropriate scope of review and, if appropriate[,] . . . decide whether the trial court did so properly." *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 40, 684 S.E.2d 914, 918 (2009) (alterations in original) (citation omitted and internal quotation marks omitted).

1. Appropriate Scope of Review

"The proper standard for the superior court's judicial review 'depends upon the particular issues presented on appeal.' " *Powell v. N.C. Crim. Just. Educ. and Training Standards Comm'n*, 165 N.C. App. 848, 851, 600 S.E.2d 56, 58 (2004) (citation omitted). "[Q]uestions of law receive *de novo r*eview, whereas fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *N.C. Dep't of Env't and Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (second alteration in original) (citation and internal quotation marks omitted). Thus, claims that a decision is "[m]ade upon unlawful procedure" receive *de novo* review whereas claims that a decision is "[u]nsupported by substantial evidence . . . or [is a]rbitrary or capricious" receive whole-record review. *Id.* at 658–59, 599 S.E.2d at 894.

In its request for judicial review, eDealer argued the Final Decision was made upon unlawful procedure. In its petition, eDealer alleged, *inter alia*, the Final Decision relied on the following procedural errors: (1) the Committee failed to employ a "Best Value" methodology as required by law; (2) Vanguard's proposal failed to satisfy all the RFP requirements, resulting in multiple material deficiencies; (3) the Committee impermissibly used clarifications to cure Vanguard's material deficiencies; and (4) the Committee failed to follow their own procedures when evaluating eDealer and Vanguard's strengths and weaknesses because they relied on two out of the five criteria.

Based on eDealer's assignment of the above procedural errors, the superior court correctly noted that it reviews claims of procedural errors under a *de novo* standard of review. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

eDealer further argued that the Final Decision was unsupported by substantial evidence, and was arbitrary, capricious, and an abuse of discretion because the Committee failed to apply the "Best Value" methodology, which led to several errors in their analyses of Criterion A, Criterion B, and Criterion C. Again, the superior court correctly noted

that its review of these claims was whole-record review. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

The NCDOT and Vanguard concede that the superior court correctly summarized the standards of review in its Order, but argue that the Order demonstrates that the superior court impermissibly made new independent factual findings. The NCDOT specifically challenges paragraphs 11–15, 17–20, 22–29, 54(b), 57–62, and 66–67.

"According to well-established law, it is the responsibility of the administrative body, not the reviewing court, 'to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.' " *Bill Davis Racing*, 201 N.C. App. at 41, 684 S.E.2d at 919 (citation omitted). The superior court, therefore, acts as an appellate court when exercising judicial review over an agency decision. *See In re Denial of N.C. IDEA's Refund of Sales*, 196 N.C. App. 426, 432, 675 S.E.2d 88, 94 (2009). "It is the traditional function of appellate courts to review the decisions of lower tribunals for errors of law or procedure, while generally deferring to the latter's 'unchallenged superiority' to act as finders of fact[.]" *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (citations omitted).

Here, the NCDOT's argument that the Order includes independent findings of fact lacks merit. The "findings" challenged by the NCDOT are not independent findings of fact the superior court reached based on logical reasoning through the evidentiary facts. *See Weaver v. Dedmon*, 253 N.C. App. 622, 631, 801 S.E.2d 131, 138 (2017) ("Any determination reached through logical reasoning is properly classified as a finding of fact."). Instead, the superior court, through paragraphs 11–15, 17–20, and 22–29, detailed the factual history of the case based on the findings contained in the Final Decision and the Proposed Decision. *See Bill Davis Racing*, 201 N.C. App. at 43, 684 S.E.2d at 920 (reasoning the inclusion of findings of fact in the trial court's order may not "necessitate a conclusion that it applied an incorrect standard of review" if the trial court merely summarized the findings of fact made by the administrative agency).

The NCDOT argues that consideration of the Proposed Decision was in error because the superior court was bound to the *agency's record* and the findings made in the Final Decision. This, however, is an incorrect statement of law, and as eDealer points out, would lead to the "rubber stamping" of an agency's decision and "render judicial review hollow." Contrary to the NCDOT's arguments, "[i]n reviewing a final decision in a contested case, the [trial] court shall determine whether

the petitioner is entitled to the relief sought in the petition based upon its review of the final decision *and the official record*." N.C. Gen. Stat. § 150B-51(c) (2023) (emphasis added).

Thus, the superior court was within its authority to consider both the Proposed Decision and the Final Decision when reviewing the evidence and did not engage in independent fact finding. *See id.*

As for paragraphs 54(b), 57–62, and 66–67, these paragraphs were included in the superior court's *de novo* and whole-record reviews and can be more clearly analyzed under the second prong of our analysis—whether the superior court applied the standards of review correctly. *See Bill Davis Racing*, 201 N.C. App. at 40, 684 S.E.2d at 918.

2. Applications of Standards of Review

[2] We next consider whether, in light of our standard of review, the superior court properly applied the *de novo* standard of review to the alleged procedural errors in the Final Decision, and whole-record review to the alleged substantive errors.

a. *De Novo Review*

The NCDOT and Vanguard argue the superior court failed to properly apply the *de novo* standard of review because it failed to give due deference to the State CIO's expertise and did not adequately explain how or why the contemplated errors were made upon unlawful procedure or affected by an error of law. We disagree.

Under a *de novo* review, "the reviewing court consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." *Meza v. Div. Soc. Servs.*, 364 N.C. 61, 69, 692 S.E.2d 96, 102 (2010) (citation and internal quotation marks omitted). Even when considering the matter anew, a reviewing court "traditionally give[s] some deference to an agency's right to interpret the statute which it administers." *Armstrong v. N.C. State Bd. of Dental Exam'rs*, 129 N.C. App. 153, 159, 499 S.E.2d 462, 467 (1998). "[A]n agency's interpretation is not binding, [however,] [a]nd under no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citation and internal quotation marks omitted).

Here, the superior court included four specific instances that show the Committee failed to follow proper procedure for the procurement process. We review each instance in order.

(i) Best Value Methodology

First, the superior court concluded the Committee improperly applied the "Best Value" methodology because the members of the Committee were instructed that they would need to come to consensus as to each proposal's ratings before performing a direct comparison of the competing proposals.

Our General Statutes establish that "[t]he acquisition of information technology by the State of North Carolina shall be conducted using the Best Value procurement method." N.C. Gen. Stat. § 143-135.9(c) (2023). Under the North Carolina Administrative Code, this "Best Value" methodology requires the Committee to evaluate the "relative strengths, deficiencies, weaknesses, and risk supporting its award recommendation." 09 NCAC 06B .0302(1)(f) (2023).

The NCDOT argues that, although the superior court stated the language of the statute, it did not explain how the Committee failed to apply the Best Value method. This argument is unsupported by the face of the Order.

In paragraph 54(a) of the Order, the superior court stated:

> (a) The Evaluation Committee[e] did not properly apply the "Best Value" methodology. . . . The "Best Value" method requires an evaluation of each proposal's "relative strengths, deficiencies, weaknesses, and risks," and consists of "a comparative evaluation of technical merit and costs." 09 NCAC 06B .0302(1)(f) and (2). The Evaluation Committee's prohibition on comparing the two proposals while grading each Evaluation Criterion, Specification, and Requirement did not follow proper procedure for a "Best Value" procurement. The Final Decision notes that the proposals were eventually compared at the **end** of the evaluation process. By that time, however, the Evaluation Committee had already reached consensus final grades for each proposal. Those grades – made without the benefit of any direct comparison – formed the primary basis of the contract award.

The superior court likewise included a detailed explanation of what the "Best Value" method required and how the Committee failed to properly apply the method.

The superior court, therefore, properly applied the relevant law to the facts of this case and conducted a proper *de novo* review. *See Meza*, 364 N.C. at 69, 692 S.E.2d at 102.

(ii) Mandatory Requirements

Next, the superior court concluded the Committee should not have considered Vanguard's proposal as it failed to meet certain, mandatory RFP requirements, rendering the proposal incomplete and therefore invalid.

The superior court's conclusion reflects a proper application of the procurement requirements to the relevant facts. According to paragraph 54(b) of the Order:

> (b) Vanguard's proposal failed to meet certain threshold "Requirements," which, under NCDIT procurement rules, are mandatory and must be satisfied in order for a proposal to be considered. With respect to the missing PMP certification and missing deliverables, the Final Decision contends that these were not mandatory "Requirements." Final Decision at 16, ¶ 65. Yet these items were expressly labeled in the RFP under the category "Project Management **Requirements**." Pet'r Ex. 1 at 5 & 19. With respect to references, the RFP stated that "[o]ffers must provide three (3) current References for work of similar scope and size." Pet'r Ex. 1 at 37. Here, the Final Decision agrees that use of the word "must" denotes a non-waivable Requirement, but the Final Decision found that Vanguard's submission of any three references —regardless of scope or size — was sufficient. Final Decision at 8, ¶¶ 19, 80, 179. This is incorrect in that the plain terms of the RFP require the references to concern work of "similar scope and size."

Despite the specificity of the superior court's consideration of Vanguard's proposal in light of the RFP requisites, the NCDOT argues that the superior court failed to consider the definition of "requirements" as provided "within the DIT Procurement Policies and Procedures Manual in the record."

The Policies and Procedures Manual defines "requirements" as:

> Features mandated by State legislation; regulatory attributes that must adhere to a type of governance, such as HIPAA or FERPA; statewide policies and procedures, such as Architecture and Security; and certain technical specifications defined by the procuring Agency. *Considered nonnegotiable.*

(emphasis added).

It is clear from the plain language of the definition that any and all requirements were nonnegotiable, and omission of any requirement would render a proposal incomplete. Further, the definition lends no support to the NCDOT's conclusory statement as to the superior court's failure to properly interpret the information in the record.

The NCDOT further argues that the superior court reached this conclusion despite the "Final Decision's direct citation to the information at issue." We interpret this to be an argument that Vanguard's clarifications cured these defects. This argument is more fully discussed in our consideration of the superior court's third illustration of the Final Decision's procedural errors, to which we next turn.

(iii) Clarifications

Third, the superior court concluded the "Committee improperly used clarifications to cure material deficiencies in Vanguard's Proposal."

Pursuant to the RFP, vendors were required to submit written offers that conformed with enumerated specifications. The Committee was required to evaluate these written proposals pursuant to the above described "Best Value" method. The Committee was permitted to request clarifications; however, pursuant to law, "[c]larifications *shall not* be utilized to cure material deficiencies or to negotiate." 09 NCAC 06B .0307 (emphasis added).

In its third illustration, the superior court concluded the Committee's use of clarifications to cure material deficiencies in Vanguard's proposal was in violation of the applicable law and the procurement procedures. While the superior court failed to state in its analysis of the third illustration the legal support for why the Committee's reliance on clarifications to cure Vanguard's material deficiencies was unlawful, it did state in its factual background that the Committee was prohibited, pursuant to 09 NCAC 06B .0307, from using requests for clarification to cure material defects in the written proposal. The inclusion of this correctly stated rule demonstrates to this Court that the superior court conducted an appropriate *de novo* review when determining the Committee could not rely on clarifications to cure material defects. *See* 09 NCAC 06B .0307.

(iv) Evaluation Criteria

Finally, the superior court concluded the Committee erred by focusing solely on Criterion A and Criterion E and "should have engaged in a more substantive, multi-factored analysis" which would have included consideration of the remaining three criteria.

The superior court correctly stated that the Final Decision, to justify the award to Vanguard, relied on Vanguard's eleven strengths and zero weaknesses, as compared to eDealer's four strengths and two weaknesses. These strengths and weaknesses, however, were solely based on Criteria A and E, which for reasons discussed below, was in error.

The superior court's conclusion that the Committee should have engaged in a more "substantive multi-factored analysis rather than focus on these few specifications" reflects a proper *de novo* review. Accordingly, a thorough review of the Order demonstrates that the superior court properly applied a *de novo* review and did so without engaging in independent fact finding. *See Bill Davis Racing*, 201 N.C. App. at 40, 684 S.E.2d at 918.

b. *Whole-Record Review*

The NCDOT and Vanguard argue the superior court incorrectly applied the whole-record review because it compared its review of the record against the Final Decision instead of determining whether the Final Decision was supported by substantial evidence. We disagree.

When applying the whole-record test, "the reviewing court may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Meza*, 364 N.C. at 69–70, 692 S.E.2d at 102 (citation and internal quotation marks omitted). "Rather, a court must examine *all the record evidence*—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (emphasis added) (citation omitted). "Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* at 660, 599 S.E.2d at 895 (citation and internal quotation marks omitted).

The NCDOT once again seems to argue, more specifically, that the superior court was bound by the evidence contained in the Final Decision and could not consider the Proposed Decision. As explained above, this is an incorrect interpretation of the law. A review of the Order shows the superior court correctly engaged in a whole-record review. The superior court concluded "the contract award to Vanguard was unsupported by substantial evidence in view of the entire record and [] it was arbitrary, capricious, and an abuse of discretion." We interpret this conclusion to be based on a review of whether the evidence in the record, including the Proposed Decision, supported the Final Decision, rather than based on a "new evaluation of the evidence[,]" as the NCDOT argues.

First, the superior court reasoned the lack of evidence supporting the Final Decision's award of the contract to Vanguard was "most apparent with respect to Criterion C[,] which concerned 'Corporate Experience of Similar Size and Scope and Strength of references Relevant or Material to Technology area(s) or Specifications.' " The superior court concluded the whole record did not support a conclusion that Vanguard and eDealer were equal with respect to this criterion because "no reasonable mind would find the parties to have the same degree of experience based on all the evidence presented." The superior court then proceeded to detail the evidence contained in the official record that shows eDealer had far more ELT experience than Vanguard. Contrary to the NCDOT and Vanguard's arguments, we conclude this was not the superior court conducting a "new evaluation of the evidence" but was instead the superior court determining that the Final Decision's conclusion that Vanguard was the stronger applicant with respect to Criterion C was not supported by substantial evidence—a correct application of whole-record review. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

Second, the superior court reviewed whether the Final Decision's conclusion that Vanguard was the stronger applicant with respect to Criterion B—proposed project schedule—was supported by substantial evidence. In its proposal, Vanguard listed a proposed schedule of 381 days whereas eDealer's proposed schedule was forty-five days. Despite this great disparity in the proposed schedules, the Final Decision concluded it was reasonable to evaluate both proposals as the same with respect to Criterion B. The superior court concluded, and we agree, that this conclusion was wholly unsupported by the evidence as eDealer's schedule was more than eight times shorter than Vanguard's.

Lastly, the superior court concluded the Final Decision's award of the contract to Vanguard based on Vanguard's "strengths" with respect to Criterion A was unsupported for reasons discussed above. Based on the superior court's analysis, it concluded that the Final Decision could not "be reconciled, under any reasonable interpretation of all the relevant evidence, with the fact that eDealer's proposal was superior with respect to Evaluation Criteria A, B, and C—the three most important Evaluation Criteria." Perhaps most importantly, the superior court stated:

> In conducting its review, the [c]ourt has not independently weighed each of these Evaluation Criteria, requirements, and specifications just discussed. Instead, after reviewing the entire record, the [c]ourt finds no discernible basis to justify the favorable grades that Vanguard received

> over eDealer for these specifications, such that the Final Decision was arbitrary and capricious.

This was not a hollow statement included by the superior court to justify its conclusion, as it is clear to this Court that this statement is supported by the evidence in the Record on Appeal.

Based on our review of the Order and the entire Record on Appeal, we conclude the superior court correctly applied the whole-record review and was justified in its ultimate conclusion that the Final Decision was unsupported by substantial evidence. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

The superior court, therefore, appropriately applied *de novo* review to the procedural errors and whole-record review to the substantive errors, and did so correctly. Thus, the superior court was justified in determining the award to Vanguard was arbitrary and capricious and an error of law. *See Bill Davis Racing*, 201 N.C. App. at 40, 684 S.E.2d at 918.

B. Disposition of the Order

[3] The NCDOT and Vanguard's second assignment of error is that the superior court should have remanded the case for further findings instead of vacating the award to Vanguard and awarding the contract to eDealer. We disagree.

Issues of statutory interpretation are questions of law reviewed *de novo*. *Armstrong*, 129 N.C. App. at 156, 499 S.E.2d at 466. The Administrative Procedure Act (the "APA") grants a reviewing court broad discretion to determine the scope of relief that should be afforded in response to an erroneous agency decision. When a reviewing court determines a decision is made on unlawful procedure or is arbitrary or capricious, "[t]he court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision . . . ." N.C. Gen. Stat. § 150B-51(b) (2023).

Here, the superior court identified four illustrations of how the procurement process failed to follow proper procedure. The superior court then determined the Final Decision was unsupported by substantial evidence because it was arbitrary, capricious, and an abuse of discretion. Based on these identified errors, and the lack of evidence in the record to support the award to Vanguard, the superior court determined remand would be "futile," reversed the Final Decision, and awarded the contract to eDealer. The superior court was within its statutory authority to modify the order instead of remanding for further findings. *See* N.C. Gen. Stat. § 150B-51(b).

The NCDOT and Vanguard, however, argue the NCDIT has sole discretion to review an award of information technology contracts, and the superior court could not modify the award pursuant to N.C. Gen. Stat. § 150B-51(b). An acceptance of this argument would lead to the conclusion that the NCDIT is exempt from the APA, which would be an erroneous interpretation of the relevant statutes. The NCDOT and Vanguard also argue the controlling statute is clear and unambiguous. The NCDOT and Vanguard are correct the controlling statute is unambiguous, but they are incorrect as to which statute is controlling.

Under N.C. Gen. Stat. § 143B-1350(a), "[t]he State CIO is responsible for establishing policies and procedures for information technology procurement for State agencies. *Notwithstanding any other provisions of law*, the Department shall . . . approve information technology procurements . . . ." N.C. Gen. Stat. § 143B-1350(a) (2023) (emphasis added). The APA applies to *every agency*, except those the APA explicitly enumerates as being excepted from the APA, of which neither the NCDIT nor the NCDOT is included. *See* N.C. Gen. Stat. § 150B-1(c)(1)–(8). "Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning." *Armstrong*, 129 N.C. App. at 156, 499 S.E.2d at 466.

The language of the APA makes clear that it applies to *all agencies*, except those that fall under very specific exemptions. The statutory provisions pertaining to Information Technology contracts apply "*notwithstanding any other provisions of law*." *See* N.C. Gen. Stat. §143B-1350(a) (emphasis added). Based on this language, coupled with the General Assembly's omission of the NCDIT from its list of agencies exempted from the APA, we are left with the conclusion that the APA is the controlling statutory scheme.

The superior court, therefore, had the authority under N.C. Gen. Stat. §150B-51(c) to modify the Final Decision, vacate the contract to Vanguard, and award the contract to eDealer. The superior court had no obligation to remand for further findings of fact. *See* N.C. Gen. Stat. §150B-51(c).

Having concluded the APA is the controlling statute, and the superior court had the authority to modify the Final Decision in lieu of remanding, we reach neither the NCDOT's nor Vanguard's remaining arguments.

IV. Conclusion

We conclude the superior court applied the correct standards of review and did not make independent findings of fact, but rather utilized

information contained in the official record to conclude the State CIO contract award to Vanguard was erroneous. We further conclude the superior court had the authority to modify the contract award instead of remanding for further fact finding.

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

FLETCHER HOSPITAL INC. D/B/A ADVENTHEALTH HENDERSONVILLE, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING AND CERTIFICATE OF NEED SECTION, RESPONDENT
AND
MH MISSION HOSPITAL, LLLP, RESPONDENT-INTERVENOR

No. COA23-672

Filed 19 March 2024

1. Hospitals and Other Medical Facilities—certificate of need—failure to conduct a public hearing—agency error

The N.C. Department of Health and Human Services Certificate of Need Section erred by conditionally approving a certificate of need (CON) application for a freestanding emergency department without holding an in-person public hearing pursuant to N.C.G.S. § 131E-185(a1)(2); even though the agency provided an alternative to a hearing due to public health concerns in the midst of the COVID-19 pandemic, the agency had no authority to suspend the statutory hearing requirements.

2. Hospitals and Other Medical Facilities—certificate of need—contested case—agency error—substantial prejudice not presumed

In a contested case hearing challenging the conditional approval of a certificate of need application to develop a freestanding emergency department, although the Administrative Law Judge (ALJ) correctly determined that the agency committed error by failing to hold a public hearing pursuant to statute, the appellate court vacated the ALJ's order granting summary judgment in favor of petitioner (another healthcare provider that filed comments in opposition to the CON application) and remanded the matter for further

proceedings because petitioner had not established that the error substantially prejudiced its rights, which could not be presumed under the facts of this case and needed to be proven.

Appeal by respondent and respondent-intervenor from a Final Decision entered 17 March 2023 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 20 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for respondent-appellant N.C. Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need Section.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Matthew A. Fisher, Kenneth L. Burgess, Iain M. Stauffer, and William F. Maddrey, for respondent-intervenor-appellant MH Mission Hospital, LLLP.

Wyrick Robbins Yates & Ponton LLP, by Charles George, Frank S. Kirschbaum, Trevor P. Presler, for petitioner-appellee Fletcher Hospital. Inc., d/b/a AdventHealth Hendersonville.

Nelson Mullins Riley & Scarborough LLP, by Andrew T. Heath, Noah H. Huffstetler, III, D. Martin Warf, Nathaniel J. Pencook, Candace S. Friel, and Lorin J. Lapidus, for Amici Curiae University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System.

GORE, Judge.

Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (the "Agency" or the "Department") and respondent-intervenor MH Mission Hospital, LLLP ("Mission"), appeal from a Final Decision entered 17 March 2023 by Administrative Law Judge David F. Sutton (the "ALJ"), which granted summary judgment for petitioner Fletcher Hospital. Inc., d/b/a AdventHealth Hendersonville ("AdventHealth"). The ALJ's Final Decision granting summary judgment in favor of AdventHealth, denying the Agency and Mission's respective motions for summary judgment, and reversing the Agency's decision to

conditionally approve Mission's Certificate of Need ("CON") application, is a final decision subject to the provisions of N.C.G.S. § 131E-188(b). Therefore, this Court has jurisdiction pursuant to N.C.G.S. § 7A-29(a).

Respondents present two issues for review: (i) whether the ALJ erroneously concluded that the Agency erred by not holding a public hearing on Mission's CON application pursuant to N.C.G.S. § 131E-185(a1)(2), and (ii) whether the ALJ erred in concluding that AdventHealth had shown substantial prejudice as a matter of law as the result of the Agency's alleged error. Upon review, we vacate and remand for additional proceedings.

I.

In this case, Mission submitted a non-competitive application to develop a freestanding emergency department ("FSED") in Chandler, North Carolina. The total projected capital expenditure for the FSED was $14,749,500. The Agency did not hold an in-person public hearing on Mission's CON application, citing public health concerns related to the COVID-19 pandemic. Instead, the Agency devised an alternative process whereby members of the public could submit written comments regarding applications under review in lieu of appearing at in-person public hearings.

AdventHealth filed written comments in opposition to Mission's application to develop the FSED. Pursuant to the alternative process, members of the public also filed written comments in lieu of appearing at an in-person public hearing. At the conclusion of the review, the Agency conditionally approved Mission's CON application to develop the FSED.

AdventHealth commenced this action by filing a Petition for Contested Case Hearing on 23 June 2022 contesting the Agency's decision to conditionally approve Mission's CON application. AdventHealth alleged, among other things, that the Agency's failure to hold an in-person public hearing constituted Agency error and substantially prejudiced AdventHealth's rights as a matter of law. AdventHealth, the Agency, and Mission all filed motions for summary judgment on 15 February 2023. The ALJ held a hearing on the motions on 27 February 2023. The ALJ entered its Final Decision granting summary judgment in favor of AdventHealth on 17 March 2023.

On 14 April 2023, the Agency and Mission each filed written notice of appeal from the ALJ's 17 March 2023 Final Decision.

II.

"The nature of the error asserted determines the appropriate manner of review[.]" *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596 (2005) (citation omitted). "Where a party asserts an error of law occurred, we apply a *de novo* standard of review." *Presbyterian Hosp. v. N.C. DHHS*, 177 N.C. App. 780, 782 (2006) (quotation marks and citation omitted). Here, respondents assert the ALJ erred in concluding that petitioner AdventHealth was entitled to judgment as a matter of law. "As summary judgment is a matter of law, review by the Court in this matter is *de novo*." *Id.* (internal citation omitted).

"[J]ust as in other contested cases, an ALJ may enter summary judgment in a case challenging a CON decision." *Cumberland Cnty. Hosp. Sys. v. N.C. DHHS*, 237 N.C. App. 113, 119 (2014). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023).

> The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. To meet its burden, the movant is required to present a forecast of the evidence available at trial that shows there is no material issue of fact concerning an essential element of the non-movant's claim and that the element could not be proved by the non-movant through the presentation of further evidence.

Bio-Medical Applications of N.C. Inc. v. N.C. DHHS, 282 N.C. App. 413, 415 (2022).

III.

[1] The first question presented is whether the ALJ correctly determined that the Agency erred by failing to hold a public hearing on Mission's CON application under N.C.G.S. § 131E-185(a1)(2). We conclude that AdventHealth has shown Agency error.

The North Carolina General Assembly has designated the Agency as the health planning agency for the State of North Carolina and empowered it to establish standards, plans, criteria, and rules to carry out the provisions and purposes of the CON Law (§§ 131E-175–192) and to

grant or deny CONs. N.C.G.S. §§ 131E-177(1), (6) (2023). The CON Law requires health care providers to obtain a CON from the Agency before developing or offering a "new institutional health service" within the State. § 131E-178(a) (2023).

In this case, Mission's proposed capital expenditure to develop a FSED is $14,749,500. This amount exceeds the statutory threshold of $4,000,000 "to develop or expand a health service or a health service facility" as defined by § 131E-176(16)(b). Therefore, Mission's proposed FSED project would constitute a "new institutional health service" within the meaning of § 131E-178(a) and require a CON.

North Carolina General Statutes § 131E-185 "sets forth procedures and requirements for the CON review process, allowing any interested party to submit written comments or make oral comments at the scheduled public hearing." *Good Hope Health Sys., L.L.C. v. N.C. DHHS*, 189 N.C. App. 534, 563 (2008). Section 131E-185(a1)(2) expressly provides, the Agency "*shall ensure* that a public hearing is conducted at a place within the appropriate service area if one or more of the following circumstances apply[:] . . . the proponent proposes to spend five million dollars ($5,000,000) or more . . . ." § 131E-185(a1)(2) (2023) (emphasis added). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts, Inc.*, 322 N.C. 271, 276 (1988) (citation omitted). Respondents concede that Mission's Application met the criteria for a public hearing, given that Mission's proposed capital expenditure to develop its FSED project exceeded $5,000,000. See § 131E-185(a1)(2). Further, there is no dispute among the parties that the Agency did not conduct a public hearing during its review of Mission's application.

Still, respondents contend the Agency's decision to not hold in-person public hearings during the relevant time of review was not error considering the "unique challenges" posed by the COVID-19 pandemic. A decision to this effect, they assert, would have been "irresponsible," have "undermine[d]" the Agency's "statutory duties," and have been "contrary to public policy." Moreover, respondents argue the Agency's unilateral "decision to implement an alternative process for public hearings in CON reviews" effectively "balance[ed] the protection of public health with the rights of the public to participate in the CON process[,]" while also "eliminating the risk associated with a public gathering." We note that the record shows, and respondents do not dispute the fact, that the Agency *did* conduct public hearings while the State of Emergency for COVID-19 was still in effect.

Regardless, we recognize the COVID-19 pandemic presented a wide range of unique and complex challenges, but neither the Agency nor Mission directs this Court to any statute, rule, regulation, or case law that would authorize the Agency to implement its own procedures as a substitute to the public hearing provision, or any other provision mandated by statute. Respondents may argue that strict compliance with § 131E-185(a1)(2) would have been irresponsible under the circumstances, have undermined the Agency's statutory duties, or that the public hearing provision in § 131E-185(a1)(2) should yield to broader public policy concerns. Yet, "we must decline" respondents' "invitation to engage in public policy considerations here in light of the unambiguous and specific language chosen by the General Assembly in drafting and enacting . . ." the CON law. *In re N.P.*, 376 N.C. 729, 737 (2021). It is well-established that this Court has "no power to add to or subtract from the language of the statute." *Ferguson v. Riddle*, 233 N.C. 54, 57 (1950). "Given the clarity of the statutes which pertain to" the public hearing requirement in § 131E-185(a1)(2), "any such public policy concerns raised here should be directed to the state's legislative branch for contemplation." *In re N.P.*, 376 N.C. at 737.

Alternatively, the University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System (together, "UNC Health") filed an Amici Curiae brief with this Court in support of no party, seeking "only to offer its perspective on the statutory question raised by the Agency not holding an in-person public hearing under the unique circumstances presented by the COVID-19 pandemic and what significant impact that would have on UNC Health and other similarly situated health care entities across the State." Amici UNC Health asserts, among other things, that "applying settled canons of statutory construction to the public hearing provision [in § 131E-185(a1)(2)] confirms that the time period for holding a public hearing specified in the statutes is directory, not mandatory." While UNC Health presents an argument that is both persuasive and well-supported by citation to authority, that argument is difficult to reconcile with our Supreme Court's decision in *HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Res.*, 327 N.C. 573 (1990), wherein the Court held that statutory provisions in § 131E-185(a1) and (c) "clearly prescribe a mandatory maximum time limit of 150 days within which the Department must act on applications for certificates of need. To the extent it is applicable, this time limit is *jurisdictional* in nature." 327 N.C. at 577 (emphasis added). The Court further explained:

> When viewed in its entirety, Article 9 of Chapter 131E of the General Statutes, the Certificate of Need Law, reveals

> the legislature's intent that an applicant's fundamental right to engage in its otherwise lawful business be regulated but not be encumbered with unnecessary bureaucratic delay. The comprehensive legislative provisions controlling the times within which the Department must act on applications for certificates of need, set forth in Article 9, will be nullified if the Department is permitted to ignore those time limits with impunity.

Id. at 579. Accordingly, we determine that the Agency was required to hold a public hearing under the facts in this case, and its failure to do so was error. Even so, Agency error alone does not resolve this matter and our inquiry does not end here.

[2] AdventHealth filed its petition for a contested case hearing pursuant to N.C.G.S. §§ 131E-188 and 150B-23 and 26 N.C.A.C. 3.0103, challenging the Agency Decision to conditionally approve the Mission Application.

North Carolina General Statutes § 150B-23(a) states, in relevant part:

> A party that files a petition . . . shall 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 did any of the following:
>
> (1) Exceeded its authority or jurisdiction.
>
> (2) Acted erroneously.
>
> (3) Failed to use proper procedure.
>
> (4) Acted arbitrarily or capriciously.
>
> (5) Failed to act as required by law or rule.
>
> The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case under this section.

§ 150B-23(a) (2023) (emphasis added). "This Court has previously addressed the burden of a petitioner in a CON contested case hearing pursuant to this statute." *Parkway Urology, P.A. v. N.C. DHHS*, 205 N.C. App. 529, 536 (2010).

> [T]he ALJ in a CON case must, in evaluating the evidence, determine *whether the petitioner has met its burden in*

> *showing that (1) the agency substantially prejudiced the petitioner's rights, and* (2) acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.

Surgical Care Affiliates, LLC v. N.C. DHHS, 235 N.C. App. 620, 630 (2014) (cleaned up). Generally, "[t]hese are discrete requirements and proof of one does not automatically establish the other." *Id.* (citations omitted).

AdventHealth contended, and the ALJ agreed, that it was entitled to summary judgment on its claim for relief on grounds that the Agency erred by failing to hold an in-person public hearing on Mission's CON application as required by § 131-185(a1)(2), and as a result, that the Agency substantially prejudiced its rights *as a matter of law*. The ALJ expressly relied on this Court's decision in *Hospice at Greensboro, Inc. v. N.C. DHHS Div. of Facility Servs.*, 185 N.C. App. 1 (2007) to support its conclusion that failure to hold a public hearing is inherently prejudicial, and thus, eliminates a requirement that AdventHealth separately show actual, particularized harm resulting from the impairment of its rights.

In contrast, respondents assert the ALJ not only misapplied our holding in *Hospice at Greensboro*, but also ignored decades of appellate precedent that conclusively establish agency error and substantial prejudice are separate and distinct elements under § 150B-23. While we have already determined that AdventHealth met its burden in showing that the Agency erred by failing to hold a public hearing under the facts of this case, we agree with respondents' position that substantial prejudice must be proven; it is not presumed to exist *per se* on this record. A mere showing that the Agency's action was erroneous "does not absolve the petitioner of its duty to separately establish the existence of prejudice, *i.e.*, to show *how* the action caused it to suffer substantial prejudice[ ]" to satisfy each element of its claim for relief. *Surgical Care*, 235 N.C. App. at 630.

In *Hospice at Greensboro*, the Agency issued a "No Review" letter that authorized the respondent-intervenor to open a hospice without first undergoing the statutorily required CON review process, and the petitioner sought a contested case hearing. 185 N.C. App. at 3–5. On appeal, the respondent-intervenor argued for reversal because the petitioner "failed to allege in its petition for a contested case hearing that the CON Section 'substantially prejudiced' its rights and failed to forecast evidence of 'substantial prejudice' as required by [N.C.G.S.] § 150B-23(a) (2005)." *Id.* at 16. We disagreed and held "that the issuance of a 'No Review' letter, which results in the establishment of 'a new

institutional health service' without a prior determination of need, substantially prejudices a licensed, pre-existing competing health service provider as a matter of law." *Id.* In reaching our holding, we reasoned that the petitioner:

> was denied any opportunity to comment on the CON application, because there was no CON process. In fact, the CON Section's issuance of a "No Review" letter to [the respondent-intervenor] effectively prevented any existing health service provider or other prospective applicant from challenging [the respondent-intervenor's] proposal at the agency level, except by filing a petition for a contested case.

Id. at 17.

Our determination in *Hospice at Greensboro* represents a narrow holding in a fact-specific case, and its guidelines apply to such instances where a petitioner is deprived of *any* opportunity to contest the applicant's proposal at the Agency level. It applies to instances where a CON determination is required, but the Agency foregoes the CON review process entirely and issues an exemption instead. In such cases, an affected person is deprived of any opportunity to contest the Agency's determination at the Agency level, and thus, prejudice is presumed as a result. *See id.* at 16–17. We have declined to extend the reach of *Hospice at Greensboro* and its automatic prejudice rule to cases where the Agency does subject a qualifying application to a CON review, but that review process is alleged to be deficient in some enumerated way. *See Surgical Care*, 235 N.C. App. at 629.

In our case, the Agency did conduct a CON review on Mission's application. AdventHealth challenged Mission's application at the Agency level by filing written comments in opposition to Mission's proposal. The Agency determined that the CON should issue upon findings that Mission's proposal "is either consistent with or not in conflict with" each of the criteria listed in § 131E-183(a). Thereafter, AdventHealth filed its petition for a contested case hearing alleging the Agency's CON determination was deficient or erroneous in several specified ways.

Section 150B-23(a) imposes dual requirements on the petitioner in a contested case hearing; "[a]s discussed above, . . . the petitioner must establish ([1]) that the Agency has deprived it of property, has ordered it to pay a fine or penalty, or has otherwise substantially prejudiced the petitioner's rights, *and*, *in addition*, . . . ([2]) that the [A]gency's decision was erroneous in a certain, enumerated way, such as failure to follow

proper procedure or act as required by rule or law." *Surgical Care*, 235 N.C. App. at 629. As the petitioner, AdventHealth has the burden of proof in this matter pursuant to § 150B-25.1. As "[t]he party moving for summary judgment[,]" AdventHealth "bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citation omitted). As already discussed, AdventHealth satisfied its burden of proof by showing Agency error. However, it must also separately establish that it was substantially prejudiced by the Agency's error; it may not rest its case upon a bare allegation that it was prejudiced by Agency error alone. "[P]roof of one does not automatically establish the other." *Surgical Care*, 235 N.C. App. at 630; *see also Midulla v. Howard A. Cain Co.*, 133 N.C. App. 306, 309 (1999) (citation omitted) ("It is well-established that conclusory statements standing alone cannot withstand a motion for summary judgment."). "[T]he Agency's action under part two of this test might ultimately result in substantial prejudice to a petitioner, [but] the taking of the action does not absolve the petitioner of its duty to separately establish the existence of prejudice, *i.e.*, to show *how* the action caused it to suffer substantial prejudice." *Surgical Care*, 235 N.C. App. at 630.

> In order to establish substantial prejudice, the petitioner must provide specific evidence of harm resulting from the award of the CON that went beyond any harm that necessarily resulted from additional competition. The harm required to establish substantial prejudice cannot be conjectural or hypothetical and instead must be concrete, particularized, and actual or imminent.

Bio-Medical, 282 N.C. App. at 417 (cleaned up).

Here, AdventHealth satisfied its burden of proof in showing Agency error, but it failed to forecast particularized evidence of substantial prejudice. Yet, our determination in this case should not be misconstrued. AdventHealth may ultimately satisfy its burden; it may not. The ALJ ruled on two specific issues that have been raised and briefed in this appeal: failure to conduct a public hearing under § 131E-185(a1)(2) and reversible error *per se*. We have resolved those specific issues. While this Court may address summary judgment on alternative grounds de novo, we deem this case an appropriate circumstance to remand for further proceedings not inconsistent with this opinion.

IV.

For the foregoing reasons, we determine that petitioner met its burden in showing that the Agency erred by failing to hold a public hearing

on respondent-intervenor's application under § 131E-185(a1)(2), but substantial prejudice cannot be presumed *per se* under § 150B-23(a). Our narrow, fact-specific holding in *Hospice at Greensboro* does not apply to the facts in this case. Thus, we vacate the ALJ's Order on Summary Judgment and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges GRIFFIN and STADING concur.

TRICOSA GREEN, PLAINTIFF
v.
E'TONYA CARTER, DEFENDANT

No. COA22-494

Filed 19 March 2024

1. Collateral Estoppel and Res Judicata—child support—prior reference describing parental status—collateral estoppel inapplicable—no adjudication of fact

In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, where the child's non-biological parent argued that the trial court was collaterally estopped from finding that she was a "lawful parent" based on a prior court order that referred to her as a "non-parent" in place of her name, collateral estoppel principles did not apply because the reference was not an adjudication of any fact or issue in that case but was merely a descriptive term used for convenience and clarity.

2. Child Custody and Support—child support—primary liability—same-sex unmarried couple—non-biological parent's obligation—gender neutral interpretation of statute inappropriate

In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, the trial court erred by adopting a gender neutral interpretation of N.C.G.S. § 50-13.4—regarding primary liability for child support to be shared by a child's "mother" and "father"—to deem the child's non-biological parent a "lawful parent" required by statute to pay child support. The clear and unambiguous statutory language did not allow for the extension of primary liability for child support to a non-biological or

non-adoptive parent, even one acting in loco parentis and sharing custodial rights.

3. Child Custody and Support—child support—secondary liability—unmarried partner—acting in loco parentis—voluntary assumption of obligation in writing required

In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, although the child's non-biological parent stood in loco parentis to the child and enjoyed custodial rights, she could not be secondarily liable for child support pursuant to N.C.G.S. § 50-13.4 because she had not voluntarily assumed a child support obligation in writing.

Judge HAMPSON dissenting.

Appeal by plaintiff from order entered 3 November 2021 by Judge J. Rex Marvel in District Court, Mecklenburg County. Heard in the Court of Appeals 11 April 2023.

Wofford Law, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for plaintiff-appellant.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellee.

STROUD, Judge.

This case raises the issue of whether Plaintiff, who is not the child's parent but who is a person acting as a parent, can be required to pay child support under North Carolina General Statute Section 50-13.4(b). Based on long-established North Carolina law, the short answer is no: Plaintiff cannot be required to pay child support unless she is the child's mother or father *or* she agreed formally, in writing, to pay child support.

The long answer requires us to interpret North Carolina General Statute Section 50-13.4(b), which governs both primary liability and secondary liability for child support. *See* N.C. Gen. Stat. § 50-13.4(b) (2019). The difference between primary and secondary liability for child support is that a person may be held secondarily liable for child support only if the people who are primarily liable – the child's parents – cannot adequately provide for the child's needs. *See id.* Indeed, North Carolina General Statute Section 50-13.4(b) first establishes that a child's "mother" and "father" have primary liability for child support. *Id.*

A "mother" is the female parent of a child, either as a biological parent or as an adoptive parent. Merriam-Webster's Collegiate Dictionary 810 (11th ed. 2005). Similarly, a "father" is the male parent of a child, whether as a biological parent, by adoption, by legitimation, or by adjudication of paternity. *Id.* at 456.

North Carolina General Statute Section 50-13.4(b) also sets out who can have secondary liability for child support: "any other person, agency, organization or institution standing in *loco parentis*." N.C. Gen. Stat § 50-13.4(b). "Standing in *loco parentis*" means "in the place of a parent" and "may be defined as one who has assumed the status and obligations of a parent without a formal adoption." *In re A.P.*, 165 N.C. App. 841, 845, 600 S.E.2d 9, 12 (2004) (citations and quotation marks omitted). Further, North Carolina General Statute Section 50-13.4(b) limits secondary liability for child support to a person standing in *loco parentis* only if that person has "voluntarily assumed the obligation of support in writing." N.C. Gen. Stat. § 50-13.4(b).

Because the parties are women who were previously in a romantic relationship, never married, and share custody of the child equally, the trial court determined that Plaintiff is primarily liable to pay child support, as a "parent," based on a novel "gender neutral" interpretation of North Carolina General Statute Section 50-13.4. But based on the well-established law discussed below, the trial court did not have a legal basis to order Plaintiff to pay child support. Instead of being "gender neutral" in application, the trial court's interpretation of North Carolina General Statute Section 50-13.4(b) created a different result than would have been required under the law if the parties to this case had been a heterosexual couple. North Carolina General Statute Section 50-13.4(b) has the same application to both same-sex unmarried couples who have a child by in vitro fertilization as to unmarried heterosexual couples who have a child by in vitro fertilization if the male partner is not the donor of the sperm; neither can be required to pay child support.

Further, the General Assembly has given instructions in North Carolina General Statute Section 12-3(16) on when a statute may have a gender neutral interpretation, and Section 50-13.4 is not covered by this statute. *See* N.C. Gen. Stat. § 12-3(16) (2019). In addition, Plaintiff also could not be secondarily liable to pay child support because this would violate established precedent addressing child support liability for a person standing in *loco parentis* to a child, regardless of gender. *See generally* N.C. Gen. Stat. § 50-13.4. For these reasons, as explained in detail below, we reverse the trial court's order and remand for further proceedings.

I. Background

This summary is based on the findings of fact in the trial court's orders as the findings were not challenged on appeal. *See In re K.W.*, 282 N.C. App. 283, 286, 871 S.E.2d 146, 149 (2022) ("Unchallenged findings of fact are deemed supported by the evidence and are binding on appeal."). The parties are two women, never married to one another, who were in an "on again off-again" romantic relationship. During the parties' relationship, they planned to have a child together. The parties participated in an in vitro fertilization ("IVF") program in the State of New York. Both parties signed the IVF Agreement in November 2015, jointly selected a sperm donor, and Partner[1] paid for the IVF process.

In November 2016, in the State of Michigan, Mother gave birth to Alisa.[2] On Alisa's birth certificate, Mother is listed as the child's mother. Under Michigan law, Partner "could not be listed on the minor child's birth certificate." The parties jointly selected a name for the child which reflected both of their names. Partner presented a proposed parenting agreement to Mother, but the parties never signed the agreement.

The parties later ended their romantic relationship, and both moved to North Carolina. In September 2018, Partner filed a child custody proceeding in Mecklenburg County against Mother, seeking custody of Alisa. In March 2019, the trial court entered a Temporary Parenting Arrangement Order granting Partner some visitation with Alisa. On 16 September 2019, at the close of the hearing on permanent custody, the trial court announced its ruling in the child custody proceeding granting the parties joint legal and physical custody. The parties immediately began operating under the joint custodial schedule.

On 11 October 2019, after the trial court's mid-September rendition of its ruling in the custody proceeding, Mother filed a "verified complaint for child support; motion to consolidate and attorney's fees[.]" Mother alleged Partner "has acted as and been treated as a parent to [Alisa] since before her birth" and has exercised custodial time with Alisa based on the permanent custody arrangement rendered on 16 September 2019. Mother alleged Partner "(i) is a parent to [Alisa] in the same sense as the heterosexual terms 'Mother' and 'Father' are used, (ii) is standing in loco

1. In the trial court, Ms. Carter was the plaintiff in the first complaint for child custody, and Ms. Green was the defendant; in the second complaint for child support, the parties' positions were reversed. The two cases were later consolidated. We will therefore refer to Plaintiff-appellant as "Partner" and Defendant-appellee as "Mother" in this opinion to avoid confusion.

2. A pseudonym is used for the minor child.

parentis to [Alisa], and (iii) has voluntarily assumed the obligation of support of [Alisa], in writing." Mother asserted claims for child support under North Carolina General Statute Section 50-13.4 and for attorney's fees. Mother also moved to consolidate the child custody and child support cases, which was allowed.

On or about 24 October 2019, the trial court entered the permanent custody order granting Partner joint legal and physical custody of Alisa. The permanent custody order includes findings of fact about both parties, their relationship, Alisa's birth, and their current circumstances. The trial court found Partner had been a substantial part of Alisa's life since her birth. The court concluded that Partner and Alisa had a parent-child relationship, and that Mother had "acted in a manner inconsistent with her protected status as a parent and[,]" as such, "ha[d] waived her constitutional right to exclusive care, custody, and control of the minor child based on clear, cogent, and convincing evidence." The trial court then concluded both Partner and Mother were "fit and proper to exercise joint legal custody and share physical custody of [Alisa]." The court set a permanent child custody arrangement granting an equal number of days with each party. The custody order is a final order which was not appealed.

On 2 December 2019, the trial court entered a temporary child support order. The trial court found Partner, as "De Facto Mother[,]" was a parent to Alisa "in the same sense as the heterosexual terms 'Mother' and 'Father' are used" and both parties were "equally liable" for Alisa's support. The trial court ordered Partner to pay Mother $604.21 in monthly child support and to continue paying the health insurance premiums for Alisa; the trial court ordered Mother to continue paying work-related child-care expenses for Alisa. On 16 December 2019, Partner filed an answer to Mother's complaint for child support. Partner identified herself as "Non-Parent" in her answer and denied any liability for child support or attorney's fees.

On 26 March 2021, Partner filed a "Motion to Dismiss, Answer and Motion to Return Child Support." Partner claimed that she was not the "biological or adoptive parent" of Alisa but she was a *de facto* parent, or standing in *loco parentis*, and as such was not liable for child support to Mother under North Carolina law. Partner also moved to vacate the temporary child support order and for Mother to reimburse her for $8,458.94 in child support that she had paid under the temporary support order. Further, Partner moved for dismissal under North Carolina General Statute Section 1A-1, Rule 12(b)(6) for failure to state a claim. The trial

court heard Partner's motion to dismiss on 1 June 2021 and entered an order denying Partner's motion to dismiss on 1 September 2021.

On 7 September 2021, the trial court held a hearing on permanent child support. At the close of Mother's evidence, Partner moved again to dismiss the complaint for child support because she, as a non-parent, could not be liable for child support under North Carolina law. The trial court denied Partner's motion without clarification or explanation.

During closing arguments, Partner again argued North Carolina law, "as currently written, does not allow th[e] [trial] [c]ourt to order [Partner] to pay child support." Partner continued, "[e]ven if the law, even if everybody in this courtroom agrees that things aren't as they should be or that the laws haven't caught on yet, this [c]ourt has to apply the laws as written." The trial court ultimately rendered a ruling finding Partner was a "parent" within the meaning of the child support statute and should be liable for support. The trial court asked the parties to submit more evidence and arguments after the hearing for purposes of calculating Partner's support obligation.

On 3 November 2021, the trial court entered a Permanent Child Support Order ("Support Order"). The Support Order identified Partner as "De Facto Mother" and Mother as "Biological Mother[.]" The trial court found:

> 14. [Partner] is a parent to [Alisa] in the same sense as the heterosexual terms "Mother" and "Father" are used. The court finds it is appropriate to apply those terms in a gender-neutral way.
>
> 15. There exists pleading, proof and circumstances that warrant this court to hold [Mother] and [Partner] equally liable for the support of the minor child. Specifically, by way of example and not limitation, [Partner] has:
>
> a. allowed her employer-sponsored health insurance to pay for [Mother's] IVF process with the express intention of birthing and raising a child together,
>
> b. signed IVF paperwork which equally bound her to the risks and rewards of the IVF process,
>
> c. continued to communicate with and to visit [Mother] even as their romantic relationship deteriorated, but before [Alisa] was born,

d. held herself out to family, friends, and social media and this Court as [Alisa's] mother,

e. took maternity photos with [Mother],

f. attended [Alisa's] baby shower as an honored parent (in matching T Shirts with [Mother]),

g. moved to Charlotte to be closer to [Alisa] after [Alisa's] birth and the end of [Partner's] relationship with [Mother],

h. kept [Alisa] for a two-week period while [Mother] traveled for work,

i. continuously helped to pay for [Alisa's] day care expenses,

j. continuously provided health insurance for [Alisa]. To do so, [Partner] signed documents claiming the minor child as her dependent and sought reimbursement for certain medical expenses;

k. continuously provided financial support to [Mother] for the benefit of [Alisa], including cash, diapers, clothes and the like;

l. filed a lawsuit and signed a complaint for child custody to be granted court ordered custody of [Alisa]. In this complaint, [Partner] refers to herself as a mother and a parent to [Alisa],

m. has maintained a consistent 50/50 parenting schedule with [Alisa],

n. has been regularly involved in [Alisa's] medical and educational development by attending doctors' appointments and being involved with her teachers,

o. [r]eferred to [Alisa] consistently as her child and to herself continuously as [Alisa's] mother.

1.(sic) [Partner] has enthusiastically and voluntarily held herself out as a parent to [Alisa] and has a support obligation that accompanies her, now court ordered, right to 50/50 custody. The duty of support should

accompany the right to custody in cases such as this one.

16. [Partner] owes a duty of support to [Alisa], and [Mother] is entitled to support from [Partner] for the use and benefit of [Alisa], pursuant to N.C.G.S. § 50-13[.4] and Worksheet B of the North Carolina Child Support Guidelines.

The trial court calculated child support using the North Carolina Child Support Guidelines. Based on the findings of fact, the trial court concluded:

4. Both [Mother] and [Partner] are the lawful parents of [Alisa] and owe a duty of support to [Alisa], pursuant to the provisions of N.C.G.S. § 50-13.4.

5. The terms Mother and Father in N.C.G.S. § 50-13.4 should be read to allow for gender neutral application to parent and parent.

The trial court then ordered Partner to pay $246.11 per month in child support and to continue paying Alisa's health insurance premiums. On 2 December 2021, Partner filed a notice of appeal.

II. Collateral Estoppel

[1] Although Partner's arguments primarily address the trial court's conclusions of law and the interpretation of North Carolina General Statute Section 50-13.4, she first argues the trial court was prevented by collateral estoppel from finding she is a "lawful parent" of Alisa because the permanent custody order referred to her as "Non-parent." Under the collateral estoppel doctrine, "parties and parties in privity with them . . . are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (citations omitted). "Collateral estoppel is intended to prevent repetitious lawsuits." *Campbell v. Campbell*, 237 N.C. App. 1, 5, 764 S.E.2d 630, 633 (2014) (citations and quotation marks omitted). To successfully assert collateral estoppel, a party must show "that the earlier suit resulted in a final judgment on the merits, that the issue in question was *identical to an issue actually litigated and necessary to the judgment*, and that both [defendant] and [plaintiff] were either parties to the earlier suit or were in privity with parties." *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) (emphasis added) (citation omitted).

In this case, the doctrine of collateral estoppel does not apply because the trial court's use of the term "Non-parent" in place of Ms. Green's name or the word "plaintiff" in the custody order was not an adjudication of any fact or issue in that case. Court orders in child custody and child support cases often use descriptive terms to refer to the parties instead of technical legal terms such as "plaintiff" or "defendant." Here, the custody order used the word "Non-parent" to refer to Partner merely for convenience and clarity, just as we have used the terms "Mother" and "Partner" in this opinion. *See, e.g.*, *State v. Gettleman*, 275 N.C. App. 260, 262, n.1, 853 S.E.2d 447, 449, n.1 (2020) (explaining that "[f]or ease of reading and clarity —and consistent with the parties' briefs, the record, and the transcripts of the proceedings below – we refer to Defendant Marc Christian Gettleman, Sr., as 'Big Marc,' Defendant Marc Christian Gettleman, II, as 'Little Marc,' and Defendant Darlene Rowena Gettleman as 'Darlene.' ").

Here, using the terms "Mother" and "Non-parent" made the custody order easier to read and understand, especially as each party was *both* a plaintiff and a defendant in two lawsuits. While the trial court could have used the parties' names or their titles as "plaintiff" and "defendant," or even nicknames or pseudonyms, the use of those terms in the context of the custody order would not have served as an adjudication of any fact or legal issue for purposes of North Carolina General Statute Section 50-13.4. *See generally id.* Accordingly, the trial court's use of the term "Non-parent" in place of Ms. Green's name or the word "Plaintiff" in the custody order does not create a basis for collateral estoppel regarding Partner's potential liability for child support under North Carolina General Statute Section 50-13.4, particularly considering the trial court's "gender neutral" interpretation of these words in the Support Order.

III. Primary Liability for Child Support under North Carolina General Statute Section 50-13.4(b)

[2] Partner's second issue on appeal is whether the trial court erred by "entering a child support order requiring a nonparent to be primarily liable for child support to the child's biological parent." Partner contends North Carolina General Statute Section 50-13.4 does not allow the trial court to interpret or apply the statute in a gender neutral manner to treat Partner as a lawful parent of the minor child who owes a duty of financial support.

As none of the findings of fact are challenged on appeal, and Partner challenges only the trial court's conclusions of law that "[b]oth [Mother] and [Partner] are the lawful parents of the minor child and owe a duty

of support to the minor child, pursuant to the provisions of N.C.G.S. § 50-13.4" and "[t]he terms Mother and Father in N.C.G.S. § 50-13.4 should be read to allow for gender neutral application to parent and parent[,]" *de novo* review is appropriate. *See Schroeder v. City of Wilmington*, 282 N.C. App. 558, 565, 872 S.E.2d 58, 63 (2022) (A "*de novo* standard applies to questions of statutory interpretation."). Meanwhile, Mother acknowledges that "the technical language of the child support statute uses the terms 'mother' and 'father' to refer to the two parents" but contends

> that is simply the language of the statute. The spirit of the statute is that the two people whose actions resulted in the birth of the child are liable for the support of that child and ensuring that the child receives support from her parents is what the statute seeks to accomplish.

Thus, in summary, Mother contends that instead of relying upon the plain language of the statute, we should consider the legislative intent to interpret the statute in a way to ensure there are two parents responsible for child support.

We therefore must first consider the meaning of the words "mother" and "father" in North Carolina General Statute Section 50-13.4. *See* N.C. Gen. Stat. § 50-13.4. These words are not defined by this statute or by any other provision of Chapter 50.[3] N.C. Gen. Stat. § 50 *et seq.* (2019). In addition, Section 50-13.4 also uses the word "parent" and "parents," referring collectively to the "mother" and "father." *See* N.C. Gen. Stat. § 50-13.4. Since the trial court concluded the parties should be considered as "parent and parent" we must consider the meaning of "parent" as well.

In this statute, the words "mother," "father," and "parent" are used as nouns. These words can also be used as verbs or adjectives and can have different meanings depending on context. North Carolina's child support statute uses "mother" and "father" as nouns to describe the people with primary liability for child support for a minor child. *Id.*

Where a statute defines a word, courts must apply that definition. *See Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219-20, 210 S.E.2d 199, 203 (1974) ("Where, however, the statute, itself, contains a

3. As far as we can tell, the definition of "parent" is provided in only two North Carolina General Statutes. *See* N.C. Gen. Stat. § 14-321.2 (2019) (prohibiting unlawful transfer of custody of a minor child and defining "parent" as "a biological parent, adoptive parent, legal guardian, or legal custodian"); *see also* N.C. Gen. Stat. § 51-2.2 (2019) ("As used in this article, the terms 'parent,' 'father,' or 'mother' includes one who has become a parent, father or mother, respectively by adoption.").

definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be. The courts must construe the statute as if that definition had been used in lieu of the word in question." (citation omitted)). But if a word is not defined by the statute, we must "begin with the plain language of the statute[.]" *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019) ("When examining the plain language of a statute, undefined words in a statute must be given their common and ordinary meaning." (citation and quotation marks omitted)).

The trial court's order concluded Mother and Partner should be considered as "parent and parent" by giving a "gender neutral" interpretation to the words "mother and father" under North Carolina General Statute Section 50-13.4. In North Carolina General Statute Section 50-13.4, the words "mother," "father," and "parent" are used as nouns to describe the people with primary liability for child support for a minor child. N.C. Gen. Stat. § 50-13.4. We turn to the ordinary definitions of "mother," "father," and "parent" when used as nouns. *See Surgical Care Affiliates, LLC, v. N.C. Indus. Comm'n*, 256 N.C. App. 614, 621, 807 S.E.2d 679, 684 (2017) ("When a statute employs a term without redefining it, the accepted method of determining the word's plain meaning is not to look at how other statutes or regulations have used or defined the term–but to simply consult a dictionary.").

Webster's New Collegiate Dictionary, 8th Edition defines "mother," when used as a noun, and as applicable to this case, as "a female parent." Webster's New Collegiate Dictionary 751 (8th ed. 1977). The same definition for "mother" is given in the Ninth and Eleventh editions of the dictionary. Webster's New Collegiate Dictionary 774 (9th ed. 1985); Merriam-Webster's Collegiate Dictionary 810 (11th ed. 2005). These dictionaries all define "father" as "a man who has begotten a child[.]" Webster's New Collegiate Dictionary 418 (8th ed. 1977); Webster's New Collegiate Dictionary 451-452 (9th ed. 1985); Merriam-Webster's Collegiate Dictionary 456 (11th ed. 2005). While North Carolina statutes do address legitimation and adjudication of paternity in North Carolina General Statutes Chapter 49, Articles 2 and 3, these statutes address male parents – fathers – and they do not address maternity. N.C. Gen. Stat. § 49-10 *et seq.* (2019) (addressing legitimation); N.C. Gen. Stat. § 49-14 *et seq.* (2019) (addressing adjudication of paternity). Thus, in North Carolina General Statute Section 50-13.4 "mother" is the female parent of a child and "father" is the male parent of a child, either biologically or by adoption or other legal process to establish paternity. N.C. Gen. Stat. § 50-13.4.

In addition, these dictionaries all distinguish "mother," as a female parent, from "father," as a male parent, in the biological sense by their reproductive roles. A "female" is defined as an "individual that bears young or produces eggs as distinguished from one that begets young." Webster's New Collegiate Dictionary 422 (8th ed. 1977); *see also* Oxford English Dictionary 823 (2nd ed. 1989) (defining female as "belonging to the sex which bears offspring"). A "male" is defined as "of, relating to, or being the sex that begets young by performing the fertilizing function in generation and produces relatively small usu[ally] motile gametes (as sperms, spermatozoids, or spermatozoa) by which the eggs of a female are made fertile." Webster's New Collegiate Dictionary 695 (8th ed. 1977); *see also* Oxford English Dictionary 259 (2nd ed. 1989) ("Of or belonging to the sex which begets offspring, or performs the fecundating [or fertilizing] function of generation.").

Further, "mother" and "father" are collectively referred to as "parents" in North Carolina General Statute Section 50-13.4 and "parent" is defined as "one that begets or brings forth offspring[,]" Webster's New Collegiate Dictionary 833 (8th ed. 1977), or "[a] person who has begotten or borne a child; a father or mother." Oxford English Dictionary 222 (2nd ed. 1989). Thus, a "female parent" is the person who provides the egg (as opposed to the sperm) and/or gestates the child and gives birth to the child. *See id.*; Webster's New Collegiate Dictionary 422 (8th ed. 1977); *see also* Oxford English Dictionary 823 (2nd ed. 1989). Our Court has made clear that conferring parental status outside our statutory framework

> [is] without legal authority or precedent. A district court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions). . . . The trial court's ruling in this case rests solely upon a flawed and non-existent legal theory.

Heatzig v. MacLean, 191 N.C. App. 451, 458, 664 S.E.2d 347, 353 (2008) (citations omitted).

Because the language of North Carolina General Statute Section 50-13.4 is "clear and unambiguous[,]" we cannot rely upon the "spirit of the statute" as Mother contends but we "must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Boseman v. Jarrell*, 364 N.C. 537, 545, 704 S.E.2d 494, 500 (2010) (citation and

quotation marks omitted). Here, Partner is not a biological or adoptive parent of Alisa. *See generally* N.C. Gen. Stat. §§ 49-10, 49-14, 48-1-106. Further, North Carolina General Statute Section 50-13.4(b) establishes that a "mother" and "father" share the primary liability for child support. *See* N.C. Gen. Stat. § 50-13.4(b).

A. Legal Basis for a Gender Neutral Application of the Terms "Mother" and "Father" used in North Carolina General Statute Section 50-13.4.

Despite the plain meanings of the terms "mother," "father," and "parent," the trial court's order relied on a "gender neutral" application of these words to conclude Partner should be held primarily liable for child support. The trial court concluded North Carolina General Statute Section 50-13.4 "should be read to allow for gender neutral application to parent and parent." The court based this conclusion primarily on four findings:

> 14. [Partner] is a parent to [Alisa] in the same sense as the heterosexual terms "Mother" and "Father" are used. The court finds it is appropriate to apply those terms in a gender-neutral way.
>
> 15. There exists pleading, proof and circumstances that warrant this court to hold [Mother] and [Partner] equally liable for the support of [Alisa].
>
> . . . .
>
> 1. (sic) [Partner] has enthusiastically and voluntarily held herself out as a parent to [Alisa] and has a support obligation that accompanies her, now court ordered, right to 50/50 custody. The duty of support should accompany the right to custody in cases such as this one.
>
> 16. [Partner] owes a duty of support to [Alisa], and [Mother] is entitled to support from [Partner] for the use and benefit of [Alisa], pursuant to N.C.G.S. § 50-13[.]

Thus, the trial court recognized that Section 50-13.4 uses the terms "mother" and "father" but concluded a gender neutral application was "appropriate" based on (1) Partner's actions in holding herself out as a parent and (2) Partner's custodial rights. But there is no legal basis for holding a person *primarily* responsible for child support based only on custodial rights or standing in *loco parentis* to a child. If Partner had been a male in a romantic relationship with Mother, and they had a child

by IVF with donor sperm, the male partner may stand in *loco parentis* to the child, but he would not be the "father" of the child as this word is used in North Carolina General Statute Section 50-13.4. *See* N.C. Gen. Stat. § 50-13.4. At best, standing in *loco parentis* may support secondary liability for child support, as we will discuss below. *See id.*

Mother contends Partner, as a "de facto" mother, should be considered as a "mother" as this term is used in North Carolina General Statute Section 50-13.4. Mother notes that Partner

> argues that [Mother] is [Alisa's] mother, that there is no father, and that the statute can only be read as involving one mother and one father – i.e., that it cannot be read as gender-neutral and applying to situations involving two parents who happen to be of the same gender. (See Appellant's brief, p 18) [Mother] disagrees. You do not need to read this statute as specifically applying to same-sex couples to determine that [Partner] is responsible for the support of the minor child. This statute expressly provides that the mother of a minor child is responsible for that child's support. [Mother] is the biological mother, so, yes, she is liable for support. [Partner] is also the mother – she has been found by the trial court to be a de facto parent – a second mother. As such, [Partner] fits within the definition of persons responsible for providing support for . . . [Alisa].

But Mother cites no legal authority for this argument, and we can find no such authority. As discussed above, Partner is not a "mother" of the child based on the plain meaning of the word. N.C. Gen. Stat. § 50-13.4. Mother also argues "[t]he intent of the statute requires a gender-neutral reading of the terms 'mother' and 'father.' A gender-based reading of this statute would be unconstitutional." In support of this argument, Mother cites only *M.E. v. T.J.*, 275 N.C. App. 528, 538, 854 S.E.2d 74, 89 (2020), *aff'd as modified*, 380 N.C. 539, 869 S.E.2d 624.

In *M.E.*, this Court addressed an entirely different statute, North Carolina General Statute Section 50B-1(b)(6), regarding domestic violence protective orders ("DVPO"). *See id.* at 531, 854 S.E.2d at 84-85. This Court stated that "our analysis is limited to a *de novo* review of whether Plaintiff was unconstitutionally denied a DVPO under N.C.G.S. § 50B-1(b)(6) *solely based on the fact that Plaintiff is a woman* and *Defendant is also a woman*." *Id.* at 538, 854 S.E.2d at 89 (emphasis in original). Mother's brief does not cite any provisions of the North

Carolina or United States Constitutions and makes no substantive constitutional argument based on *M.E.*

Mother argues only that the "underlying principles behind the gender-neutral reading" of the statute regarding domestic violence should also be applied to North Carolina General Statute Section 50-13.4. But even if a "gender neutral" interpretation would allow for Partner to be treated differently than a male in the same situation – and it does not – a "gender neutral" interpretation is not available for North Carolina General Statute Section 50-13.4. The General Assembly has amended the North Carolina General Statutes to mandate the terms "husband" and "wife," unlike the terms "mother" and "father," be construed in gender-neutral terms. N.C. Gen. Stat. § 12-3(16) (2019).

Shortly after the Supreme Court's opinion in *Obergefell v. Hodges*, 576 U.S. 644 (2015) held the right to marriage is a fundamental constitutional right for same-sex couples, the General Assembly added subsection 16 in North Carolina General Statute Section 12-3(16), titled "Rules for construction of statutes." It states:

> In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:
>
> . . . .
>
> (16) "Husband and Wife" and similar terms.–The words "husband and wife," "wife and husband," "man and wife," "woman and husband," "husband or wife," "wife or husband," "man or wife," "woman or husband," or other terms suggesting two individuals who are then lawfully married to each other shall be construed to include any two individuals who are then lawfully married to each other.

N.C. Gen. Stat. § 12-3(16) (effective July 12, 2017).

North Carolina General Statute Section 12-3(16) does not apply to this case because the parties were never married to one another. *See id.* The words "mother" and "father," as well as the related legal rights and obligations, differ from "husband" and "wife." *See id.*; *see generally* N.C. Gen. Stat. Chapter 50 (using "husband" and "wife" and "mother" and "father" in separate Sections of the Chapter). Since the General Assembly has specifically addressed the instances where a gender neutral interpretation may be used, this Court is not free to give the words

"mother" and "father" in North Carolina General Statute Section 50-13.4 a gender neutral meaning or application. *See Boseman*, 364 N.C. at 545, 704 S.E.2d at 500. Mother's interpretation would re-write North Carolina General Statute Section 50-13.4, and only the General Assembly has the authority to re-write the statute. *See State v. J.C.*, 372 N.C. 203, 208, 827 S.E.2d 280, 283 (2019) ("It is not the province of the courts to rewrite statutes absent some constitutional defect or conflict with federal law." (citation omitted)).

Further, another section of North Carolina General Statute Section 12-3 addresses gender in construction of statutes:

> (1) Singular and Plural Number, Masculine Gender, etc.–Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and *every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.*

N.C. Gen. Stat. § 12-3(1) (emphasis added). North Carolina General Statute Section 12-3(1) would allow construction of a statute using the pronoun "his" to include "hers" unless "the context [of the statute] clearly shows to the contrary." *Id.*

The North Carolina General Statutes are replete with uses of the pronoun "his" or "he," but most statutes using these terms are clearly not referring only to males; they are referring to persons, either natural or corporate. *See, e.g.*, N.C. Gen. Stat. § 1A-1, 15(a) (2019). For example, North Carolina Rules of Civil Procedure 15(a) provides,

> A party may amend *his* pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, *he* may so amend it at any time within 30 days after it is served.

Id. (emphasis added). In North Carolina Rule of Civil Procedure 15(a), the words "his" and "he" refer back to a "party" who has filed a pleading, and these may clearly be read as "her" and "she" or even "its" and "it." *Id.* The gender of the party is entirely irrelevant for purposes of a procedural rule about amending pleadings. *See generally id.* Indeed, a "party"

to a case may even be a city or town, or a corporation or other corporate entity with no sex or gender. *See*, *e.g.*, N.C. Gen. Stat. § 1A-1, Rule 4 (2019) (setting out manner of service of process for all types of "parties," including "natural persons" as well as the State, Agencies of the State, and various corporate entities). But in North Carolina General Statute Section 50-13.4, "the context clearly shows to the contrary" of a gender neutral interpretation. *See* N.C. Gen. Stat. §§ 12-3(1), 50-13.4. As used in North Carolina General Statute Section 50-13.4, the word "mother" is, by definition, female and the word "father" is, by definition, male. *See* N.C. Gen. Stat. § 50-13.4. The trial court, therefore, erred in giving North Carolina General Statute Section 50-13.4 a "gender neutral" interpretation to impose primary liability for child support upon Partner.

IV. Secondary Liability for Child Support Based on the Status of Standing in *Loco Parentis*

[3] Both parties make arguments in the alternative regarding secondary liability for child support based on Partner's standing in *loco parentis* to Alisa. "This Court has defined a person *in loco parentis* as one who has assumed the status and obligations of a parent without formal adoption." *See Moyer v. Moyer*, 122 N.C. App. 723, 724, 471 S.E.2d 676, 678 (1996) (citation and quotation marks omitted). Partner asserts she is not Alisa's mother but stands in *loco parentis* to Alisa so she could, at most, only be secondarily liable for child support. But Partner also asserts the requirements for secondary liability under Section 50-13.4(b) are not met. Mother asserts Partner may be secondarily liable for child support because she assumed a voluntary obligation to support Alisa but admits "[c]ounsel has not been able to locate case law that addresses what is required for this voluntary assumption to be in writing in a case involving two people who were not married to each other." Mother also identifies no writing in which Partner assumed a child support obligation for Alisa.

It is undisputed that Partner stands in *loco parentis* to Alisa. The trial court addressed Partner's status as in *loco parentis* to Alisa in the custody order as well as the Support Order on appeal. North Carolina General Statute Section 50-13.4(b) addresses when "any other person" standing in *loco parentis* may have secondary liability for child support:

> In the absence of pleading and proof that the circumstances otherwise warrant, *any other person*, agency, organization or institution *standing in loco parentis shall be secondarily liable for such support*. Such other circumstances may include, but shall not be limited to,

> the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. *However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing.*

N.C. Gen. Stat. § 50-13.4(b) (emphasis added).

North Carolina General Statute Section 50-13.4(b) does not mention the marital status or sex of a person standing in *loco parentis*; it applies simply to "a person who is not the child's parent . . . standing in *loco parentis*[.]" *Id.* Thus, North Carolina General Statute Section 50-13.4(b) applies to Partner because she is "a person who is not the child's parent . . . standing in *loco parentis*." *Id.*

North Carolina General Statute Section 50-13.4(b) was first adopted in 1967 and has not been significantly amended since it changed the liability framework between parents in 1981, but the history of the statute aids in understanding the differences between primary and secondary responsibility for child support as well as the allocation of primary liability to the "mother" and "father" of a child. *See* N.C. Gen. Stat. § 50-13.4 (1967); N.C. Gen. Stat. § 50-13.4 (1976 & Supp. 1979); N.C. Gen. Stat. 50-13.4 (1981). Section 50-13.4(b) states, "In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child." N.C. Gen. Stat. § 50-13.4(b). Even before the adoption of Chapter 50 of the North Carolina General Statutes, common law recognized that both parents of a child, mother and father, owe a duty of support to the child. *See Lee v. Coffield*, 245 N.C. 570, 572, 96 S.E.2d 726, 728 (1957) ("The fact that the father, during life, is primarily responsible for the support, maintenance, and education of his minor children does not relieve the mother of her responsibility. Upon the death of the father, a duty rests on the mother to the best of her ability to provide for the support of her children. This we conceive to be the common law as adopted by North Carolina." (citation omitted)).

Before amendments to North Carolina General Statute Section 50-13.4 in 1981, the law set different child support standards for mothers and fathers. *See* N.C. Gen. Stat. § 50-13.4(b) (1967). The father of a child was primarily liable for financial support of the child; the mother had secondary liability and would be ordered to pay child support only if the father could not provide full support for the child. *See id.* The statute held the father primarily liable for child support and the mother secondarily liable from the time of adoption of Section 50-13.4 in 1967 through 1981:

> (b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, *in that order*, for the support of a minor child. *Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child.* Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.

N.C. Gen. Stat. § 50-13.4 (1976 & Supp. 1979) (emphasis added).

The Supreme Court of North Carolina noted the primary responsibility of the father for child support based on the plain language of Section 50-13.4:

> Taken together, [§ 50-13.4(b) and (c)] clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. Thus, where the father cannot reasonably be expected to bear all the expenses necessary to meet the reasonable needs of the children, the court has both the authority and the duty to order that the mother contribute supplementary support to the degree she is able.
>
> . . . .
>
> *The statute places primary liability for the support of the minor child on the father. Therefore, . . . the father of*

> *the minor child, is primarily liable for support of the child. It is his responsibility to pay the entire support of the child in the absence of pleading and proof that circumstances of the case otherwise warrant. The mother's duty is secondary.*

In re Register, 303 N.C. 149, 153-54, 277 S.E.2d 356, 359 (1981) (emphasis added) (citations, quotation marks, and alterations omitted).

In 1981, Section 50-13.4(b) was amended to make the mother and father of a child *both* primarily liable for child support. *See* N.C. Gen. Stat. § 50-13.4(b) (1981) ("In the absence of pleading and proof that the circumstances otherwise warrant, *the father and mother shall be primarily liable for the support of a minor child*. . . . Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case[.]" (emphasis added)). The Supreme Court of North Carolina clarified the effect of the 1981 amendment in *Plott v. Plott* by footnote:

> Prior to the statutory amendments to G.S. 50-13.4 in 1981, the father had the primary duty of support, while the mother's duty was only secondary. In cases decided under the prior version of 50-13.4(b), the courts softened the financial burden placed on fathers by reading subsections (b) and (c) to G.S. 50-13.4 together. These companion subsections were interpreted as contemplating a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. Prior case law interpreted this statute as requiring the trial court to first find that the father alone could not make the entire payment before the mother could be required to contribute. Practically all states have imposed on mothers an equal duty to support.

313 N.C. 63, 67 n.1, 326 S.E.2d 863, 866 n.1 (1985) (citations and quotation marks omitted). "Today, the equal duty of both parents to support their children is the rule rather than the exception in virtually all states. The parental obligation for child support is not primarily an obligation of the father but is one shared by both parents." *Id.* at 68, 326 S.E.2d at 867 (citation, quotation marks, and alterations omitted).

Another important addition in the 1981 amendment to Section 50-13.4 was the addition of the words "secondary liability" for those standing in *loco parentis* and the clarification as to when that secondary liability would attach. *See* N.C. Gen. Stat. § 50-13.4 (1981) (stating there would be no secondary liability "absent evidence and a finding that such person, agency, organization or institution [standing in loco parentis] has voluntarily assumed the obligation of support in writing.").[4]

Here, although Partner does stand in *loco parentis* to Alisa, she did not "voluntarily assume[ ] the obligations in writing." *See* N.C. Gen. Stat. § 50-13.4 (2019). There was no written agreement for Partner to assume a child support obligation for Alisa. There are no findings of fact in the Support Order and no evidence to show Partner assumed this obligation in writing.[5]

The trial court found Partner "signed IVF paperwork which equally bound her to the risks and rewards of the IVF process." But the IVF paperwork addressed mostly the medical "risks and rewards" of the procedure, not the legal responsibilities. Furthermore, the IVF paperwork includes a section entitled "Legal Considerations and Legal Counsel." This section informs the parties:

> The law regarding embryo cryopreservation, subsequent thaw and use, and parent-child status of any resulting child(ren) is, or may be, unsettled in the state in which either the patient, spouse, partner, or any donor currently or in the future lives, or the state in which the ART ["Assisted Reproductive Technology"] program is located.

The parties acknowledged they had not received legal advice from the IVF procedure and that they should consult an attorney with any questions regarding "individual or joint parental status as to a resulting child."

The trial court also found Partner "continuously provided health insurance for [Alisa]. To do so, [Partner] signed documents claiming [Alisa] as her dependent and sought reimbursement for certain medical expenses." Again, this finding notes Partner "signed documents" for insurance purposes, but there is no indication in the evidence that these documents addressed child support in any way. Partner's provision of

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4. Based upon the findings of fact, "[t]he parties jointly selected a [sperm] donor for the IVF process[.]" Thus, there is no "father" of the child available to contribute to the support of the child.

5. There is a finding in the Support Order that "[Partner] presented [Mother] with a parenting agreement, but that agreement was never signed."

medical insurance for Alisa supports the trial court's finding Partner stood in *loco parentis* to Alisa, but it is not a voluntary assumption of a child support obligation. *See* N.C. Gen. Stat. § 50-13.4. Because Partner never assumed a child support obligation in writing, Partner could not be held secondarily liable for child support. *See id.* ("[T]he judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing.").

Indeed, imposing even secondary liability for child support based solely upon Partner's *de facto* parental relationship with Alisa and her custodial rights would be contrary to the long-established law applicable to heterosexual couples in the same situation. *See generally Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994); *Moyer*, 122 N.C. App. 723, 471 S.E.2d 676. A parent's romantic partner or a stepparent may have a close and loving relationship with the biological child of her partner and may even have custodial rights under North Carolina General Statute Section 50-13.2, but the romantic partner or stepparent has no secondary child support obligation unless it was voluntarily assumed in writing. *See* N.C. Gen. Stat. § 50-13.4. Ironically, any attempt to treat a same-sex couple differently than a heterosexual couple as to the law to secondary liability for child support would lead to disparate outcomes and end up treating the child of a same-sex relationship *differently* than the child of a heterosexual relationship under the same circumstances.

In two cases, *Duffey v. Duffey* and *Moyer v. Moyer*, this Court clarified the requirement for a written agreement to establish secondary child support liability in the context of a de facto parent. *See Duffey*, 113 N.C. App. 382, 438 S.E.2d 445; *Moyer*, 122 N.C. App. 723, 471 S.E.2d 676. In *Duffey*, the plaintiff-mother had a daughter before her marriage to the stepfather. *See Duffey*, 113 N.C. App. at 383, 438 S.E.2d at 446. The stepfather treated the stepdaughter as his own and intended to adopt her, but the adoption proceedings were never completed. *Id.* Three more children were born during the parties' marriage, although the stepfather was not the natural father of the last child, who was conceived after the parties' separation, but born before they were divorced. *Id.* After the parties separated, they executed a separation agreement addressing custody of the children. *Id.* The stepfather agreed to pay child support for each of the four children, including the two who were not his biological or adoptive children. *Id.* The separation agreement was later incorporated into the judgment of absolute divorce. *Id.* at 384, 438 S.E.2d at 446. The stepfather appealed from the trial court's order requiring him to pay child support, claiming the trial court had erred in interpreting the

separation agreement and "the trial court's order requiring him to pay support for his stepchildren [was] void as against public policy." *Id.* at 384, 438 S.E.2d at 447.

On appeal in *Duffey*, this Court rejected the stepfather's argument and affirmed the trial court's order requiring him to pay child support for the two stepchildren because he stood in *loco parentis* to the children and had voluntarily assumed the child support obligation in the executed separation agreement:

> By signing the Separation Agreement in which he agreed to pay child support to plaintiff, defendant voluntarily and in writing extended his status of in loco parentis and gave the court the authority to order that support be paid. This is all that is required by the express terms of N.C.G.S. § 50-13.4(b).

Id. at 385, 438 S.E.2d at 447-48.

This Court reasoned:

> Applying the applicable law to the facts of this case, the trial court found that defendant had voluntarily assumed an obligation of support for Derissa and Dominique and that he stood in loco parentis to these two stepchildren at the time of the execution of the Separation Agreement. We agree.
>
> All the evidence shows that defendant voluntarily accepted Derissa and Dominique into his home and that he acted as a father to his stepchildren. Defendant cared and provided for his stepchildren by supplying them with military identification and listing them as his dependents. Thus, there is no doubt that defendant stood in loco parentis to Derissa and Dominique during the term of his marriage to plaintiff.

Id. at 385, 438 S.E.2d at 447.

Similarly, in *Moyer v. Moyer*, this Court applied the same law but came to a different result because the stepfather had *not* formally entered into a written agreement to pay child support. *Moyer*, 122 N.C. App. at 725-26, 471 S.E.2d at 678. In *Moyer*, the parties were the child's biological mother and stepfather. *Id.* at 723, 471 S.E.2d at 677. The plaintiff-mother had a daughter from a past relationship when she married the stepfather in 1987. *Id.* at 723-24, 471 S.E.2d at 677. Together they had a son in 1990. *Id.* at 724, 471 S.E.2d at 677. During the marriage, the stepfather supported both children. *Id.* The parties separated in 1994 and signed an

informal hand-written agreement in which the stepfather agreed to pay $400 per month as child support for both children. *Id.* This agreement was not acknowledged. *Id.* The mother brought a claim against the stepfather for child support for both children, and the trial court concluded the stepfather was in *loco parentis* to the stepdaughter and ordered him to pay child support for her. *Id.* The stepfather appealed only "those portions of the order relating to support" of the stepdaughter. *Id.*

After this Court reviewed the development of the law regarding the obligation of a person standing in *loco parentis* to pay child support in detail, it went on to explain what evidence would be required for secondary liability for child support to attach to a non-parent standing in *loco parentis*:

> [T]he court may not order that support be paid by a person standing *in loco parentis* absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. . . . If the rule were otherwise, a stepparent *in loco parentis* could find himself with a legal duty of support without the formalities required to bind a biological or adoptive parent to an identical obligation. Such a result is illogical, not in the interest of public policy, [because] it places a stricter duty on a stepparent *in loco parentis*, than on a biological or adoptive parent.

Id. at 725-26, 471 S.E.2d at 678-79 (citations omitted).

Our dissenting colleague relies upon *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997)), for the proposition that the duty of primary liability for child support should accompany the right to custody in this type of case. But in *Price*, the analysis and holding addressed custody, not child support. *See generally id.* There is no mention of a child support claim or order in *Price v. Howard*. *See generally id.* The opinion did mention that the trial court's order on custody had also required the nonparent party to share therapy costs for the child, but the holding of the case addressed custodial rights. *See id.* at 84, 484 S.E.2d at 537. To the extent *Price* could be considered as a *sub silentio* ruling on some sort of child support obligation based upon the reference to therapy costs, *Price* refers only to potential secondary liability under North Carolina General Statute Section 50-13.4(b), not primary liability. The Court stated:

> Although support of a child ordinarily is a parental obligation, other persons standing *in loco parentis* may also

> acquire a duty to support the child. *See* N.C.G.S. § 50-13.4(b) (1995). It is clear that the duty of support should accompany the right to custody in cases such as this one. Therefore, upon remand, the trial court should reconsider the issue of who should bear the costs of the child's therapy in light of its ultimate custody award.

Id. Therefore, we do not consider *Price* as controlling authority on the issue of a nonparent's liability for child support.

Here, under *Duffey* and *Moyer*, the result as to secondary liability for child support would be the same as if Mother had been in a romantic relationship with, for example, an infertile man as her partner, and the unmarried couple had a child by IVF using a sperm donor.[6] *See Duffey*, 113 N.C. App. 382, 438 S.E.2d 445; *Moyer*, 122 N.C. App. 723, 471 S.E.2d 676. Although the child may consider the man as her father, and he may act as a father to the child, and he may even be granted custodial rights, he still would have no child support obligation under North Carolina General Statute Section 50-13.4 *unless* he assumed the obligation in a writing.[7] *See* N.C. Gen. Stat. § 50-13.4. The law is the same for any partner or spouse standing in *loco parentis* to the child of his or her partner, no matter the sex of the parties, so in this case Partner cannot be held secondarily liable for child support.

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6. If the mother is married, North Carolina General Statute Section 49A-1, entitled "Status of child born as a result of artificial insemination" may apply. N.C. Gen. Stat. § 49A-1 (2019). Section 49A-1 states, "Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique." *Id.*

7. Mother's brief noted that she could not find any law addressing an agreement to pay child support in a same-sex relationship. We recognize that *Duffey* and *Moyer* involved heterosexual couples and *Moyer* relied upon North Carolina General Statute Section 52-10.1 regarding agreements of a "married couple" to hold that the written agreement did not satisfy the formalities to order the stepfather to be obligated to pay child support to the stepchild. *Moyer*, 122 N.C. App. at 726, 471 S.E.2d at 679. Under North Carolina General Statute Section 12-3(16), a "married couple" could now include a same-sex married couple as a term "suggesting two individuals who are then lawfully married to each other[.]" N.C. Gen. Stat. § 12-3(16). Since the parties here were not married, Section 52-10.1 would not apply to them, but the requirement of Section 50-13.4 for the person standing in *loco parentis* to "voluntarily assume[ ] the obligation of support in writing" still applies to this case. N.C. Gen. Stat. § 50-13.4. Here, because there was no written agreement of any sort regarding child support, we need not address whether any particular level of formality is required for a written agreement regarding child support by a same-sex unmarried couple.

V. Conclusion

The trial court's attempt to impose one obligation of a mother or father – child support – upon Partner, to go along with the benefit of joint custody already conferred upon her is understandable. It may seem only fair for Mother and Partner to share the responsibility of financial support for Alisa along with the benefits of joint physical and legal custody. It may seem just as fair to require a stepfather or male partner who stands in *loco parentis* to his partner's child to pay child support, especially if he also shares custody with the child's natural or legal parent. But here, North Carolina's statutes and established case law allow Partner to act as a parent to Alisa under Section 50-13.2 without paying child support under Section 50-13.4. *See* N.C. Gen. Stat. § 50-13.2 (stating custody may be awarded to "such person, agency, organization or institution as will best promote the interest and welfare of the child"); *see also* N.C. Gen. Stat. § 50-13.4 ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child.").

We fully appreciate the difficult issues created by IVF and other forms of assisted reproductive technology, but only the General Assembly has the authority to amend our statutes to address these issues.[8] Protection of the children born into these situations, whether to a same-sex couple or a heterosexual couple, is a complex policy issue, but this Court does not have the role of creating new law or adopting new policies for our state. *See Allen v. Allen*, 76 N.C. App. 504, 507, 333 S.E.2d 530, 533 (1985) ("Issues of public policy should be addressed to the legislature.").

After our *de novo* review, we conclude the trial court erred by giving a "gender neutral" interpretation to North Carolina General Statute Section 50-13.4, ordering Partner to pay child support. Partner cannot be held primarily liable for child support because she is not Alisa's "parent" within the meaning of North Carolina General Statute Section 50-13.4(b). Partner cannot be secondarily liable for child support under North Carolina General Statute Section 50-13.4(b) because she did not assume an obligation to support Alisa in writing. We therefore reverse the Support Order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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8. For a full discussion of these issues, *see* The Honorable Beth S. Dixon, For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology, 43 CAMPBELL L. REV. 21 (2021).

Judge FLOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.[1]

In 1997, in *Price v. Howard*, our Supreme Court grappled with a child custody case involving an unwed heterosexual couple where the man—despite having believed he was the father and acted in all ways as the father to the parties' child—was determined to not actually be the biological father of the child. *Price v. Howard*, 346 N.C. 68, 70-71, 484 S.E.2d 528, 529 (1997). The man's name was not listed on the birth certificate, but his last name was given to the child. The man had exercised custody with the child. The man acted in all ways as a natural parent to the child. *Id.* There, our Supreme Court recognized that a biological mother may act inconsistently with her constitutionally protected status as a natural parent by ceding custodial and other parenting duties to a third-party where "[k]nowing that the child was her natural child, but not plaintiff's, she represented to the child and to others that plaintiff was the child's natural father. She chose to rear the child in a family unit with plaintiff being the child's *de facto* father." *Id.* at 83, 484 S.E.2d at 537.

Crucially, as it relates to this case, the Court concluded by reversing the mandate of the Court of Appeals which had, in turn, reversed the trial court's order requiring the parties to share therapy costs for the child. The Court stated: "Although support of a child ordinarily is a parental obligation, other persons standing *in loco parentis* may also acquire a duty to support the child. *See* N.C.G.S. § 50–13.4(b) (1995). It is clear that the duty of support should accompany the right to custody in cases such as this one." *Id.* at 84, 484 S.E.2d at 537.

Today, almost 28 years later, the majority effectively holds that—as it relates to an unwed same-sex couple—the duty of support, as a matter of law, does not accompany the right to custody in cases such as *this* one. To the contrary, the majority decision here concludes holding

1. I agree with the majority's statement of facts and analysis in Parts I and II of the Opinion of the Court. I respectfully dissent from Part III for the reasons stated. Although not necessary to my reasoning, and an issue I would not reach in this case, I concur in the result in Part IV, again, for reasons stated. I further dissent from the conclusion reached in Part V because—for all the reasons stated—the proper result here is to affirm the trial court.

a woman in an unwed same-sex couple to the principle espoused by our Supreme Court in *Price* applicable to a man in an unwed heterosexual couple is, somehow, not gender-neutral. I disagree and respectfully dissent. The trial court's Order should be affirmed.

I. Primary Liability of Child Support

In this case, as the trial court found, the pleadings and evidence establish circumstances warranting both parties in this case held primarily liable for the support of their minor child. Moreover, the trial court's Findings support its Conclusions of Law, including that Plaintiff and Defendant are parents of the minor child and owe a duty of support to their minor child under N.C. Gen. Stat. § 50-13.4. *See State o/b/o Midgett v. Midgett*, 199 N.C. App. 202, 205-06, 680 S.E.2d 876, 878 (2009) (recognizing the standard of review for child support orders is broadly an abuse of discretion but requires—as any bench trial—analyzing whether trial court's findings are supported by evidence and, in turn, the findings support the conclusions of law). Three independent—but also interrelated—legal bases undergird this conclusion: (A) our case law derived from *Price* establishing partners—including but not limited to same-sex partners—of a biological parent may become *de facto* parents by assuming parental rights and responsibilities ceded by the biological parent; (B) collateral and judicial estoppel; and (C) the language of the child support statute itself.

A. De Facto Parent

As it relates to this case, our Courts have subsequently followed the reasoning in *Price* and applied it—in gender neutral fashion—including to same-sex unwed couples. *See Ellison v. Ramos*, 130 N.C. App. 389, 396, 502 S.E.2d 891, 895 (1998) (female in unwed heterosexual relationship had standing to pursue custody action against biological father). In particular, in *Mason v. Dwinnell*, this Court applied *Price* to a custody determination involving a same-sex unwed couple who had a child through IVF. There, the trial court found:

> [The parties] jointly decided to create a family and intentionally took steps to identify [non-biological parent] as a parent of the child, including attempting to obtain sperm with physical characteristics similar to [non-biological parent], using both parties' surnames to derive the child's name, allowing [non-biological parent] to participate in the pregnancy and birth, holding a baptismal ceremony at which [non-biological parent] was announced as a parent and her parents as grandparents, and designating

> [non-biological parent] as a parent of the child on forms and to teachers.

Mason v. Dwinnell, 190 N.C. App. 209, 222-23, 660 S.E.2d 58, 67 (2008). Moreover, after the child's birth:

> The findings of fact also reveal that [the parties] functioned as if both were parents, with [biological parent] agreeing to allow [non-biological parent] to declare the child as a dependent on her tax returns and the parties sharing caretaking and financial responsibilities for the child. The court found, without challenge by [biological parent], that [biological parent] "encouraged, fostered, and facilitated the emotional and psychological bond between the minor child and [non-biological parent]" and that "[t]hroughout the child's life, [non-biological parent] has provided care for him, financially supported him, and been an integral part of his life such that the child has benefited from her love and affection, caretaking, emotional and financial support, guidance, and decision-making." As a result, [non-biological parent] became "the only other adult whom the child considers a parent . . ."

Id. at 223, 660 S.E.2d at 67. This Court held: "In sum, we conclude that the district court's findings of fact establish that [biological parent], after choosing to forego as to [non-biological parent] her constitutionally-protected parental rights, cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent." *Id.* at 227, 660 S.E.2d at 70. We determined these findings supported the conclusion the biological parent had acted inconsistently with her constitutionally protected status as a parent. *Id.* at 230, 660 S.E.2d at 71. While we acknowledged our decision did not mean that "[non-biological parent] is entitled to the rights of a legal parent," *id.* at 227, 660 S.E.2d at 70, we noted the biological mother

> nonetheless voluntarily chose to invite [non-biological parent] into that relationship and function as a parent from birth on, thereby materially altering her child's life. [Biological mother] gave up her right to unilaterally exclude [non-biological parent] (or unilaterally limit contact with [non-biological parent]) by choosing to cede to [non-biological parent] a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child.

Id. at 226, 660 S.E.2d at 69. We went on to affirm the trial court's best interests determination awarding joint legal and physical custody to the parties. *Id.* at 233, 660 S.E.2d at 73.

What *Price*, *Mason*, and other cases recognize at law is that a person who is in a domestic or intimate relationship with the biological parent—but is not a biological parent to a child may, in fact, be "transformed into a parent": a de facto parent. *See Boseman v. Jarrell*, 364 N.C. 537, 552, 704 S.E.2d 494, 504 (2010); *Moriggia v. Castelo*, 256 N.C. App. 34, 53, 805 S.E.2d 378, 388-89 (2017); *Davis v. Swan*, 206 N.C. App. 521, 529, 697 S.E.2d 473, 478 (2010). This relationship exceeds that of a typical *in loco parentis* relationship—such as a step-parent relationship—where a person has become part of a child's life *in place of a parent* and taken on obligations and responsibilities associated with parenting. *See Liner v. Brown*, 117 N.C. App. 44, 48, 449 S.E.2d 905, 907 (1994) (quoting *Shook v. Peavy*, 23 N.C. App. 230, 232, 208 S.E.2d 433, 435 (1974) ("This Court has defined the term in loco parentis to mean "in the place of a parent" and has defined "person in loco parentis" as "one who has assumed the status and obligations of a parent without a formal adoption.").[2]

The de facto parent relationship arises under "the circumstances of [a parent] intentionally creating a family unit composed of [themselves], [the] child and, to use the Supreme Court's words, a 'de facto parent.' " *Mason*, 190 N.C. App. at 225-26, 660 S.E.2d at 68 (quoting *Price*, 346 N.C. at 83, 484 S.E.2d at 537). This is so where a trial court in a custody case make findings that "establish that [the legal parent] intended—during the creation of this family unit—that this parent-like relationship would be permanent, such that [they] 'induced [non-parent and minor] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.' " *Id.* at 226, 660 S.E.2d at 69. The use of this de facto parenting relationship is one that was judicially created and recognized as a basis for a judicial determination a parent had acted inconsistently with their parental status to permit the de facto parent standing to seek legal and physical custody of their child.

In this case, Plaintiff utilized this de facto parent concept to obtain legal custody. In her Amended Complaint for Custody, Plaintiff alleged

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2. Notably, however, for purposes of asserting *in loco parentis* as a defense to a criminal offense, we have held the *in loco parentis* "relationship is established only when the person with whom the child is placed intends to assume the status of a parent by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance." *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809, 811 (1980).

"Plaintiff has a parent-child relationship with the minor child and the minor child refers to Plaintiff as 'Mom' or 'Mama.' " Plaintiff further alleged: the parties jointly entered into an assisted reproductive technology agreement; Plaintiff's heavy involvement in the IVF process—including jointly selecting a sperm donor and the storage and freezing of embryos and Plaintiff's payment of costs associated with storage and "significant sums towards the costs of IVF treatment"; Plaintiff's participation in appointments during the pregnancy; Plaintiff's provision of health insurance for Defendant including for IVF treatments, doctor's visits, and delivery; Plaintiff's adding the child as a dependent on her health insurance; Plaintiff's provision of "substantial funds" and "financial assistance" to Defendant to assist in providing for the child's needs and expenses—including daycare expenses; and joint sharing of parental responsibilities.

The trial court relied on many of these facts to conclude Plaintiff has a "parent/child relationship with the minor child and has standing to seek custody of the minor child against" Defendant—including specifically Plaintiff's provision of health insurance for the child and coverage of IVF treatments, payment of uninsured medical expenses for the child, and payment of daycare expenses. The trial court—in the custody order—expressly found Plaintiff "bonded with the minor child and formed a parent-child like relationship with the minor child." Based on its Findings, the trial court ultimately concluded: "The parties are fit and proper *parents* to have joint legal custody of the minor child and to share physical custody of the minor child . . ." (emphasis added). In granting joint legal custody, the trial court awarded Plaintiff final decision-making authority regarding the child's education. The trial court further ordered the parties to alternate physical custody on holidays and special occasions including Thanksgiving, Christmas, and Mothers' Day.

No party has challenged this custody order. Specifically, the parties do not challenge the trial court's Findings and Conclusions that a parent-child relationship existed between Plaintiff and the minor child or, indeed, that Plaintiff is a fit and proper parent to have custody of the minor child. Indeed, the custody order appears consistent with the holdings of *Price* and *Mason* in its analysis of the relationship between Plaintiff and the minor child and whether Defendant "intended—during the creation of this family unit—that this parent-like relationship would be permanent, such that [they] 'induced [Plaintiff and the minor child] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.' " *Mason*, 190 N.C. App. at 225-26, 660 S.E.2d at 69 (quoting *Price*, 346 N.C. at 83, 484 S.E.2d at 537).

As such, Plaintiff was transformed into a parent—certainly a *de facto* parent—through the parties' actions. Because of that particular status and relationship with the minor child—based on the principles espoused in *Price* and applied in *Mason*— Plaintiff sought and obtained legal custody of the child.[3] Consistent with *Price*, then, "[i]t is clear that the duty of support should accompany the right to custody in cases such as this one." *Price*, 346 N.C. at 84, 484 S.E.2d at 537. Indeed, the trial court—expressly echoing our Supreme Court in *Price*—found "De Facto Mother has enthusiastically and voluntarily held herself out as a parent to the minor child and has a support obligation that accompanies her, now court ordered, right to 50/50 custody. The duty of support should accompany the right to custody in cases such as this one."

B. Collateral and Judicial Estoppel

Although not expressly applied in the trial court's order in this case, undergirding its reasoning are the two related concepts of collateral and judicial estoppel. The trial court recognized Plaintiff had litigated the issue of her de facto parentage of the minor child to obtain custody in the very same case file in which the child support order was ultimately entered. The trial court determined that having prevailed on that issue in the custody proceeding under based on allegations of a parental relationship and her assumption of the rights and duties of a parent—including providing health insurance and other financial support for the child—and having been adjudged in the custody order to be a parent to the minor child, Plaintiff should not then be permitted to disavow the parental relationship to avoid paying child support.

"Under the doctrine of collateral estoppel, also known as 'estoppel by judgment' or 'issue preclusion,' the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Strates Shows, Inc. v. Amusements of America, Inc.*, 184 N.C. App. 455, 461, 646 S.E.2d 418, 423 (2007) (citation and quotation marks omitted). "Collateral estoppel bars the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Id.* (citation and quotation marks omitted). "The elements of collateral estoppel are as follows:

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3. "Although not defined in the North Carolina General Statutes, our case law employs the term 'legal custody' to refer generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27-28 (2006) (citations omitted).

(1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 37, 738 S.E.2d 819, 825 (2013) (citation and quotation marks omitted). Notably "the fact that a prior judgment was based on an erroneous determination of law or fact does not as a general rule prevent its use for purposes of collateral estoppel." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 431, 349 S.E.2d 552, 558 (1986).

Although a related concept, judicial estoppel differs from collateral estoppel in three ways:

> First, judicial estoppel seeks to protect the integrity of the judicial process itself, whereas collateral estoppel and res judicata seek to protect the rights and interests of the parties to an action. Second, unlike collateral estoppel, judicial estoppel has no requirement that an issue have been actually litigated in a prior proceeding. Third, unlike collateral estoppel, judicial estoppel has no requirement of "mutuality" of the parties in either its offensive or defensive applications.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 16, 591 S.E.2d 870, 880–81 (2004) (citations omitted). "[B]ecause of its inherent flexibility as a discretionary equitable doctrine, judicial estoppel plays an important role as a gap-filler, providing courts with a means to protect the integrity of judicial proceedings where doctrines designed to protect litigants might not adequately serve that role." *Id.* at 26, 591 S.E.2d at 887.

In *Whitacre*, the North Carolina Supreme Court identified three factors used to determine the applicability of judicial estoppel:

> The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply, is that a "party's subsequent position 'must be clearly inconsistent with its earlier position.' " Second, the court should "inquire whether the party has succeeded in persuading a court to accept that party's earlier position." Third, the court should inquire "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Judicial estoppel is an "equitable doctrine invoked by a court at its discretion."

Price v. Price, 169 N.C. App. 187, 190-91, 609 S.E.2d 450, 452 (2005) (quoting *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004) (citations omitted)).

Applying collateral estoppel, there was a prior suit between these parties which resulted in a permanent custody order constituting a final judgment on the merits. *See* N.C. Gen. Stat. § 50-19.1 (2023). The custody suit as with the child support action involved the issue of whether Plaintiff was, de facto, a parent of the child. The issue was actually litigated in the custody suit and necessary to the judgment because absent a determination Plaintiff was a de facto parent, Plaintiff would not have had standing to seek custody of the minor child. Finally, the trial court determined Plaintiff had formed a parent-child relationship—and, thus, Plaintiff was a de facto parent of the child. Indeed, the trial court in the custody proceeding went further: finding both Plaintiff and Defendant were "fit and proper parents." Critically on the facts of this case, without these determinations, the trial court could not have awarded Plaintiff the legal custody of the minor child Plaintiff sought. The trial court's adjudication in the custody action precludes Plaintiff from contending she is not, in fact, a parent of the minor child in a later child support proceeding.

Judicial estoppel is equally, if not more, applicable. First, in her initial Complaint for custody, Plaintiff alleged the minor child was "her child." In the Amended Complaint, Plaintiff referred to herself as "Mom." Plaintiff further alleged she has "a parent-child relationship with the minor child." Plaintiff alleged that part of this relationship was the fact she provided financial support for the child, including health insurance. For Plaintiff to claim herself as a parent providing support for the child in the custody action while claiming not to be a parent to disavow any obligation to support her child is clearly inconsistent. For example, Plaintiff alleged she acted as a parent to the child by providing health insurance—but now seeks to claim she should not be obligated to provide health insurance for the child under a support order because she is not a parent.

Second, Plaintiff absolutely succeeded in persuading the trial court she had a parent-child relationship with the child and convincing the court she was a fit and proper *parent* to exercise custody. Indeed, the trial court awarded her joint legal custody including decision-making responsibilities and final decision-making authority over educational decisions.

Third, permitting Plaintiff's inconsistent position creates an unfair advantage by putting her in the position of having all the benefits of

legal and physical custody with none of the legal support obligations. Defendant would suffer an unfair detriment in that Plaintiff may now make long-term decisions with financial ramifications for the child, including specifically educational decisions, which Defendant would be solely responsible for paying. Indeed, Plaintiff's position may even have detrimental impacts on the child if Plaintiff is no longer obligated to provide financial support or health insurance for the child.

As such, Plaintiff, having claimed a parent-child relationship as a de facto parent to the child to wrest custody, at least in part, away from Defendant should be estopped in the subsequent child support proceeding from denying that she is a parent to the child for purposes of her support obligation.

C. Child Support Statute

Ultimately, however, it is the plain language of the child support statute itself that provides for Plaintiff to share in the primary liability for child support. Section 50-13.4(b) expressly provides: "*In the absence of pleading and proof that the circumstances otherwise warrant*, the father and mother shall be primarily liable for the support of a minor child." N.C. Gen. Stat. § 50-13.4(b) (2023) (emphasis added).

In this case, the trial court expressly found "pleading, proof and circumstances" warranting holding both parties equally liable for child support of their child, including many facts that were also used to establish Plaintiff's custodial rights. Plaintiff has not challenged any of these Findings on appeal. Those Findings are, thus, binding on this Court on appeal. *Cash v. Cash*, 286 N.C. App. 196, 202, 880 S.E.2d 718, 725 (2022). In turn, they support the trial court's conclusion Plaintiff should be held liable for child support as a lawful parent. *See id.*

Again, crucially, Plaintiff has been found by a court in a custody action to be a parent to the minor child. This parental status was not thrust unwittingly upon Plaintiff. Plaintiff voluntarily assumed this status even before the birth of the child. Plaintiff actively advocated for this status in the custody proceeding. Plaintiff has not challenged any Finding of Fact in the support order reaffirming the parental status she obtained through her custody action. As a parent, Plaintiff may be held liable for child support. *See* N.C. Gen. Stat. § 50-13.4(b) ("However, the judge may not order support to be paid by a person who is not the child's parent . . . absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing."). Indeed, the facts and circumstances of this case compel the conclusion Plaintiff should be held primarily liable for the support of her child along with Defendant. *See id.*

Thus, the trial court's Findings support its determination under Section 50-13.4(b) that Plaintiff and Defendant should be held primarily liable for child support. Therefore, the trial court did not err in ordering Plaintiff to pay child support in this case. Consequently, the trial court's Order should be affirmed.

II. Secondary Liability for Child Support

As I would conclude on the facts and circumstances of this case Plaintiff is primarily liable for child support and would affirm the trial court on that basis, I would not otherwise reach the issue of secondary liability for child support. However, I do agree with the majority to the extent that if Plaintiff is determined to not be a parent to the child, then, in the absence of a written assumption of the support obligation, Plaintiff may not be held secondarily liable for support. If, as Plaintiff claims, she is nothing more than a temporary *in loco parentis* figure to Defendant's child with no real duties or obligations, then it follows Plaintiff cannot be held legally liable for the support of the child. However, it also follows that having disavowed any support obligation or parental status with respect to support, Plaintiff's custodial rights—obtained by her allegations of parental status and obligations—may be revisited. The trial court, on motion of a party, should consider whether Plaintiff's disavowal of her parental status and support obligation constitutes a substantial change of circumstances affecting the child warranting a modification of Plaintiff's legal and physical custodial rights in the child's best interests. *See* N.C. Gen. Stat. § 50-13.7 (2023). As in *Price*, the right to custody should accompany the duty of support in cases such as this one. *Price*, 346 N.C. at 84, 484 S.E.2d at 537.

HUDSON v. HUDSON

[293 N.C. App. 87 (2024)]

AL HUDSON, PLAINTIFF
v.
ANSLE HUDSON, DEFENDANT

No. COA22-1000

Filed 19 March 2024

Judges—recusal—scope of authority to enter subsequent order—order vacated—new hearing required

In a years-long domestic case, a trial judge lacked authority to enter an order on permanent child support and alimony after she recused herself from all future hearings in the case. Although the support and alimony issues were heard prior to the recusal, the judge's stated reason for recusing—in order to promote justice after plaintiff father commented that the judge favored one party over another—was not limited to any particular issue or claim. Therefore, the support and alimony order was vacated and the matter was remanded for a new hearing and entry of a new order.

Appeal by defendant from order entered 7 July 2022 by Judge Tracy H. Hewett in District Court, Mecklenburg County. Heard in the Court of Appeals 8 August 2023.

Sodoma Law, by Amy E. Simpson, for plaintiff-appellee.

Marcellino & Tyson, PLLC, by Danielle J. Walle and Matthew T. Marcellino, for defendant-appellant.

STROUD, Judge.

Defendant appeals from a child support and alimony order. Because the trial judge had previously recused before entering the order, we reverse and remand.

I. Procedural Background

Because the determinative issue on appeal is based upon the trial judge's lack of authority to enter the order after her recusal from the case, we need not thoroughly address the factual background of this case. In brief summary, plaintiff-father and defendant-mother were married and had three children. They later separated and divorced. In August 2019, Judge Tracy H. Hewett entered an order for post-separation support and temporary child support.

In September 2021, Judge Hewett heard Mother's claims for alimony and permanent child support. In November 2021, Judge Hewett emailed counsel a general summary of her ruling and directed Father's counsel to draft the order. Before the ruling from the September 2021 hearing was written and signed by Judge Hewett, Judge Hewett entered an Order of Recusal on or about 7 March 2022. The Order of Recusal stated that Judge Hewett recused herself from all future hearings "not based on any parts of the Judicial Code of Conduct" but because Father commented "the court was biased toward defendant/mother and/or prejudiced against plaintiff/father" and as such recusal was appropriate "[b]ased on the perception articulated and the years long history of these parties appearing before this judge, and believing that in order to promote justice all parties must feel heard." Thereafter, on 7 July 2022, Judge Hewett entered a Permanent Child Support and Alimony Order. Mother appeals.

II. Recusal

Mother contends "[t]he trial judge erred by continuing to preside over this matter following her recusal" and "[t]he trial judge lacked authority to enter orders following her recusal without following the requisite procedures to continue presiding over this matter."

> Black's Law Dictionary defines *recusal* as "removal of oneself as judge or policy-maker in a particular matter, esp. because of a conflict of interest." *Disqualification* is defined as "something that incapacitates, disables, or makes one ineligible; esp., a bias or conflict of interest that prevents a judge or juror from impartially hearing a case, or that prevents a lawyer from representing a party."

State v. Smith, 258 N.C. App. 682, 686, n. 2, 813 S.E.2d 867, 869, n. 2 (2018) (emphasis in original) (citations and brackets omitted). Both parties heavily rely on the Code of Judicial Conduct, but their arguments speak more to when a judge should recuse, not the authority of a judge after an order for recusal has been entered. The recusal order was not appealed, and we express no opinion on whether Judge Hewett was in fact required to recuse. The order of recusal is the law of the case.

Father, citing unpublished caselaw, contends a partial recusal is appropriate and left Judge Hewett with authority to enter the Permanent Child Support and Alimony Order since she had previously heard the evidence and, by email, rendered a general ruling. *See State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) ("Citation to unpublished authority is expressly

disfavored by our appellate rules but permitted if a party, in pertinent part, believes there is no published opinion that would serve as well as the unpublished opinion. N.C. R. App. [P.] 30(e)(3) (2004). . . . [W]e reiterate that citation to unpublished opinions is intended solely in those instances where the persuasive value of a case is manifestly superior to any published opinion." (quotation marks and ellipses omitted)). In *Zurosky v. Shaffer*, No. COA14-954, 242 N.C. App. 523, 776 S.E.2d 897 (2015) (unpublished), Father's cited case, this Court noted that at times a partial recusal may be appropriate, but not in circumstances

> where the trial judge recused herself on the issue of attorney's fees due to her spouse's interest as a partner of the firm seeking recovery of the fees, the underlying motions for which attorney's fees are sought are amply intertwined with the claims for attorney's fees so that recusal from both issues is proper.

Id., slip op. at 10. Father argues because there are no "intertwined" issues, partial recusal is appropriate. We disagree.

Indeed, even if we found Father's argument persuasive, *Zurosky* is still inapposite to this case. In *Zurosky*, attorney's fees were the very issue upon which the trial judge could have been perceived as biased, but here we are bound by Judge Hewett's own order of recusal. *See id.* The recusal order was not limited to particular issues but to "future hearings that involve either or both above-named parties" because Father commented "the court was biased toward defendant/mother and/or prejudiced against plaintiff/father" and as such recusal was appropriate "[b]ased on the perception articulated and the years long history of these parties appearing before this judge, and believing that in order to promote justice all parties must feel heard."

Although the recusal order referred to "future hearings," the order from the 8 and 9 September 2021 hearing had not yet been entered. An order is not effective until it is written, signed, and filed. *See McKinney v. Duncan*, 256 N.C. App. 717, 719-20, 808 S.E.2d 509, 511-12 (2017) ("A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. This Court has previously held that Rule 58 applies to orders, as well as judgments, such that an order is likewise entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." (citations and quotation marks omitted)). The recusal order did not limit its application only to any newly filed motions or issues arising after entry of the recusal order, and given the stated reason for the recusal order, the purpose of the recusal order would not be served by a limited or partial recusal. Father claimed Judge

Hewett was biased against him and that based on the "years long history of these parties appearing before this judge" the order was necessary to "promote justice" and allow "all parties [to] feel heard." This reason for recusal is not limited to any particular issue or claim. In addition, as Father is the party who requested the recusal, we find it disingenuous that he now contends he believes Judge Hewett should not be recused from entering the order on appeal, since he argues the order should be affirmed.

While we are not aware of any binding authority regarding a trial court's authority after recusal, nor does Mother cite to any, we do find persuasive the reasoning in the unpublished case of *Phillips v. Phillips*, No. COA09-1059, 206 N.C. App. 330, 698 S.E.2d 557 (2010) (unpublished):

> Once a trial judge has been disqualified or has recused herself, that judge may not enter an order or judgment in the case in which she was presiding. *See Motors Corp. v. Hagwood*, 233 N.C. 57, 58-61, 62 S.E.2d 518, 518-20 (1950) (explaining that a hearing conducted by a trial court who already had retired, but was attempting to serve as an emergency judge, was *coram non judice*, and the judgment entered was vacated). *Accord Bolt v. Smith*, 594 So.2d 864, 864 (Fla. Dist. Ct. App. 1992) ("[O]nce a trial judge has recused himself, further orders of the recused judge are void and have no effect."); *Byrd v. Brown*, 613 S.W.2d, 695, 699-700 (Mo. Ct. App. 1981) (holding that the trial judge lacked "authority" over the case once the judge was disqualified and, therefore, the judge's subsequent orders were "void"). Therefore, in addition to the stay pending appeal, the trial judge's recusal also operated to divest her of authority to enter the subsequent order awarding attorneys' fees.

Id., slip op. at 7-8 (alterations in original).

Recusal simply means "[r]emoval of oneself[.]" Black's Law Dictionary 1529 (11th ed. 2019). While we, as in *Zurosky*, "make no determination as to whether a partial recusal is appropriate in other cases or under different circumstances[,]" *Zurosky*, slip op. at 10, here, where the recusal order itself provides the recusal was based upon perceived bias against one party, Judge Hewett had no authority to enter the order on appeal after her recusal. As we conclude Judge Hewett did not have authority to enter the Permanent Child Support and Alimony Order, we vacate the order and remand to the trial court for further proceedings.

Our Supreme Court has previously stated that upon recusal of a district court judge, Rule 63 does not allow a "substituted judge" to "enter . . . [the recused judge's] order as written" but instead must hold a new hearing. *See Lange v. Lange*, 357 N.C. 645, 648, 588 S.E.2d 877, 879-80 (2003). While the appeal in *Lange* was from the recusal order itself, the Supreme Court stated,

> If the Court of Appeals determines that Judge Christian erred in entering his order recusing Judge Jones from the parties' case, the matter will be remanded to the trial court for further proceedings in accordance with Rule 63. In such circumstance, the newly assigned judge will have the discretion either to enter Judge Jones' order or to hold a new custody modification hearing.
>
> However, if Judge Christian's recusal order is affirmed on appeal, Rule 63 has no application in that Judge Jones was properly recused before he retired. In such case, the newly assigned judge will have no discretion in how to proceed in that a new hearing will be held and a new order entered. Therefore, affirming Judge Christian's recusal order will have the effect of eliminating any discretion a judge may have to enter Judge Jones' custody modification order.

Our Supreme Court determined in *Lange* that Rule 63 would give a newly assigned judge discretion to enter the same order on behalf of the judge who heard the matter if this was based only on that judge's retirement, but if the recused judge was properly recused, Rule 63 would not allow the newly assigned judge the discretion to enter the same order on behalf of the recused judge. *See id.* Therefore, not only did Judge Hewett lack the authority to enter the order after her recusal, on remand the trial court must hold a new hearing.

We appreciate Judge Hewett's decision to recuse to "promote justice" and to allow "all parties [to] feel heard" even if recusal was not necessarily required under the Code of Judicial Conduct. The Code of Judicial Conduct is intended to be a minimum standard of behavior for judges so it is prudent for a judge to err on the side of caution. Certainly her intent was not to prolong the resolution of this case, and it is unfortunate that a new hearing is required. But considering the recusal order and the requirements of Rule 63, we are constrained to vacate the order on appeal and to order a new hearing.

III. Conclusion

We vacate the Permanent Child Support and Alimony Order and remand this matter to the trial court for a new hearing and entry of a new order.

VACATED AND REMANDED.

Judges GRIFFIN and FLOOD concur.

IN THE MATTER OF THE APPEAL OF
OAK MEADOWS COMMUNITY ASSOCIATION, APPELLANT

FROM THE DECISION OF THE RANDOLPH COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE EXEMPTION OF CERTAIN REAL PROPERTY.

No. COA23-728

Filed 19 March 2024

Taxation—property tax—exemption—manufactured home community—definition of "providing housing"

The North Carolina Property Tax Commission properly denied a non-profit organization's request for a property tax exemption because the organization's operation of a leased-land housing cooperative—in which the organization owned the land and rented home sites to members who secured their own individually-owned manufactured homes—did not meet the definition of "providing housing" for low-income residents pursuant to N.C.G.S. § 105-278.6(a)(8). The statutory term was unambiguous and, given its plain meaning, clearly required more than merely making real property available for others to purchase their own dwelling structures.

Appeal by taxpayer-appellant from final decision entered 28 February 2023 by the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 23 January 2024.

Robinson, Bradshaw & Hinson, P.A., by Emily J. Schultz, H. Hunter Bruton, Emma W. Perry, Curtis C. Strubinger, and Timothy P. Misner, for taxpayer-appellant.

Poyner Spruill LLP, by Emily M. Meeker and N. Cosmo Zinkow, for appellee Randolph County.

ZACHARY, Judge.

This appeal raises a single issue of law: the definition of the phrase "providing housing" as used in the property tax exemption provided for "[r]eal and personal property owned by . . . [a] nonprofit organization *providing housing* for individuals or families with low or moderate incomes[.]" N.C. Gen. Stat. § 105-278.6(a)(8) (2023) (emphasis added). Oak Meadows Community Association ("Oak Meadows") applied for this exemption, which the Randolph County Board of Equalization and Review ("Randolph County") denied. Oak Meadows now appeals from the final decision of the North Carolina Property Tax Commission ("the Commission"), which affirmed Randolph County's denial of Oak Meadows's request. After careful review, we affirm.

I. Background

Oak Meadows is a North Carolina nonprofit organization, and its purpose is "to own and maintain land as a manufactured home community with the goal of a permanently affordable, safe, and stable environment in which its current and future members shall live as residents[.]" Oak Meadows owns approximately 3.74 acres of land ("the Property") in Asheboro, North Carolina. The Property has the infrastructure to operate as a manufactured home community ("MHC") accommodating 60 manufactured homes.

Oak Meadows is structured as a leased-land housing cooperative, in which its members are residents on the Property. Oak Meadows's members own their manufactured homes individually, and Oak Meadows has no ownership interest in any of the homes. No individual obtains a financial return on investment through membership in Oak Meadows.

On 9 February 2022, Oak Meadows requested a property tax exemption pursuant to § 105-278.6(a)(8) for the Property. On 16 February 2022, Randolph County denied Oak Meadows's request, concluding that "housing is not being provided for individuals or families with low or moderate incomes." Oak Meadows timely appealed to the Commission, before which the matter came on for hearing on 9 November 2022.

On 28 February 2023, the Commission issued its final decision, affirming the denial of Oak Meadows's request. The Commission found as fact:

2. There appears to be no dispute that the manufactured homes situated in the MHC on the [Property] are individually owned, and that [Oak Meadows] has no ownership interest in the manufactured homes. Accordingly, we find that [Oak Meadows] owns only the underlying land within the MHC and does not own any of the homes themselves.

3. Although [Oak Meadows] owns the MHC land, we note that land alone is insufficient to house an individual or family. [Oak Meadows] facilitates manufactured home lot rentals for its members, but since individual homeowners must secure their own manufactured housing separately from leasing lots within the MHC, we find that [Oak Meadows] does not "provid[e] housing for individuals or families."

Based on these findings of fact, the Commission concluded:

2. The plain language of N.C. Gen. Stat. §105-278.6 provides that a property owner must be engaged in "providing housing for individuals or families with low or moderate incomes" in order to receive the benefit offered by the statute. [Oak Meadows] does not provide housing by solely owning the rental lots in a MHC, and the individual homeowners are responsible for securing their own homes to place upon the rental lots. Accordingly, [Oak Meadows] does not qualify for the benefit offered by N.C. Gen. Stat. §105-278.6.

3. Although [Oak Meadows] contends that granting the requested exemption is consistent with the policy of the State in promoting the creation of housing for low and moderate income households, we find there to be no ambiguity in the language of the statute that would allow for the requested exemption under the facts of this case, and note further that the Commission has no authority to override the stated intent of the General Assembly.

Consequently, the Commission affirmed Randolph County's denial of Oak Meadows's request. Oak Meadows timely filed notice of appeal.

II. Discussion

Oak Meadows argues that the Commission erred as a matter of law by denying its request for a property tax exemption because the

Commission's "atextual interpretation cannot be squared with [N.C. Gen. Stat. § 105-278.6(a)(8)]'s plain meaning, or [its] statutory structure and purpose." We disagree.

A. Standard of Review

On appeal from a decision of the Commission, this Court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 105-345.2(b). This Court

> may affirm or reverse the decision of the Commission, declare the decision null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are any of the following:
>
> (1) In violation of constitutional provisions.
>
> (2) In excess of statutory authority or jurisdiction of the Commission.
>
> (3) Made upon unlawful proceedings.
>
> (4) Affected by other errors of law.
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted.
>
> (6) Arbitrary or capricious.

Id. "In making these determinations, the court shall review the whole record or the portions of it that are cited by any party, and due account shall be taken of the rule of prejudicial error." *Id.* § 105-345.2(c).

"The taxpayer bears the burden of proving that its property meets the requirements of an *ad valorem* taxation exemption." *In re Blue Ridge Hous. of Bakersville LLC*, 226 N.C. App. 42, 49, 738 S.E.2d 802, 807 (2013) (cleaned up), *disc. review improvidently allowed*, 367 N.C. 199, 753 S.E.2d 152 (2014). "Issues of statutory construction are questions of law, reviewed de novo on appeal." *Id.* (cleaned up). When conducting de novo review, the appellate court "considers the matter anew and freely substitutes its own judgment for that of the Commission." *Id.* (citation omitted).

B. Analysis

"In appeals to the Commission, the taxpayer bears the burden of proving that its property is entitled to an exemption under the law." *In re Eagle's Nest Found.*, 194 N.C. App. 770, 773, 671 S.E.2d 366, 368 (2009). "This burden is substantial and often difficult to meet because all property is subject to taxation unless exempted by a statute of statewide origin." *Id.* (citation omitted). "[W]here a statute provides for an exemption from taxation, the statute is construed strictly against the taxpayer and in favor of the State. The underlying premise when interpreting taxing statutes is: Taxation is the rule; exemption the exception." *Broadwell Realty Corp. v. Coble*, 291 N.C. 608, 611, 231 S.E.2d 656, 658 (1977) (cleaned up).

When interpreting tax statutes, as with any other statute, it is a "well-recognized rule that the words used in a statute must be given their natural or ordinary meaning." *In re N.C. Forestry Found., Inc.*, 296 N.C. 330, 337, 250 S.E.2d 236, 241 (1979). "Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *In re POP Capitol Towers, LP*, 282 N.C. App. 491, 497, 872 S.E.2d 338, 342 (2022) (citation omitted).

Here, the parties agree that this case may be resolved upon review of the plain language of N.C. Gen. Stat. § 105-278.6(a)(8), although they disagree as to the effect of that language. The term "provide housing" as used in § 105-278.6(a)(8) "has not been defined by statute or judicial decision; therefore, we look to its natural, approved and recognized meaning." *In re R.W. Moore Equip. Co.*, 115 N.C. App. 129, 132, 443 S.E.2d 734, 736, *disc. review denied*, 337 N.C. 693, 448 S.E.2d 533 (1994). When interpreting undefined words or phrases, "courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Parkdale Am., LLC v. Hinton*, 200 N.C. App. 275, 279, 684 S.E.2d 458, 461 (2009).

In its appellate brief, Oak Meadows provides a dictionary definition of the word "provide" as meaning to "supply" or "make available." Oak Meadows thus contends that it "is 'providing housing' by supplying real property and making it available to use for housing." Oak Meadows further explains that it "provides individuals and families with a place to live—namely legal home sites in a safe and affordable community" and that "a home site, like the manufactured home itself, is an essential element of manufactured housing."

Be that as it may, providing "an essential element of manufactured housing" is not the same as "providing housing." It strains credulity to suggest that the natural or ordinary meaning of the phrase "providing housing" would be "providing [the real property for] housing[.]" N.C. Gen. Stat. § 105-278.6(a)(8).

Notably, Oak Meadows offers a dictionary definition of "provide" in its appellate brief, but fails to include a dictionary definition of "housing." "Housing" is defined as: "Structures built as dwellings for people, such as houses, apartments, and condominiums." *Housing*, Black's Law Dictionary (11th ed. 2019). This definition is consistent with the natural or ordinary meaning of "housing" and also contradicts Oak Meadows's argument that it "is 'providing housing' by supplying real property and making it available to use for housing." As the Commission aptly noted, "land alone is insufficient to house an individual or family." Thus, the Commission did not err in rejecting Oak Meadows's argument.

Because the "statutory language is clear and unambiguous," we are without authority to "engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *POP Capitol Towers*, 282 N.C. App. at 497, 872 S.E.2d at 342 (citation omitted). We therefore affirm the Commission's final decision, which affirmed Randolph County's denial of Oak Meadows's request for a property tax exemption pursuant to N.C. Gen. Stat. § 105-278.6(a)(8).

III. Conclusion

For the foregoing reasons, the Commission's final decision is affirmed.

AFFIRMED.

Judges COLLINS and WOOD concur.

IN RE X.M.

[293 N.C. App. 98 (2024)]

IN RE X.M., M.M., M.M., P.C.

No. COA23-655

Filed 19 March 2024

1. Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—noncompliance with case plan—unresolved substance abuse

The trial court properly terminated a mother's parental rights in her four children on the ground of willful failure to make reasonable progress in correcting the conditions that lead to the children's removal from the home (N.C.G.S. § 7B-1111(a)(2)), where the mother did not adequately comply with the portions of her case plan requiring her to create a safe living environment for her children and to address her substance abuse issues. Further, the court correctly reasoned that, because of the mother's failure to engage in any meaningful treatment for her substance abuse, her incapability to parent was both willful and likely to continue into the future.

2. Appeal and Error—record on appeal—termination of parental rights proceeding—incomplete transcript—no prejudice shown

In an appeal from an order terminating a mother's parental rights in her four children, there was no merit to the mother's argument that the transcript of the underlying proceedings—which was inaudible for certain portions due to technological errors—was inadequate to allow for meaningful appellate review. The mother failed to demonstrate prejudice stemming from the incomplete transcript where the parties worked together to create a purported narrative of the inaudible portions and where the trial court additionally relied upon prior orders and reports in the case when making its findings and conclusions. Although the mother also argued that the narrative was insufficient to allow for review of the court's best interests determination, she failed to show any inaccuracies in the narrative or to otherwise explain how the information it provided precluded appellate review.

Appeal by respondent from order entered 19 January 2023 by Judge Corey J. MacKinnon in McDowell County District Court. Heard in the Court of Appeals 6 March 2024.

IN RE X.M.

[293 N.C. App. 98 (2024)]

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for the respondent-appellant-mother.

McDowell County DSS, by Aaron G. Walker, for the petitioner-appellee.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for the guardian ad litem.

TYSON, Judge.

Respondent-Mother ("Mother") appeals from an order entered on 19 January 2023, which terminated her parental rights to her four minor children. We affirm.

I. Background

Mother and Father are the biological parents of their four minor children, Alexander, Maria, Matthew, and Patricia. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). Father did not appeal the trial court's 19 January 2023 order terminating his parental rights.

Father had primary custody of all four children since May 2014. The Yancy County district court found Mother had failed to provide proper care and supervision to her children or to follow a safety plan. The court also found she had kept the children in a home where domestic violence had occurred, and she had abused controlled substances. The order adjudicated the four children as neglected pursuant to N.C. Gen. Stat. § 7B-101(15) (2023) and granted Father primary custody.

The McDowell County Department of Social Services ("DSS") began investigating Father in October 2019. A report to DSS alleged Father had left the four children under the care of a 21-year-old cousin, while Father lived and traveled out of state doing carnival work. Father discussed the matter with DSS and agreed to only leave the children with the young cousin for short periods of time.

McDowell County DSS received another report on 24 February 2020. This report alleged Father had left the four children with a cousin for six months and asserted the cousin was unable to properly address the minor children's behaviors or to provide proper care and support. An exhibit attached to the subsequent Juvenile Petition summarized the report as follows:

> The allegations were that the minor children were fighting and physically assaulting one another. The minor children disclosed to [the] social worker that a male teen in the home encouraged [Alexander] to physically assault the other three children. [Alexander] has been diagnosed with PTSD, ODD, ADHD, [and] Autism Spectrum Disorder. [Alexander] was taunted by the adults in the home and his behavior escalated into a physical altercation between [Alexander] and the other minor children. [Alexander] is eligible to be placed in a Level II Therapeutic Foster Care based on his mental health issues, however, the parents have not made themselves available to sign the necessary forms to facilitate that move.

Later reports also identified Maria and Patricia as possible victims of sexual assault by a non-relative.

DSS investigated and assessed whether the cousin was an acceptable placement for the children and whether any other relatives were available for placement. The cousin caring for the children admitted to the social worker that she suffered from multiple sclerosis, anxiety, and depression, and could not work or adequately care for the children. McDowell County DSS attempted to reach Mother, who was living in Summerton, South Carolina, at the time. Mother failed to respond. Social workers also reached out to Father to identify another potential guardian for the children. Father explained he "had no one" else and stated: "I guess do what you need to do."

The court adjudicated the four children as neglected and dependent and placed them into DSS custody on 24 March 2020. An Adjudication Order was entered on 11 June 2020, and it required Mother and Father to "aggressively comply" with the following case plan requirements: (1) complete a Comprehensive Clinical Assessment, follow all service recommendations, and demonstrate benefit from the service recommendations; (2) submit to random drug screenings as requested by DSS and produce negative results; (3) maintain appropriate housing, employment or income, and transportation; and, (4) consistently visit with the children.

Several permanency planning review hearings were held between March 2020 and August 2022, including hearings on 27 August 2020, 22 October 2020, and 27 May 2021. Permanency planning review hearings were scheduled for 14 October 2021 and 18 November 2021, but those hearings were rescheduled because the evaluation of Father's new

residence in California had not been completed. Another permanency planning hearing scheduled for 9 December 2021 was rescheduled because the social worker was sick. A permanency planning hearing was held on 20 January 2022, which changed the primary permanent plan for each of the minor children to adoption with a secondary plan of reunification.

Mother and Father put minimal efforts into completing their case plans, did not cooperate with DSS, and did not regularly visit with their children between the time the children were taken into DSS custody in March 2020 and the hearing to terminate Mother's and Father's parental rights in August 2022. Father tested positive for several drugs, including cocaine, methamphetamine, amphetamines, and THC. Mother tested positive for amphetamines, methamphetamine, cocaine, cannabinoids, benzoylecgonine, and norcocaine, and she also admitted to using heroin.

Father avoided contact with DSS, and at one point hung up the phone on a social worker. Mother would reply to text messages, but she refused to reveal her whereabouts, where she was living, and evaded being served with motions. Lastly, both Mother and Father rarely and sporadically visited with their children throughout the more than two-year period while in DSS' custody.

A motion to terminate parental rights was filed on 11 August 2022, and an amended motion was later filed on 11 October 2022. DSS sought to terminate Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(6) (2023) and to terminate Father's parental rights pursuant to N.C. Gen. Stat § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(7). The court terminated Mother's and Father's parental rights pursuant to each of the respective grounds as alleged in DSS' petitions on 19 January 2023. Father did not appeal.

Mother filed notice of appeal on 22 February 2023.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 7B-1001(a)(7) (2023).

III. Issues

Mother argues the trial court erred by concluding grounds existed to terminate her parental rights according to N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(6). She also argues the available transcript, which was inaudible for certain portions due to technological errors, is inadequate to provide meaningful appellate review.

IV. Termination of Parental Rights

[1] "[A]n adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. . . . [I]f this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted).

A. Standard of Review

"We review a trial court's adjudication [to terminate parental rights] under N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation and internal quotation marks omitted). "The trial court's supported findings are deemed conclusive even if the record contains evidence that would support a contrary finding." *In re L.D.*, 380 N.C. 766, 770, 869 S.E.2d 667, 671 (2022) (citation and internal quotation marks omitted).

Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)).

In a termination of parental rights hearing, "[t]he burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2023). When a challenged finding of fact is not necessary to support a trial court's conclusions, those findings "need not be reviewed on appeal." *See In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (citation omitted).

B. Analysis

Courts may terminate a parent's rights to the care, custody, and control of their child when certain limited, statutorily-defined grounds exist. A court may terminate parental rights if the evidence and findings clearly and convincingly demonstrate:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made

> in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2).

Our Supreme Court has outlined the analysis trial courts must perform before terminating a parent's parental rights pursuant to this ground:

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, *and* (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (emphasis supplied) (citation omitted).

"[A] respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." *In re J.W.*, 173 N.C. App. 450, 465-66, 619 S.E.2d 534, 545 (2005) (citation and internal quotation marks omitted). "Leaving a child in foster care or placement outside the home is willful when a parent has the ability to show reasonable progress, but is unwilling to make the effort." *In re A.J.P.*, 375 N.C. 516, 525, 849 S.E.2d 839, 848 (2020) (citation, internal quotation marks, and alterations omitted).

Our Supreme Court stated:

> Parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2). However, in order for a respondent's noncompliance with her case plan to support the termination of her parental rights, there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home.

In re J.S., 374 N.C. at 815-16, 845 S.E.2d at 71 (citation, internal quotation marks, and alterations omitted).

The Supreme Court further explained a parent's non-compliance with case plan conditions are relevant, "provided that the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." *In re T.M.L.*, 377 N.C. 369, 379, 856 S.E.2d 785, 793 (2021) (citation and quotation marks omitted).

Here, the children were removed from Mother's and Father's care for their failure to: create a safe living environment for their children; to refrain from illegally using controlled substances; and, to find a suitable guardian while they traveled to carnivals in various states. Mother failed to address and remedy each of these concerns.

Mother has consistently struggled to adequately address her substance abuse issues. While Mother attended a detoxification program for one week in August 2020, she continued to test positive for the presence of controlled substances afterwards. In December 2020, Mother tested positive for the presence in her body of amphetamines, methamphetamines, cocaine, cannabinoids, benzoylecgonine, and norcocaine. Mother later attended some group substance abuse sessions in March of 2021. Despite those group sessions, Mother continued to refuse drug tests and screens throughout the life of this case; and on the occasions when she did comply with the random drug screens, she always tested positive.

Mother also failed to comply with the portions of her case plan requiring her to create a safe living environment for her children. As of the date of the termination of parental rights hearing, Mother was homeless and had been so for several months. When social workers attempted to serve Mother with motions to terminate her parental rights, she revealed she was temporarily working in Coney Island, but refused to reveal her exact whereabouts. If her children were not in her care while traveling for work, Mother failed to provide DSS with any information about the identity of where they would reside or who the children would stay with.

The trial court also explained Mother's incapability to parent was willful and would likely continue into the future, given her "failure to refrain from substance abuse", and given she "has not engaged in any meaningful treatment." In other words, "the objectives sought to be achieved by the case plan provision in question address issues that

contributed to causing the problematic circumstances that led to the juvenile[s'] removal from the parental home." *Id*. The trial court did not err by terminating Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

V. Transcript

[2] Mother cites the section of the Juvenile Code regarding the recordation of juvenile proceedings, which provides: "All adjudicatory and dispositional hearings shall be recorded by stenographic notes or by electronic or mechanical means. Records shall be reduced to a written transcript only when timely notice of appeal has been given." N.C. Gen. Stat. § 7B-806 (2023).

An appellant bears the burden to "commence settlement of the record on appeal, including providing a verbatim transcript if available." *Sen Li v. Zhou*, 252 N.C. App. 22, 27, 797 S.E.2d 520, 524 (2017). "Where the appellant has done all that she can to do so, but those efforts fail because of some error on the part of our trial courts, it would be inequitable to simply conclude that the mere absence of the recordings indicates the failure of appellant to fulfill that responsibility." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (1998).

This Court has previously explained: the "unavailability of a verbatim transcript does not automatically constitute error. To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006). In addition, "violation of the statute [requiring recording] does not relieve defendant of her burden of complying with App. R. 9(a)(1)(v) and showing prejudicial error." *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988) (first citing an earlier version of N.C. R. App. P. 9(a)(1)(e); and then citing *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981)).

In child custody cases, this Court has explained:

> [O]nly where a trial transcript is entirely inaccurate and inadequate, precluding formulation of an adequate record and thus preventing appropriate appellate review[,] would a new trial be required. Where the transcript, despite its imperfections, is not so inaccurate as to prevent meaningful review by this Court, the assertion that the recordation of juvenile court proceedings are inadequate to protect juvenile's rights is properly overruled.

In re Hartsock, 158 N.C. App. 287, 293, 580 S.E.2d 395, 399 (2003) (citations, internal quotation marks, and alterations omitted).

Respondent, working together with DSS' counsel and the Guardian Ad Litem's counsel, developed a purported narrative of proceedings. The introduction to the narrative explained the portions of the hearing the transcriptionist was able to decipher from the recordings were "inadequate for the parties to designate that the transcript would be used to present testimonial evidence and statements occurring at the hearing." Further, the narrative introduction explained the history of how both parties addressed the missing segments and settled upon the narration provided on appeal:

> On 8 June 2023, respondent's counsel served petitioner's counsel and GAL counsel with a redlined version of the transcript, reflecting what respondent's counsel could hear when listening to the audio file. On 23 June 2023, GAL counsel suggested changes to the annotations. Respondent's counsel accepted those changes on 7 July 2023. On that same date and 13 July 2023, Respondent's counsel circulated a proposed narrative of proceedings. The parties agree that the following shall serve as a narrative of the proceedings that occurred on 19 January 2023 pursuant to N.C. R. App. P. 9(c)(1). It is not a verbatim or complete transcript. The parties further agree that the narrative best presents the true sense of the testimonial evidence, statements made, and events occurring at the TPR hearing concisely and at a minimum of expense to the litigants.

Mother argues the available narrative of proceedings is inadequate to resolve whether sufficient findings support the likelihood of adoption of Maria, Matthew, and Patricia, which is a required factor in the best interest determination. However, the trial court also took judicial notice of all prior orders and reports from the underlying juvenile orders.

Mother has failed to demonstrate the narrative prepared for appeal, coupled with the prior orders and reports from previous permanency planning hearings, were "entirely inaccurate and inadequate" or otherwise "preclud[ed] formulation of an adequate record and thus prevent[ed] appropriate appellate review." *In re Hartsock*, 158 N.C. App. at 293, 580 S.E.2d at 399 (citation and internal quotation marks omitted). Mother's argument is without merit and overruled.

VI. Conclusion

Respondent's parental rights were properly terminated under N.C. Gen. Stat. § 7B-1111(a)(2). *See In re T.M.L.*, 377 N.C. at 379, 856 S.E.2d at 793. We need not address Respondent's remaining arguments on appeal regarding grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (3), and (6). *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71.

Mother has failed to demonstrate prejudice stemming from the inadequacy or the unavailability of portions of the trial court transcript. Mother has not demonstrated any inaccuracies in the provided and agreed-upon narration or explained how the provided information precluded appellate review. *See In re Hartsock*, 158 N.C. App. at 293, 580 S.E.2d at 399. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); NAACP ALAMANCE COUNTY BRANCH #5368; DOWN HOME NC; ENGAGE ALAMANCE; DREAMA CALDWELL; TAMARA KERSEY; REVEREND DOCTOR DANIEL KUHN; REVEREND RANDY ORWIG; AND MARYANNE SHANAHAN, PLAINTIFFS

v.

ALAMANCE COUNTY; ALAMANCE COUNTY BOARD OF COMMISSIONERS; AND COMMISSIONERS STEVE CARTER, WILLIAM LASHLEY, PAMELA T. THOMPSON, JOHN PAISLEY, AND CRAIG TURNER, JR., IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. COA23-262

Filed 19 March 2024

1. Counties—authority—removal of Confederate monument—monument protection law

In a civil action seeking the removal of a Confederate monument located outside of a county courthouse, the trial court properly granted summary judgment for the county, its board of commissioners, and multiple commissioners in their official capacities (collectively, defendants) because they lacked authority to remove the monument under N.C.G.S. § 100-2.1, which limits the circumstances under which an "object of remembrance" may be removed. The monument at issue met the definition of an "object of remembrance," and neither of the two enumerated scenarios where the

statute allowed for relocation of the monument were applicable in this case. Further, although section 100-2.1 does not apply to monuments that a "building inspector or similar official" has determined poses a threat to public safety, the building inspector exception did not apply here because the county manager who contacted defendants about removing the monument was not a "similar official" to a building inspector.

2. Constitutional Law—North Carolina—monument protection law—as-applied challenge—county's refusal to remove Confederate monument

In a civil action seeking the removal of a Confederate monument located outside of a county courthouse, the trial court properly granted summary judgment for the county, its board of commissioners, and multiple commissioners in their official capacities (collectively, defendants) where defendants did not violate the state constitution by maintaining the monument pursuant to a monument protection statute (N.C.G.S. § 100-2.1), and therefore the statute was constitutional as applied in the case. First, defendants did not violate the Equal Protection Clause because, regardless of any potential discriminatory intent on their part, defendants could not have relocated the monument anyway because they lacked authority under section 100-2.1 to do so. Second, defendants did not violate N.C. Const. art. V, § 2(7) (permitting counties to appropriate taxpayer money to accomplish "public purposes only") by spending taxpayer funds on law enforcement's response to protests at the monument and on the erection of a fence around the monument, since expenditures for public safety and the protection of county-owned property served public purposes. Finally, defendants did not violate the Open Courts Clause where plaintiffs failed to show that they were deprived of public access to legal proceedings by virtue of the monument's presence, even if offensive to some, in front of the courthouse.

Appeal by plaintiffs from order entered 5 October 2022 by Judge Forrest Donald Bridges in Alamance County Superior Court. Heard in the Court of Appeals 14 November 2023.

Wilmer Cutler Pickering Hale & Dorr LLP, by Ronald C. Machen, Jr., Karin Dryhurst, Mark C. Fleming, and Marissa M. Wenzel; The Paynter Law Firm, PLLC, by Stuart M. Paynter, Gagan Gupta,

and Sara Willingham; and Tin, Fulton, Walker & Owen, PLLC, by Abraham Rubert-Schewel, for Plaintiffs-Appellants.

Teague, Campbell, Dennis & Gorham, L.L.P., by Natalia K. Isenberg; and Womble, Bond, Dickinson (US) LLP, by Christopher J. Geis, for Defendants-Appellees.

DILLON, Chief Judge.

This appeal arises from a dispute concerning the presence of a Confederate monument outside a county courthouse.

I. Background

The monument at issue is located in front of the Alamance County courthouse in Graham and depicts an archetypal Alamance County infantry soldier serving the Confederacy during the Civil War (the "Monument").

In the summer of 2020, there was an increase in protests nationwide against the presence of Confederate monuments in public squares. On 30 March 2021, the North Carolina State Conference of the NAACP, the Alamance County branch of the NAACP, Down Home NC, Engage Alamance, and several individuals (collectively, "Plaintiffs") commenced this suit against Alamance County, the Alamance County Board of Commissioners, and multiple commissioners in their official capacities (collectively, "Defendants"). Plaintiffs assert Defendants' maintenance and protection of the Monument is unconstitutional. Consequently, they demand the Monument be moved from its current location in front of the courthouse to a "historically appropriate location."

The parties filed cross-motions for summary judgment. After a hearing on the matter, the trial court entered an order granting Defendants' motion for summary judgment. Plaintiffs appeal.

II. Analysis

On appeal, Plaintiffs argue that Defendants acted and are acting unconstitutionally by maintaining and protecting the Monument in its current location in front of the courthouse and refusing to remove the Monument to another location. For the reasoning below, we conclude that Defendants lack authority from our General Assembly to remove the Monument based on N.C. Gen. Stat. § 100-2.1 (the "Monument Protection Law" or the "Law") and that the Monument Protection Law as applied in this dispute is constitutional. We, therefore, affirm the order of the trial court granting Defendants summary judgment.

A. Defendants Lack Authority Under the Monument Protection Law

[1] Our Court reviews questions of statutory interpretation *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009). Additionally,

> [w]hen a court engages in statutory interpretation, the principal goal is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, "the spirit of the act and what the act seeks to accomplish." If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

McAuley v. N.C. A&T State Univ., 383 N.C. 343, 347, 881 S.E.2d 141, 144 (2022) (cleaned up).

Subsection (b) of the Monument Protection Law provides that "[a]n object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection." N.C. Gen. Stat. § 100-2.1(b) (2023). An "object of remembrance" is defined as "a monument . . . that commemorates an event, a person, or military service that is part of North Carolina's history." *Id.*

The record conclusively shows that the Monument is a monument located on public property which commemorates military service that is part of North Carolina's history. In so concluding, we note our federal government recognizes that service in the Confederate Army qualifies as "military service." *See* 38 U.S.C. § 1501 ("The term 'Civil War veteran' includes a person who served in the military or naval forces of the Confederate States of America during the Civil War"); *Id.* § 1532 (allowing surviving spouses of Confederate soldiers to qualify as surviving spouses of Civil War veterans for receiving pensions). We further note that North Carolina recognizes "Confederate Memorial Day" as a legal public holiday. N.C. Gen. Stat. § 103-4(a)(5) (2023). Thus, we conclude as a matter of law that the Monument was of the type intended to be covered by the General Assembly when it enacted the Monument Protection Law.

And for the reasoning below, we conclude that, under the Monument Protection Law, Defendants lack authority to remove the Monument.

None of the statutory exceptions to the Monument Protection Law, set forth in subsection (c) of the Law, apply in the present case. Indeed, the Monument Protection Law provides four exceptions to the Law's application. *Id.* § 100-2.1(c)(1)–(4). The only exception potentially applicable here is the building inspector exception, which exempts an object of remembrance from the limitations of the statute if "a building inspector or similar official has determined [the object of remembrance] poses a threat to public safety because of an unsafe or dangerous condition." *Id.* § 100-2.1(c)(3). The building inspector exception only gives discretion to a "building inspector or similar official" to determine whether a monument poses a safety threat. Building inspectors' duties include the enforcement of laws regarding the following: building construction; installation of plumbing, electric, heating, refrigeration, and air-conditioning systems; and "maintenance of buildings and other structures in a safe, sanitary, and healthful condition." N.C. Gen. Stat. § 160D-1104(a)(1)–(3) (2023). On its face, the building inspector exception is intended to allow for removal only when there are *structural concerns* about a monument that could endanger the public, such as when a monument is at risk of toppling over due to faulty design.

Here, Plaintiffs argue that Alamance County's county manager should have qualified as a "similar official" under the building inspector exception. On 20 June 2020, during the wave of protests in summer 2020, the county manager emailed the commissioners, asking them to consider removing the Monument. He was concerned about the safety of people protesting at the Monument, both protesters attending in favor of and in opposition to the Monument.[1]

In contrast to a building inspector's role, a county manager's role is a managerial role. *See* N.C. Gen. Stat. § 153A-82 (2023). Specifically, the county manager is "the chief administrator of county government" whose duties include, among others, the following: supervision of county offices, departments, boards, commissions, and agencies; attendance at meetings of the board of commissioners; ensurance that the board of commissioners' orders, ordinances, resolutions, and regulations are faithfully executed; and preparation of the annual budget. *Id.*

Because the county manager is not a "similar official" to a building inspector, we conclude the building inspector exception does not apply to the county manager in this case. Accordingly, the trial court

1. The county manager did not consult with the county attorney before sending this email and was unaware that the Law would prohibit removal of the Monument.

correctly determined that no exceptions applied to allow for removal of the Monument.

Having determined that the Monument Protection Law applies to the Monument, we consider whether the Law authorizes Defendants to remove the Monument. Subsection (b) of the Law provides two circumstances under which an object of remembrance may be relocated, namely (1) "[w]hen appropriate measures are required by the State or a political subdivision of the State to preserve the object" or (2) "[w]hen necessary for construction, renovation, or configuration of buildings, open spaces, parking, or transportation projects." N.C. Gen. Stat. § 100-2.1(b)(1)–(2). However, there is nothing in the record showing that either circumstance applies to the Monument. Accordingly, we conclude the General Assembly has not clothed Defendants with authority to remove the Monument under the facts of this case.

B. North Carolina Constitution

[2] Plaintiffs contend the trial court erred "by holding that a statute could excuse violations of the North Carolina Constitution" because Defendants violate multiple provisions of the North Carolina Constitution by "maintaining and protecting a symbol of white supremacy in front of an active courthouse at the center of town."

Plaintiffs bring an as-applied—rather than a facial—constitutional challenge of the statute. "[A]n as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context." *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (citation omitted).

Plaintiffs argue there are material disputes of fact regarding these constitutional claims that could not be decided at summary judgment and warranted a trial. We disagree with Plaintiffs and conclude that Plaintiffs' constitutional claims were appropriately decided as matters of law at the summary judgment stage.

As a preliminary matter, Plaintiffs correctly note that a statute cannot excuse constitutional violations because our state constitution governs as "the supreme law of the land." *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944). However, as discussed below, there are no constitutional violations here that the statute would be excusing.

1. Equal Protection Clause

First, Plaintiffs argue there was discriminatory intent behind Defendants' decision not to move the Monument, in violation of the Equal Protection Clause.

Our state constitution's Equal Protection Clause states that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

In their brief, Plaintiffs invoke the *Arlington Heights* analysis for determining whether discriminatory intent was a motivating factor in Defendants' decision. *See id.* at 265–68. However, Defendants' intent in not relocating the Monument is irrelevant in this case. Even if some of the Defendants had a discriminatory intent, as alleged by Plaintiffs, that intent was not the reason that the Monument has remained in front of the courthouse—the Monument has remained in place *because the Monument Protection Law forbids Defendants from moving the Monument.*

As a county, Alamance County (and, thus, its Board of Commissioners) can only act within the boundaries set forth by the General Assembly. *See High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965) (noting that counties "possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them."). Under the Monument Protection Law, the County has no authority to move the Monument. Regardless of some commission members' comments or misunderstandings of their legal ability to move the Monument, the rule of law does not change. At all times, the Monument Protection Law has required the County to leave the Monument in its current place. Defendants' hands are tied—even if they wanted to move the Monument, they could not.

The General Assembly (under N.C. Const. art. VII, § 1) has authority to grant and rescind counties' powers. However, Plaintiffs did not sue the legislature, which is the entity with the authority to alter the power given to counties to relocate monuments under the Monument Protection Law.

Thus, we conclude Defendants did not violate the Equal Protection Clause by failing to move the Monument.

B. Alleged Misuse of Taxpayer Money

Next, Plaintiffs argue that Defendants' expenditures violate the constitutional provision that counties may appropriate money "for the accomplishment of public purposes only." N.C. Const. art. V, § 2(7).

"The term 'public purpose' is not to be narrowly construed. It is not necessary that a particular use benefit every citizen in the community to be labeled a public purpose." *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (citation omitted). "Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose." *Haugh v. Cnty. of Durham*, 208 N.C. App. 304, 315, 702 S.E.2d 814, 822 (2010). "A tax or an appropriation is certainly for a public purpose if it is for the support of government, or for any of the recognized objects of government." *Green v. Kitchin*, 229 N.C. 450, 455, 50 S.E.2d 545, 549 (1948). "[C]ourts will not interfere with the exercise of discretionary powers conferred on [a local government] for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Id.* at 459, 50 S.E.2d at 551.

Here, Defendants spent funds on the law enforcement response to protests at the Monument and on the erection of a fence to protect the Monument. There is no doubt that expenditures for public safety and protection of county-owned property serve a public purpose. Public safety is a primary objective of local government, as carried out by law enforcement, and supports the county's general welfare by maintaining a safe environment for the community. And preventing damage to county-owned property saves the county from paying for repairs later on when the property is damaged. Further, the General Assembly explicitly allows a board of county commissioners "to expend from the public funds of the county an amount sufficient to erect a substantial iron fence" to protect monuments "erected to the memory of our Confederate dead[,]" N.C. Gen. Stat. § 100-9 (2023), indicating that the General Assembly sees this property protection as a public purpose.

Accordingly, it was not an abuse of discretion for Defendants to make such expenditures and no constitutional rights were violated.

C. Open Courts Clause

Finally, Plaintiffs argue that Defendants violate North Carolina's Open Courts Clause by their "maintenance of the Monument outside the courthouse [which] conveys the appearance of judicial prejudice because it broadcasts officially sanctioned racial degradation[.]"

The Open Courts Clause of the North Carolina Constitution instructs that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18.

This Clause was added to the North Carolina Declaration of Rights in 1868. Our Supreme Court has interpreted this provision to require members of the public access to legal proceedings so they can "see and hear what goes on in the courts." *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999). We conclude that the Open Courts Clause does not prohibit the placement of an object of historical remembrance in or around a courthouse, though some may find offense. Indeed, in many courthouses and other government buildings across our State and nation, there are depictions of historical individuals who held certain views in their time many today would find offensive.

In this case, Plaintiffs fail to show they are denied the Clause's guarantees. They do not contend that the Alamance County courthouse is not regularly in session or that legal remedies are being withheld, nor do they contend that trials are closed to the public or that criminal defendants are denied speedy trials. Therefore, we conclude Defendants did not violate the Open Courts Clause.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment to Defendants.

AFFIRMED.

Judges STROUD and ZACHARY concur.

PERRYMAN v. TOWN OF SUMMERFIELD

[293 N.C. App. 116 (2024)]

TERESA W. PERRYMAN AND DANNY B. NELSON, BOTH INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE TOWN OF SUMMERFIELD THROUGH THEIR STANDING AS TAXPAYERS OF THE TOWN OF SUMMERFIELD, PLAINTIFFS

v.

TOWN OF SUMMERFIELD; C. DIANNE LAUGHLIN, INDIVIDUALLY AND IN HER FORMER OFFICIAL CAPACITY AS TOWN OF SUMMERFIELD COUNCIL MEMBER; DENA H. BARNES, INDIVIDUALLY AND IN HER FORMER OFFICIAL CAPACITY AS TOWN OF SUMMERFIELD COUNCIL MEMBER; JOHN W. O'DAY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TOWN OF SUMMERFIELD COUNCIL MEMBER; E. REECE WALKER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TOWN OF SUMMERFIELD COUNCIL MEMBER; NELSON MULLINS RILEY & SCARBOROUGH LLP; AND FRAZIER, HILL AND FURY, RLLP, DEFENDANTS

No. COA23-40

Filed 19 March 2024

1. Civil Procedure—motion to dismiss—lack of standing—dependent on merits of motion to dismiss for failure to state a claim

In an action for declaratory and injunctive relief filed against a town and its council members (defendants) by two residents (plaintiffs), who alleged that the town had illegally appropriated taxpayer money to fund a council member's legal defense in a quo warranto action, the appellate court declined to address whether plaintiffs sufficiently alleged their standing as taxpayers to bring their claim and to survive defendants' Rule 12(b)(1) motion to dismiss where, in order to determine whether plaintiffs adequately alleged an infringement of a legal right necessary to establish standing, the appellate court needed to address the merits of defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. Thus, the court decided the appeal based on its Rule 12(b)(6) analysis of plaintiffs' substantive claims.

2. Cities and Towns—failure to state a claim—challenge to town's use of taxpayer money—not illegal—claim barred by collateral estoppel and res judicata

In an action for declaratory and injunctive relief filed against a town and its council members (defendants), where two residents (plaintiffs) alleged that the town violated N.C.G.S. § 1-521 by using taxpayer money to fund a council member's legal defense in a quo warranto action, the trial court properly granted defendants' motion to dismiss the action for failure to state a claim. First, the town did not violate section 1-521's prohibition against appropriating tax funds to defend against a quo warranto action because, here, the purported quo warranto action was not a true quo warranto action but rather an impermissible collateral attack on judicial determinations made

in prior lawsuits. Second, because one of the plaintiffs had already filed a lawsuit against the town that raised the same cause of action and the exact same issue, and because the dismissal of that suit with prejudice under Rule 12(b)(6) operated as a final judgment on the merits, plaintiffs' claims were barred under both collateral estoppel and res judicata principles.

Appeal by Plaintiffs from Order entered 26 May 2022 by Judge Mark E. Klass in Guilford County Superior Court. Heard in the Court of Appeals 26 October 2023.

Rossabi Law Partners, by Gavin J. Reardon, for Plaintiffs-Appellants.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus and G. Gray Wilson, for Defendants-Appellees Town of Summerfield, C. Dianne Laughlin, Dena H. Barnes, John W. O'Day, and E. Reece Walker.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell Jr., for Defendant-Appellee Nelson Mullins Riley & Scarborough LLP.

HAMPSON, Judge.

Factual and Procedural Background

Teresa W. Perryman and Danny B. Nelson (Plaintiffs) appeal from an Order dismissing their Complaint against the Town of Summerfield (the Town), C. Dianne Laughlin, Dena H. Barnes, John W. O'Day, E. Reece Walker (collectively, the Town Defendants), and Nelson Mullins Riley & Scarborough LLP (Law Firm Defendant). The Record before us reflects the following:

On 7 January 2022, Plaintiffs filed a Complaint against the Town Defendants, Law Firm Defendant, and Frazier, Hill and Fury, RLLP (Frazier Hill) (collectively, Defendants).[1] Plaintiffs' Complaint sought declaratory and injunctive relief along with disgorgement of attorney fees paid by the Town to the Law Firm Defendant and Frazier Hill arising from allegations the Town Defendants had appropriated Town

1. As noted below, Plaintiffs voluntarily dismissed their claims against Frazier, Hill and Fury, RLLP and, thus, it is not a party to this appeal.

funds for the defense of a *quo warranto* action in contravention of N.C. Gen. Stat. § 1-521.

The Complaint alleged Todd Rotruck—a non-party to this action—was elected to the Town's Council in November 2017. However, in April 2018, following a voter challenge, the Guilford County Board of Elections determined Rotruck was not an eligible voter in the Town. The Complaint further alleged that following his subsequent removal from the Town Council, Rotruck filed two lawsuits. The first was filed against the Town challenging his removal from the Council and seeking reinstatement by writ of mandamus. This case was dismissed with prejudice and Rotruck did not appeal. The second was against the Guilford County Board of Elections challenging its determination Rotruck was an ineligible voter in Summerfield. The trial court in that action affirmed the Board of Elections' decision. Rotruck did appeal this ruling and this Court affirmed the trial court's decision. *Rotruck v. Guilford Cnty. Bd. of Elections*, 267 N.C. App. 260, 833 S.E.2d 345 (2019). In October 2018, the Town Council voted to appoint Dianne Laughlin (Laughlin) to the seat previously held by Rotruck.

The Complaint further alleged Rotruck commenced a third action—this time captioned as a *quo warranto* action—in which Rotruck, as a relator nominally on behalf of the State, sought to challenge Laughlin's appointment to the Council (the Quo Warranto Action). On 15 February 2019, the trial court in the Quo Warranto Action entered an order staying the proceeding pending the outcome of Rotruck's appeal to this Court in his action against the Guilford County Board of Elections. Rotruck would eventually dismiss the Quo Warranto Action in January 2020.[2]

The Complaint also alleged a fourth related lawsuit—this time by a group of individuals including J. Dwayne Crawford and Plaintiff Nelson[3]—filed in May 2019 (the Crawford Lawsuit). This fourth suit challenged the Town's use of funds to pay attorney fees for Laughlin's defense of the Quo Warranto Action filed by Rotruck. In January 2020, the trial court in the Crawford Lawsuit dismissed the action. This Court subsequently affirmed the dismissal of the Crawford Lawsuit. *Crawford v. Town of Summerfield*, 276 N.C. App. 275, 855 S.E.2d 301 (2021) (unpublished).

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2. The dismissal followed this Court's affirmance of the trial court's decision in Rotruck's action against the Board of Elections.

3. Nelson took a voluntary dismissal in the Crawford Lawsuit.

The Complaint in the case *sub judice* again challenged the Town's alleged expenditure of funds to pay attorney fees in the Quo Warranto Action under N.C. Gen. Stat. § 1-521. The Complaint alleged Plaintiffs had standing to challenge the expenditures as taxpayers to the Town. The Complaint further alleged the Town Council members themselves should be held liable in both their official and individual capacities. With respect to the Law Firm Defendant and Frazier Hill, the Complaint alleged each should be ordered liable for the fees paid to them in defense of the Quo Warranto Action.

On 14 March 2022, the Town Defendants and the Law Firm Defendant each filed Motions to Dismiss the Complaint. Both Motions alleged the Complaint should be dismissed under Rules 12(b)(1), (6), and (7) of the North Carolina Rules of Civil Procedure. In summary, the Motions alleged Plaintiffs lacked standing to challenge the use of Town funds; the present action was barred by issue preclusion and collateral estoppel arising from the Crawford Lawsuit; the Quo Warranto Action was not, in fact, a *quo warranto* action but merely an effort to improperly relitigate issues already decided in the two earlier suits by Rotruck against the Town and the Board of Elections; the Complaint was barred by the statute of limitations; and Plaintiffs failed to join Rotruck as a real party in interest. In addition, the Law Firm Defendant alleged the claim for disgorgement should be dismissed as there was no separate claim recognized for disgorgement outside of the contractual relationship and Plaintiffs were not parties to any contract with the Law Firm Defendant.

The Motions to Dismiss were heard on 25 April 2022 in Guilford County Superior Court. The same day, Plaintiffs voluntarily dismissed Frazier Hill from this action. At the hearing, the remaining Defendants asked the trial court to take judicial notice of the contents of the court files in the two lawsuits filed by Rotruck, the Quo Warranto Action, and the Crawford Lawsuit.

On 26 May 2022, the trial court entered its Order granting the Motions to Dismiss. In its Order, the trial court took judicial notice of the trial and appellate filings in the two actions filed by Rotruck, the Quo Warranto Action, and the Crawford Lawsuit. The trial court made Findings of Fact for purposes of its consideration of Defendants' Motions under Rule 12(b)(1), relying in part on the order dismissing the prior Crawford Lawsuit, noting that even if not binding, the order was persuasive. The trial court noted: "The Guilford County Superior Court has previously considered the Town Defendants' position that the Town's payments pursuant to the fee agreement were authorized by N.C. Gen. Stat. §160A-167(a) and not in contravention of N.C. Gen.

Stat. § 1-521. In the Crawford Lawsuit, Judge Hall ruled in the Town Defendants' favor on that issue." The trial court further noted that this Court affirmed the order in the Crawford Lawsuit. The trial court ruled Plaintiffs had failed to establish standing to bring the lawsuit. Separately, the trial court considered Defendants' Motions under Rule 12(b)(6) and determined that, even assuming Plaintiffs had standing, the Complaint should be dismissed for failure to state a claim upon which relief could be granted. In so doing, the trial court rejected Plaintiffs' request for findings of fact and conclusions of law as inconsistent with Rule 12(b)(6). The trial court dismissed Plaintiffs' Complaint with prejudice under both Rules 12(b)(1) and (6).

On 24 June 2022, Plaintiffs timely filed Notice of Appeal from the trial court's Order. On 24 October 2023, prior to oral argument in this matter, Plaintiffs filed a Motion to Dismiss Appeal against Law Firm Defendant. We allow the Motion to Dismiss the Appeal against Law Firm Defendant. The trial court's Order as to the dismissal of the Law Firm Defendant is now unchallenged and remains undisturbed. We therefore limit our discussion of the trial court's Order to the dismissal of the Town Defendants.

Issues

The dispositive issues on appeal are whether: (I) Plaintiffs had standing as taxpayers to challenge the Town's allegedly improper expenditures of tax funds to pay attorney fees for Laughlin in the Quo Warranto Action; and (II) the trial court properly dismissed the Complaint against the Town Defendants for failure to state a claim under Rule 12(b)(6).

Analysis

In this case, the trial court dismissed Plaintiffs' Complaint under Rules 12(b)(1)—for lack of standing—and 12(b)(6)—for failure to state a claim upon which relief may be granted. "The standard of review on a motion to dismiss under Rule 12(b)(1) is de novo." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011). "On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts 'a de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.' " *Hendrix v. Town of W. Jefferson*, 273 N.C. App. 27, 31, 847 S.E.2d 903, 906 (2020) (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003)).

I. Taxpayer Standing

[1] Here, Plaintiffs first contend they sufficiently alleged standing as taxpayers to bring their Complaint and to survive the Town Defendants' Motion to Dismiss under 12(b)(1). Plaintiffs alternatively contend they have derivative standing to bring the action on behalf of the Town's interests. Plaintiffs further argue the trial court erred in considering the merits of their action in its 12(b)(1) analysis.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation and quotation marks omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Est. of Apple v. Com. Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). "As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007). Standing may properly be challenged by a 12(b)(1) motion to dismiss. *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) ("[s]tanding concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss.").

"Standing to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (citation and quotation marks omitted). More recently, the North Carolina Supreme Court clarified, under North Carolina law, standing exists when a party alleges the infringement of a legal right under a valid cause of action. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608, 853 S.E.2d 698, 733 (2021). There, in relevant part, the Supreme Court explained:

> When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and

> the action is solely in the public interest, the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action.

Id.

"Generally, an individual taxpayer has no standing to bring a suit in the public interest." *Fuller*, 145 N.C. App. at 395, 553 S.E.2d at 46 (citing *Green v. Eure*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975)). However, the taxpayer may have standing if he can demonstrate:

> [A] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose[;] that the carrying out of [a] challenged provision will cause him to sustain personally, a direct and irreparable injury[;] or that he is a member of the class prejudiced by the operation of [a] statute.

Id. (quoting *Texfi Indus. v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979) (citations omitted)). "We recognized as early as the nineteenth century that taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials." *Goldston v. State*, 361 N.C. 26, 30-31, 637 S.E.2d 876, 879-80 (2006).

Here, the trial court expressly found for purposes of Rule 12(b)(1) Plaintiffs were taxpayers. The trial court also found Plaintiffs sought to challenge tax funds allegedly appropriated and expended to pay attorney fees in the Quo Warranto Action. Thus, Plaintiffs generally "have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials." *Goldston*, 361 N.C. at 30-31, 637 S.E.2d at 879-80. The trial court, however, determined Plaintiffs did not have taxpayer standing where the Crawford Lawsuit had previously decided the issue of the alleged payment of attorney fees in the Quo Warranto Action in the Town's favor. In effect, the trial court determined Plaintiffs failed to allege any infringement of a legal right to challenge the payments allegedly made by the Town. *See Comm. to Elect Dan Forest*, 376 N.C. at 608, 853 S.E.2d at 733. Recognizing "there is a fine line between the issue of standing and the issue of failure to state a claim[,]" we address the substantive allegations of Plaintiffs' Complaint under a 12(b)(6) analysis. *Texfi Indus., Inc.*, 44 N.C. App. at 269, 261 S.E.2d at 23. Considering our analysis here, we also do not reach the issue of whether Plaintiffs established derivative standing to bring a suit on behalf of the Town.

II. Failure to State a Claim

[2] A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted). "[A] motion to dismiss is properly granted when it appears that the law does not recognize the plaintiff's cause of action or provide a remedy for the alleged [cause of action]." *Brown v. Friday Servs., Inc.*, 119 N.C. App. 753, 755, 460 S.E.2d 356, 358 (1995). "When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). A Rule 12(b)(6) dismissal is proper where "the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

Moreover, documents attached to and incorporated into a complaint are properly considered as part of a Rule 12(b)(6) motion to dismiss. *Holton v. Holton*, 258 N.C. App. 408, 418-19, 813 S.E.2d 649, 657 (2018) (citing *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004)). "Additionally, a document that is the subject of a plaintiff's action that he or she specifically refers to in the complaint may be attached as an exhibit by the defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment." *Id.* at 419, 813 S.E.2d at 657.

Plaintiffs argue the trial court erred by dismissing their Complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Plaintiffs contend they stated a valid claim for declaratory and injunctive relief declaring the Town's payments of attorney fees in the Quo Warranto Action unlawful under N.C. Gen. Stat. § 1-521. Plaintiffs assert they alleged Rotruck brought a quo warranto action directly against Laughlin and the Town, therefore, was barred from appropriating attorney fees for Laughlin's defense under N.C. Gen. Stat. § 1-521.

Quo warranto actions in North Carolina are governed by Article 41 of Chapter 1 of the North Carolina General Statutes. Under N.C. Gen. Stat. § 1-515, quo warranto actions are generally brought by the Attorney General on behalf of the State, including in instances "[w]hen a person usurps, intrudes into, or unlawfully holds or exercises any public office[.]" N.C. Gen. Stat. § 1-515 (2021). However, a private party may bring a quo warranto action under Article 41 when "application is made to the Attorney General by a private relator to bring such an action[.]" N.C. Gen. Stat. § 1-516 (2021). N.C. Gen. Stat. § 1-521 provides for an

expedited trial procedure for quo warranto actions and further provides: "It is unlawful to appropriate any public funds to the payment of counsel fees in any such action." N.C. Gen. Stat. § 1-521 (2021).

Here, Plaintiffs allege Rotruck properly applied to the Attorney General and was granted leave to bring the Quo Warranto Action as a relator. Plaintiffs further allege the Town appropriated public funds to pay counsel fees on behalf of Laughlin in violation of Section 1-521. Indeed, this Court has recognized a separate declaratory judgment action claiming a violation of Section 1-521 is a viable method of bringing this claim. *State ex rel. Pollino v. Shkut*, 271 N.C. App. 272, 275, 843 S.E.2d 716, 719 (2020).

The Town Defendants counter, however, that the Complaint and documents properly considered at 12(b)(6) establish the Quo Warranto Action was itself nothing more than an impermissible collateral attack on prior court decisions, and, thus, in fact, not a valid quo warranto action. As such, the Town Defendants contend they were authorized to appropriate funds for the Quo Warranto Action and Plaintiffs' Complaint should fail as a matter of law.[4] The Town Defendants point to both Rotruck's prior actions against the Town and the Guilford County Board of Elections as well as the Quo Warranto Action and subsequent Crawford Lawsuit as barring Plaintiffs' Complaint. The Complaint contains allegations concerning the filing and outcomes in each of those actions and the trial court permissibly considered the documents filed in those actions—including Complaints in Rotruck's action against the Town, the Quo Warranto Action, and the Crawford Lawsuit; the orders dismissing each of those actions; and the stay order issued in the Quo Warranto Action—for purposes of Rule 12(b)(6). *See Holton*, 258 N.C. App. at 418-19, 813 S.E.2d at 657; *see also Stocum v. Oakley*, 185 N.C. App. 56, 61, 648 S.E.2d 227, 232 (2007) (trial court may take judicial notice of its own records in prior cases where it has relevance). Plaintiffs make no argument on appeal that the trial court erred in considering the materials from these prior lawsuits.

"A collateral attack is one in which a party is not entitled to the relief requested 'unless the judgment in another action is adjudicated invalid.' " *In re Webber*, 201 N.C. App. 212, 219, 689 S.E.2d 468, 474 (2009) (quoting *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005) (citation omitted)). " 'A collateral attack on a judicial proceeding is "an attempt to avoid, defeat, or evade it, or deny its force and effect, in

4. The Town Defendants assert payment of attorney fees was generally authorized by N.C. Gen. Stat. § 160A-167(a).

some incidental proceeding not provided by law for the express purpose of attacking it." ' " *Id.* (quoting *Reg'l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (citation omitted)). "Collateral attacks generally are not permitted under North Carolina law." *Id.*

Examination of the four prior actions alleged in the Complaint reveals several crucial points factoring into our analysis. First, Rotruck's action against the Town sought mandamus relief reversing his removal from the Town Council and a declaration his removal was invalid. This lawsuit was dismissed with prejudice pursuant to Rules 12(b)(1) and 12(b)(6). *See Hoots v. Pryor*, 106 N.C. App. 397, 404, 417 S.E.2d 269, 274 (1992) ("A dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice."). Second, in Rotruck's action seeking judicial review of the Guilford County Board of Elections, a Superior Court affirmed the determination of the Board of Elections that Rotruck was not an eligible voter residing in the Town—the basis of his removal from the Town Council. On appeal, this Court found "no merit to Plaintiff's arguments," and affirmed. *Rotruck*, 267 N.C. App. at 262, 833 S.E.2d at 347.

The Complaint in the Quo Warranto Action, in turn, alleged Rotruck was the rightful holder of the seat on the Town Council, that he was improperly removed, and the seat declared vacant. Thus, the Quo Warranto Action Complaint alleged Laughlin could not validly hold the seat. The Quo Warranto Action sought Rotruck's reinstatement to the Council. On 21 March 2019, the trial court in the Quo Warranto Action entered an order staying that action pending Rotruck's appeal against the Board of Elections. In relevant part, the court concluded Rotruck's first two suits against the Town and the Board of Elections "are binding on this [c]ourt, and thus operate as COLLATERAL ESTOPPEL and issue preclusion with respect to the claims brought and made in those actions." The trial court there further concluded: "That most, if not all, remedies that this [c]ourt could in equity entertain pursuant to Relator's claim for Quo Warranto would be inconsistent with the Orders of this [c]ourt . . . or be in express violation of the Orders of this [c]ourt[.]" The court in the Quo Warranto Action observed "proceeding with the present matter before decision of the North Carolina Court of Appeals . . . would subject the parties to the risk of inconsistent Judgments[.]" Rotruck subsequently voluntarily dismissed the Quo Warranto Action after this Court decided in favor of the Board of Elections.

Unquestionably, the Crawford Lawsuit raised the same claims against the Town Defendants as in the present case: a declaration

payment of Laughlin's attorney fees was unlawful under Section 1-521 and holding the Town Defendants liable for those fees. The trial court in the Crawford Lawsuit also dismissed that action under Rules 12(b)(1) and 12(b)(6) with prejudice. In so doing, the trial court determined allowing further amendment of the complaint in that case would be futile. The court concluded "that under the facts of this case, . . . the binding ruling of the North Carolina Courts relative to the underlying quo warranto action, as well as our [c]ourts' rulings in those actions entitled *Rotruck v. Guilford County Board of Elections* . . . and *Rotruck v. Summerfield Town Council* . . . demonstrate that [Laughlin] was indeed a duly appointed member of the Summerfield Town Council." The court further ruled Laughlin "is entitled to reimbursement for [counsel] fees, including expenses incurred for the defense of the quo warranto action pursuant to G.S. § 160A-167(a)." Additionally, the court expressly concluded "as a matter of law that the Town Council did not appropriate funds for the defense of an expedited trial pursuant to a quo warranto action as proscribed by G.S. § 1-521."

Here, for Rotruck to have been entitled to relief in the Quo Warranto Action, it would have required judgments in both his prior lawsuits against the Town and the Board of Elections to be invalidated. *See In re Webber*, 201 N.C. App. at 219, 689 S.E.2d at 474. The Quo Warranto Action would require a determination Rotruck was eligible to sit on the Council and that he should be reinstated—determinations that were conclusively made in those two prior actions. The Quo Warranto Action was plainly "an attempt to avoid, defeat, or evade . . . , or deny [the] force and effect" of the two prior failed actions in an incidental purported quo warranto proceeding. *Id.* Moreover, nothing in the quo warranto statutes provides a mechanism for attacking prior judicial determinations involving a party's claim to public office. *See id.* While Plaintiffs claim the Quo Warranto Action was narrowly focused only on Laughlin's right to hold office, this ignores the fact the entire basis of the action was Rotruck's already rejected claim he was improperly removed from office and had a right to that office instead of Lauglin. There was no contention in the Quo Warranto Action that Laughlin should be removed from the office for any other reason other than Rotruck's claim to the office. Rotruck's voluntary dismissal of the Quo Warranto Action following this Court's decision in *Rotruck v. Guilford County Board of Elections* is at least a tacit concession on his part that the Quo Warranto Action fell with the successful voter challenge.

Thus, in this case, Plaintiffs' Complaint and the documents referenced and properly considered at 12(b)(6) reveal the Quo Warranto

Action was not a valid quo warranto action under Article 41 of Chapter 1 of the General Statutes, but instead an impermissible collateral attack on prior conclusive judicial determinations. Therefore, on the facts of this case, Plaintiffs' Complaint failed to state a cause of action based on the allegedly unauthorized appropriation of counsel fees under Section 1-521. Consequently, the trial court did not err in dismissing Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Moreover, the Crawford Lawsuit bars the present Complaint under principles of either *res judicata* or collateral estoppel.

> [U]nder *res judicata* as traditionally applied, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. When the plaintiff prevails, his cause of action is said to have "merged" with the judgment; where defendant prevails, the judgment "bars" the plaintiff from further litigation. In either situation, all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded. Under collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies. Traditionally, courts limited the application of both doctrines to parties or those in privity with them by requiring so-called "mutuality of estoppel:" both parties had to be bound by the prior judgment.

Thomas M. McInnis & Assocs., Inc. v. Hall, 318 N.C. 421, 428-29, 349 S.E.2d 552, 556-57 (1986) (citations omitted).

Here, Plaintiffs in this case—asserting standing as Town residents and taxpayers to challenge the appropriation of funds by the Town—are in privity with the Crawford Lawsuit plaintiffs—who also asserted claims as Town residents and taxpayers. *See State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (" 'In general, "privity involves a person so identified in interest with another that he represents the same legal right" ' previously represented at trial.") (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996) (citation omitted)). Indeed, Plaintiff Nelson was originally a party to the Crawford Lawsuit.

The Crawford Lawsuit was dismissed under both Rule 12(b)(1) for lack of standing *and* Rule 12(b)(6) for failure to state a claim. The case was dismissed with prejudice because allowing a second amendment to the complaint in that case would have been futile precisely because the trial court there concluded plaintiffs' claim that the Town improperly appropriated funds for the defense of the Quo Warranto Action failed as a matter of law. This Court affirmed that dismissal. *Crawford*, 276 N.C. App. 275, 855 S.E.2d 301 (unpublished).

The dismissal in *Crawford* with prejudice under Rule 12(b)(6) operated as a final judgment on the merits. *See Hoots*, 106 N.C. App. at 404, 417 S.E.2d at 274. The Complaint in this case alleged the same cause of action against the Town Defendants. *Res Judicata* bars this second action against the Town Defendants. Likewise, even for purposes of collateral estoppel, the issue of whether the Crawford Lawsuit plaintiffs could bring a claim against the Town for appropriation of attorney fees in the Quo Warranto Action was actually litigated, decided, and necessary to the court's determination there to dismiss the case with prejudice resulting in a final judgment on the merits. Indeed, in affirming the trial court, this Court made no modification to the trial court's dismissal with prejudice. *Compare United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 650, 881 S.E.2d 32, 60 (2022) (vacating in part and remanding case for dismissal without prejudice and not with prejudice where dismissal was based solely on lack of subject matter jurisdiction).

Even if Plaintiffs have facially alleged a violation of § 1-521 by the Town Defendants, the Complaint on its face reveals a bar to Plaintiffs' claim arising by operation of the Crawford Lawsuit and the dismissal of Rotruck's prior actions, including the Quo Warranto Action. Thus, additionally, Plaintiffs' Complaint in this action is barred by *res judicata* and collateral estoppel by operation of the dismissal of the Crawford Lawsuit with prejudice and this Court's affirmance of that dismissal. Therefore, the Complaint and the documents properly considered on a Motion to Dismiss reveal Plaintiffs' claims in this case are barred. Consequently, the trial court did not err by dismissing Plaintiffs' Complaint with prejudice under Rule 12(b)(6).

Conclusion

Accordingly, for the foregoing reasons, the trial court's 26 May 2022 Order dismissing Plaintiffs' Complaint with prejudice is affirmed.

AFFIRMED.

Judges CARPENTER and FLOOD concur.

STATE OF NORTH CAROLINA
v.
DAVID ASHLEY BIVINS

No. COA23-550

Filed 19 March 2024

Sentencing—prior record level—calculation—State-conceded error —additional points improperly assessed

A judgment convicting defendant of multiple drug-related crimes and sentencing him as a habitual felon was vacated because, as the State conceded on appeal, the trial court erred in sentencing defendant as a prior record level V offender by counting three additional points based on prior convictions that, under the sentencing statute, should not have counted toward the assessment of defendant's prior record level. The instructions on remand directed the court to determine whether an additional point should be added based on one of defendant's new convictions; that said, regardless of the court's determination, the total number of points would only support sentencing defendant as a prior record level IV offender.

Appeal by defendant from judgment entered 23 March 2021 by Judge Gregory R. Hayes in Cleveland County Superior Court. Heard in the Court of Appeals 21 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General, Kerry M. Boehm, for the State.

Michelle Abbott, for the defendant-appellant.

TYSON, Judge.

David Ashley Bivins ("Defendant") appeals from judgment entered upon a jury's verdicts for Selling or Delivering a Schedule II Controlled Substance and Felonious Possession with Intent to Sell or Deliver Methamphetamine. The judgment he appeals from was also entered pursuant to a plea agreement for Felonious Possession with Intent to Sell or Deliver Methamphetamine, Selling or Delivering a Schedule II Controlled Substance, and to attaining Habitual Felon Status. We discern no error at trial or in the plea agreement, but vacate the judgment and remand for the trial court to correct a State-conceded sentencing error.

I. Background

Cleveland County Sheriff's Office Narcotics Division and a confidential informant participated in a controlled buy of methamphetamine on 20 July 2019 and again on 8 August 2019. The confidential informant had previously worked with Narcotic Division deputies and participated in multiple controlled buys of drugs. Narcotic Division deputies met with the informant prior to the buy, searched his person for contraband, provided him with $200 in marked currency, and equipped him with a cell phone capable of recording the interaction.

The confidential informant traveled to a local motel, while being surveilled from the neighboring Bojangles restaurant parking lot, and purchased 1.95 grams of methamphetamine from Defendant. Following the buy, the confidential informant "turned over the meth" to the Narcotic Division lead deputy. The lead deputy debriefed with the confidential informant to confirm the details of the buy, searched his person and his vehicle to ensure the integrity of the controlled buy, and then released the informant. The lead deputy entered the sealed bag of suspected methamphetamine into the Sheriff's Office secured evidence locker and submitted it for laboratory analysis.

On 23 March 2021, a jury convicted Defendant of one count of Possession with Intent to Sell or Deliver Methamphetamine and one count of Selling or Delivering a Schedule II Controlled Substance. After the jury's verdict, but prior to sentencing, Defendant also entered into a plea arrangement with the State. Defendant pleaded guilty to having attained Habitual Felon Status, along with one additional count of Possession with Intent to Sell or Deliver Methamphetamine and one additional count of Selling or Delivering a Schedule II Controlled Substance pursuant to a plea agreement, which stemmed from a second controlled buy by the same confidential informant from Defendant on 8 August 2019.

At the sentencing hearing held on 23 March 2021, the State submitted a Prior Record Level Worksheet ("PRL Worksheet") and copies of records of the Defendant's prior convictions to support the worksheet. The PRL Worksheet submitted by the State assigned a total of sixteen points to Defendant, based upon seven prior misdemeanor convictions, three prior felony convictions, and for Defendant being on probation at the time of the offense.

Defendant stipulated to his prior record level and signed the PRL Worksheet. His four substantive convictions were consolidated for

sentencing. Defendant was sentenced as a level V offender to 127 to 165 months of active imprisonment.

Defendant filed a petition for writ of *certiorari* on 6 September 2022, seeking a belated appeal after failure to enter timely notice of appeal. This Court granted Defendant's petition for writ of *certiorari* on 26 October 2022.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-1444(5) (2023) and N.C. R. App. P. 21(a)(1).

III. Issues

Defendant challenges his sentence of 127 to 165 months imprisonment for two counts of Selling or Delivering a Schedule II Controlled Substance, two counts of Felonious Possession with Intent to Sell or Deliver Methamphetamine, and attaining Habitual Felon Status. Defendant argues the trial court erred by sentencing him at an inflated prior record level. The State concedes this error.

IV. Sentencing Error

A. Standard of Review

Sentencing errors are preserved for appellate review "even though no objection, exception, or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d)(18) (2023). Although a defendant may stipulate to "the existence of [his or her] prior convictions, which may be used to determine the defendant's prior record level for sentencing purposes, the trial court's assignment of defendant's prior record level is a question of law." *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830-31 (2013) (citation omitted). "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)).

B. Analysis

Our General Statutes provide: "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions . . . ." N.C. Gen. Stat. § 15A-1340.14(a) (2023). A prior record level is determined by counting eligible points for prior convictions the State has proven. N.C. Gen. Stat. § 15A-1340.14(b), (f). Generally, only non-traffic Class A1 and

Class 1 misdemeanor offenses count. N.C. Gen. Stat. § 15A-1340.14(b). Convictions of Class 2 and Class 3 misdemeanors do not count. *See id.*

One point is assigned for misdemeanor convictions, and a misdemeanor is "defined as any Class A1 and Class 1 nontraffic misdemeanor offense." N.C. Gen. Stat. § 15A-1340.14(b)(5). The following misdemeanor offenses also receive one prior record point: (1) Impaired Driving, pursuant to N.C. Gen. Stat. § 20-138.1 (2023); (2) Impaired Driving in a Commercial Vehicle, pursuant to N.C. Gen. Stat. § 20-138.2; and, (3) Death by Vehicle, pursuant to N.C. Gen. Stat. § 20-141.4(a2). N.C. Gen. Stat. § 15A-1340.14(b)(5).

The points assigned for prior felony convictions include two points for Class H or I Felony convictions, and four points for Class G Felony convictions. N.C. Gen. Stat. § 15A-1340.14(b)(3)-(4). Prior felony convictions used to establish whether a person has attained habitual felon status do not also count in determining a prior record level. N.C. Gen. Stat. § 14-7.6 (2023).

When multiple convictions are entered in the same superior court session in the same calendar week, only the conviction carrying the most points is assessed. N.C. Gen. Stat. § 15A-1340.14(d). If a prior offender is convicted of more than one offense in a single session of district court, only one of the convictions is used. *Id.*

The relevant statutes "do not prohibit the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another separate conviction obtained in the same week to determine prior record level." *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996).

An offender with ten to thirteen points shall be sentenced as a prior record level IV, and an offender with fourteen to seventeen points shall be sentenced as a prior record level V. N.C. Gen. Stat. § 15A-1340.14(c).

On appeal, Defendant points out several purported errors in the trial court's sentencing. First, a clerical discrepancy exists between the PRL Worksheet and the structured sentencing document. The PRL Worksheet states Defendant had sixteen prior record level points, while the structured sentencing document listed fifteen prior record level points. Regardless of the variance in points between the two documents, the trial court sentenced Defendant as a level V offender.

Second, Defendant asserts, and the State concedes, he was erroneously assessed with four additional points to increase his prior record level from IV to V. The PRL Worksheet shows seven points for prior

misdemeanors, eight points for prior felonies, and one point for committing the current offense while on probation, which totals sixteen points.

Defendant has accumulated seventeen prior misdemeanor convictions over a ten-year period. Four of Defendant's misdemeanor convictions are for traffic-related offenses, which are not included in the prior record level calculation per N.C. Gen. Stat. § 15A-1340.14(b)(5). Four of Defendant's misdemeanor convictions are for Class 2 or 3 offenses, and those convictions are also excluded in the prior record level calculation. *Id.* Four of Defendant's misdemeanor convictions were entered on the same date as an offense with a higher point total. The higher-point total conviction is the only conviction properly included in Defendant's point total calculation pursuant to N.C. Gen. Stat. § 15A-1340.14(d). In accordance with the statutes' disregard and exclusion of certain convictions, Defendant's PRL Worksheet should include a total of five points for five countable misdemeanors under N.C. Gen. Stat. § 15A-1340.14(b)(5).

Defendant also has six prior felony convictions, in addition to the four felony convictions before us on appeal. Here, three of those six prior convictions were used to establish the indictment that Defendant had attained habitual felon status, and two felonies occurred on the same day, leaving only two felonies to be assessed in the PRL Worksheet calculation. *See Truesdale*, 123 N.C. App. at 642, 473 S.E.2d at 672; N.C. Gen. Stat. § 15A-1340.14(d).

One of these is a Class I felony, properly assessed at two points. N.C. Gen. Stat. § 15A-1340.14(b)(4). The other was a Class G felony to be assigned four points. N.C. Gen. Stat. § 15A-1340.14(b)(3). Under the current statutes, Defendant's PRL Worksheet should include a total of six points based upon the two qualifying felony convictions, and not those otherwise used to support the habitual felon indictment or occurring on the same court session.

N.C. Gen. Stat. § 15A-1340.14(b)(7) provides that one additional point should be assigned "if the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision . . . ." In this case, the Defendant stipulated to the fact that he was on probation for prior offenses at the time of the current offenses, which supports the addition of one point to be included in his PRL Worksheet calculation. N.C. Gen. Stat. § 15A-1340.14(b)(7).

Additionally, N.C. Gen. Stat. § 15A-1340.14(b)(6) provides one additional prior record level point may be assigned "[i]f all the elements of the present offense are included in any prior offense for which the offender

was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point." On appeal, the State argues Defendant should have been assessed one additional point because all elements of the present offense for Selling or Delivering a Schedule II Controlled Substance are included in Defendant's prior offense on 6 April 2016 for Selling or Delivering a Schedule II Controlled substance conviction. On remand for resentencing, the trial court should assess whether one additional point should be added pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6).

Under the current statutes, Defendant's prior record level should have been assessed as at least twelve points: five for misdemeanors, six for felonies, and one additional point for being on probation at the time of the offense. Depending on the trial court's assessment of N.C. Gen. Stat. § 15A-1340.14(b)(6), Defendant's prior record level potentially could be assessed as thirteen total points. N.C. Gen. Stat. § 15A-1340.14. Regardless of whether the trial court assesses Defendant's prior record level as twelve or thirteen total points to support a prior record level IV, the trial court erred when sentencing Defendant by assigning three additional prior record level points to achieve a prior record level V. The State concedes this error.

V. Conclusion

Defendant received a fair trial, free from prejudicial errors he preserved or argued on appeal. His waivers of trial and guilty pleas to other crimes under the plea agreement are not challenged as not knowingly and intelligently entered.

After using three prior felony convictions to support his habitual felon indictment and excluding non-qualifying prior convictions, Defendant should have been sentenced within the presumptive range, per the plea agreement, as a prior record level IV offender with twelve or thirteen prior record level points. The trial court's judgments are vacated, and we remand for re-sentencing based on the conceded proper prior record level. *It is so ordered.*

NO ERROR AT TRIAL; JUDGMENT VACATED AND REMANDED FOR RESENTENCING.

Judges MURPHY and WOOD concur.

STATE OF NORTH CAROLINA
v.
SAEQUAN MARQUETTE JACKSON

No. COA23-636

Filed 19 March 2024

1. Homicide—felony murder—armed robbery—continuous transaction—sufficiency of evidence

In a prosecution for first-degree murder under a felony murder theory and for the predicate felony of robbery with a dangerous weapon, the trial court properly denied defendant's motion to dismiss both charges where the State presented sufficient evidence showing that defendant's acts of shooting the victim and then taking the victim's car constituted a single, continuous transaction. Importantly, the time between the shooting and the taking was short where, according to eyewitness testimony, defendant briefly sat down and then drove off in the victim's car a few minutes after shooting the victim, who was still alive when defendant left the scene.

2. Homicide—felony murder—armed robbery—jury instruction—self-defense—applicability

In a prosecution for first-degree murder under a felony murder theory and for the predicate felony of robbery with a dangerous weapon, the trial court did not commit plain error by declining to instruct the jury on self-defense. Under binding legal precedent, self-defense is not a defense to felony murder but can be a defense to the underlying felony, which would defeat the felony murder charge. However, self-defense is not a defense to armed robbery, and therefore defendant was not entitled to a self-defense instruction.

Appeal by Defendant from Judgments entered 19 December 2022 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Deputy General Counsel Daniel P. Mosteller, for the State.

Marilyn G. Ozer for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Saequan Marquette Jackson (Defendant) appeals from Judgments entered pursuant to jury verdicts finding Defendant guilty of First-Degree Murder based on Felony Murder, Robbery with a Firearm, and Possession of a Stolen Vehicle. The Record before us tends to show the following:

On 31 August 2018, Defendant was staying with a female friend in her Greensboro, North Carolina apartment. Defendant was awoken by a series of phone calls to the friend's cell phone by Ronald McCray. Defendant testified he answered the friend's phone to tell McCray to stop calling. McCray stated he was outside the apartment and, according to Defendant, threatened him.

McCray arrived at the apartment complex around 6:40 a.m. Defendant went out to the parking lot with a nine-millimeter handgun in his waistband. Defendant testified McCray exited the car and walked toward Defendant, threatening to kill him. Defendant shot McCray four times. Tachayla Loggins, a sixteen-year-old who lived in the same apartment complex witnessed the shooting and went inside her apartment to tell her mother. Loggins' mother looked outside and saw Defendant sitting outside "for a few minutes" before eventually leaving in McCray's vehicle. Defendant acknowledged at trial he had stolen the car after briefly returning to his friend's apartment.

Loggins and her mother went outside around the same time Defendant left the scene in McCray's car. McCray was still alive and awake on the ground of the parking lot when Loggins and her mother arrived. McCray later died from the gunshot wounds. The day after this incident, police received a report McCray's car was abandoned in a field. Defendant was subsequently arrested on 31 August 2018 for First-Degree Murder. On 8 October 2018, Defendant was indicted on one count of First-Degree Murder, one count of Robbery with a Dangerous Weapon, and one count of Possession of a Stolen Motor Vehicle.

Defendant's trial began 5 December 2022. On 9 December 2022, the jury returned verdicts finding Defendant guilty of First-Degree Murder based on Felony Murder, Robbery with a Dangerous Weapon, and Possession of a Stolen Vehicle. The trial court sentenced Defendant to six to seventeen months of imprisonment for the conviction of Possession of a Stolen Vehicle. The trial court sentenced Defendant to life in prison without parole for the First-Degree Murder conviction, to run at the expiration of the sentence for Possession of a Stolen Vehicle. The trial court arrested judgment on the Robbery with a Dangerous Weapon conviction because it was the underlying felony supporting

the Felony Murder conviction. Defendant gave oral Notice of Appeal in open court.

Issues

The issues are whether the trial court (I) erred by denying Defendant's Motion to Dismiss the armed robbery charge and instructing the jury on felony murder; and (II) plainly erred by instructing the jury self-defense could not justify felony murder based on armed robbery.

Analysis

I. Motion to Dismiss

[1] Defendant first contends the trial court erred by denying his Motion to Dismiss the Felony Murder and Armed Robbery charges due to insufficient evidence Defendant shooting McCray and taking his car were a continuous transaction. Specifically, Defendant contends the taking of the vehicle was an "afterthought," and the State failed to present evidence Defendant intended to rob the victim at the time of the murder by force.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Wilson*, 269 N.C. App. 648, 651-52, 839 S.E.2d 438, 441 (2020) (quoting *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007)). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted); *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

"If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). "Only defendant's evidence which does not contradict and is not inconsistent with the state's evidence may be considered favorable to defendant if it explains or clarifies the state's evidence or rebuts inferences favorable to the state."

State v. Sumpter, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986) (citations omitted). However, "[w]hether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

In the present case, Defendant moved to dismiss the First-Degree Murder and Armed Robbery charges for insufficient evidence. The First-Degree Murder conviction was based on Felony Murder. "Felony murder elevates a homicide to first-degree murder if the killing is committed in the perpetration or attempted perpetration of certain felonies or any 'other felony committed or attempted with the use of a deadly weapon[.]' " *State v. Frazier*, 248 N.C. App. 252, 262, 790 S.E.2d 312, 320 (2016) (quoting N.C. Gen. Stat. § 14-17(a)). "The temporal order of the killing and the felony is immaterial where there is a continuous transaction[.]" *State v. Roseborough*, 344 N.C. 121, 127, 472 S.E.2d 763, 767 (1996). Furthermore, "it is immaterial whether the intent to commit the felony was formed before or after the killing, provided that the felony and the killing are aspects of a single transaction." *Id.*

Our statute defining armed robbery provides: "Any person . . . who, having in possession or with the use or threatened use of any firearms, . . . whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another[.]" N.C. Gen. Stat. § 14-87(a) (2021).

Here, there was substantial evidence to support finding the shooting and armed robbery constituted a continuous transaction. The State presented evidence showing the time between the shooting and taking was short. Loggins and her mother went to the victim just as Defendant left the scene, at which point McCray was still alive and awake. Loggins' mother testified Defendant drove off within "a few minutes" after briefly sitting in McCray's car. Looking to our precedents in similar cases and drawing "every reasonable inference" in the State's favor, this evidence supports the conclusion this was a continuous transaction.

A similar set of facts arose in *State v. Reaves*, 9 N.C. App. 315, 176 S.E.2d 13 (1970). There, a defendant shot a State Highway Patrol officer then fled in the officer's patrol car, which contained the officer's service revolver. *Id.* at 316-17, 176 S.E.2d at 15. On appeal, the defendant argued the evidence was insufficient to support a conviction for armed robbery because the intent to take the car and revolver "arose in defendant's mind only after defendant found his own automobile locked[.]" *Id.* at 317, 176 S.E.2d at 15. Therefore, the defendant argued, "there was not the necessary coincidence in time between the use . . . of a deadly weapon and the

felonious taking[.]" *Id*. This Court rejected that argument, concluding there was "one continuing transaction[.]" *Id*. Our Supreme Court has similarly rejected an argument that "if the jury found defendant took [a vehicle] 'while scared and confused' in order to escape the scene, he would not be guilty of armed robbery[.]" *State v. Webb*, 309 N.C. 549, 555, 308 S.E.2d 252, 256 (1983). The Court observed that even if the evidence was favorable to the defendant, it was not exculpatory justifying a separate jury instruction. *Id*.

Defendant points to *State v. Powell* in support of his contention his taking of the car was an "afterthought." 299 N.C. 95, 261 S.E.2d 114 (1980). In *Powell*, our Supreme Court held the underlying larceny did not support the defendant's guilt for felony murder because the evidence, viewed in the light most favorable to the State, indicated the defendant "took the objects as an afterthought once the victim had died." *Id*. at 102, 261 S.E.2d at 119. As Defendant correctly notes, however, *Powell* has been distinguished frequently. Indeed, our Supreme Court has repeatedly rejected arguments a defendant must have intended to commit armed robbery at the time he killed the victim in order for the exchange to be a continuous transaction. *See State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992) ("Neither the commission of armed robbery . . . nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing." (citation omitted)); *State v. Faison*, 330 N.C. 347, 359, 411 S.E.2d 143, 150 (1991) ("[I]t is immaterial whether the intent was formed before or after force was used upon the victim, provided that the theft and force are aspects of a single transaction." (citation omitted)).

Additionally, this issue was squarely and accurately presented to the jury. The trial court issued jury instructions, in pertinent part, as follows:

> If you find beyond a reasonable doubt that there is a continuous transaction, the temporal order of the threat or use of a firearm and the taking is immaterial. Provided that the theft and the force are aspects of a single transaction, it's immaterial whether the intention to commit the theft was formed before or after force was used upon the victim.

Further:

> Therefore, if you, the jury, find from the evidence beyond a reasonable doubt that . . . there was an immediate causal connection between the defendant's use of force and his

> felonious conduct, it would be your duty to find the defendant guilty[.]
>
> . . .
>
> And, finally, . . . if the State has failed to satisfy you beyond a reasonable doubt that . . . the defendant did act in self-defense but that there was an immediate causal connection between the defendant's use of force and his felonious conduct, then the defendant's actions would be justified by self-defense[.]

These instructions are consistent with our case law on continuous transactions in the context of felony murder, and they present the issue of continuity squarely to the jury. In returning a verdict of guilty, the jury clearly determined the shooting and vehicle theft were a continuous transaction. Thus, whether the shooting and theft were a single transaction was a jury issue, which was presented to the jury. Therefore, the jury's verdict of guilty determined the shooting and theft were a continuous event. Consequently, we conclude the trial court did not err by denying Defendant's Motion to Dismiss.

II. Jury Instruction

[2] Defendant contends the trial court plainly erred by not instructing the jury it could consider self-defense as a justification for felony murder or armed robbery.

"[T]he trial court has a duty 'to instruct the jury on all substantial features of a case raised by the evidence.' " *State v. Fletcher*, 370 N.C. 313, 325, 807 S.E.2d 528, 537 (2017) (quoting *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted)). Defendant did not object to the jury instructions at trial. Consequently, our review on appeal is limited to plain error. N.C. R. App. P. 10(a)(4) (2021) ("In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)

(citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Defendant argues he was entitled to an instruction that self-defense was available as a defense to felony murder. Our Supreme Court has held "self-defense is not a defense to felony murder." *State v. Juarez*, 369 N.C. 351, 354, 794 S.E.2d 293, 297 (2016). However, "[p]erfect self-defense . . . may be a defense to the underlying felony, which would thereby defeat the felony murder charge[.]" *Id.* (citation omitted). Thus, "self-defense is available in felony murder cases only to the extent that self-defense relates to applicable underlying felonies as in the case sub judice." *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995).

Here, the underlying felony was armed robbery. Our Supreme Court has held "self-defense is not a defense to [armed robbery]." *State v. McLymore*, 380 N.C. 185, 199 n. 3, 868 S.E.2d 67, 78 n. 3 (2022); *see also State v. Evans*, 228 N.C. App. 454, 459, 747 S.E.2d 151, 155 (2013) (holding trial court did not err in omitting a self-defense instruction where defendant was charged with first-degree murder based on felony murder rule with the underlying felonies attempted robberies with a dangerous weapon); *State v. Jacobs*, 363 N.C. 815, 822, 689 S.E.2d 859, 864 (2010) ("We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself[.]"). Based on our precedents, self-defense is inapplicable to armed robbery. Therefore, self-defense does not excuse felony murder where the underlying felony is armed robbery. Consequently, Defendant was not entitled to a self-defense instruction on the charge of felony murder.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
WARREN DOUGLAS JACKSON

No. COA23-727

Filed 19 March 2024

1. Search and Seizure—traffic stop—protective frisk—probable cause—plain feel doctrine—pill bottle

After pulling defendant over for driving without a license, an officer who conducted a protective frisk of defendant's person did not have probable cause to seize a pill bottle that he felt when patting down defendant's pocket. The "plain feel" doctrine did not apply where there was insufficient information from either the context of the stop or the shape of the bottle to put the officer on alert that the bottle contained contraband.

2. Search and Seizure—traffic stop—inevitable discovery doctrine—additional basis for vehicle search—inferred finding

In a trial for possession of methamphetamine, which was found in defendant's car after he was pulled over for driving without a license (DWLR), the methamphetamine was admissible under the inevitable discovery doctrine. Although the officer did not have probable cause to search defendant's car based on finding a pill bottle on defendant's person during a protective frisk—because the "plain feel" doctrine was inapplicable under the circumstances—the officer testified that even if no contraband had been found on defendant's person he would have arrested defendant for DWLR and would have searched defendant's car incident to that arrest. Although the trial court did not make an express finding that the officer would have made an arrest for DWLR, defendant presented no evidence conflicting with the officer's testimony; therefore, such a finding could be inferred.

Judge STADING concurring in result only.

Appeal by defendant from judgment entered 14 February 2023 by Judge R. Gregory Horne in Superior Court, Avery County. Heard in the Court of Appeals 28 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth G. Arnette, for the State.

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

ARROWOOD, Judge.

Warren Douglas Jackson ("defendant") appeals from judgment entered upon his conviction for possession of methamphetamine. For the following reasons, we find that defendant received a fair trial free from prejudicial error.

I. Background

Detective Ridge Phillips ("Phillips") of the Avery County Sheriff's Office was patrolling in a rural section of Avery County, North Carolina when he saw defendant driving a truck on Squirrel Creek Road. Knowing that defendant had a revoked driver's license at the time, Phillips pulled him over. According to Phillips, at the time of the stop, he had interacted with defendant two to three times in the past. Specifically, Phillips testified that he had previously arrested defendant for possession of a firearm by a felon and that he had been aware of defendant's previous involvement with narcotics.[1]

Upon approaching defendant's truck, Phillips testified that he asked defendant if he could search the truck to "make sure there were no guns, knives, drugs or anything in the vehicle" and that defendant consented to the search. Phillips's body camera did not record any sound while defendant was sitting in the truck, so the request to search the truck and defendant's response cannot be substantiated. According to Phillips, he then asked defendant to step out of the truck.[2]

As defendant stepped out of the truck, the audio from Phillips's body camera activated, and defendant could be heard stating, "Yeah, I got a pocketknife." As Phillips directed defendant in position for a pat-down search, the following exchange occurred:

Phillips: You just got a pocketknife?

Defendant: Yeah.

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1. However, when asked about specific information that Phillips had on defendant relating to drug possession, Phillips stated, "I couldn't tell you."

2. Phillips testified that while interacting with defendant, defendant did not act nervous or evasive and complied with his requests. Specifically, when asked whether there was anything "suspicious about [defendant's] behavior aside from having a knife on him," Phillips testified, "No, not on his behavior."

> **Phillips**: Alright, keep your hands out of your pockets. I am going [to] pat you down for my safety.

After patting down defendant's front right pant pocket, Phillips asked defendant, "What all is in your pocket right here?" While asking the question, Phillips simultaneously slid a travel-size pill bottle out of the pocket.[3] In response, defendant stated, "cigarette lighter and my medicine." Phillips testified, "On the pat-down I felt what was a pill bottle in the front right pocket, what I know through my training and experience to be a pill bottle. People keep their controlled substances, whether it be pills or other things, inside of it." Phillips further testified that when feeling the bottle, it was not "consistent with a prescription bottle." With the pill bottle in Phillips's hand, Phillips asked defendant what kind of medicine was in the bottle, and defendant stated, "Percocets." Phillips opened the bottle and observed two pills inside. Phillips testified that when he saw the bottle, he noticed it was not a prescription bottle.

After defendant stated he had a prescription for the pills, Phillips told defendant he was going to detain him and placed defendant in handcuffs. Phillips told defendant he "was just detaining him for now because [he] found them Percocets" and started pulling other items out of defendant's pockets, including a wallet, lighters, and a pocketknife. While searching defendant's pockets, Phillips stated, "You can't carry around Percocets in your pocket without the prescription bottle, okay. That is a controlled substance."[4] Defendant replied that he kept them in a non-prescription bottle to prevent people from stealing them, given that the prescription bottle would let people know he had them.

Because of the pills, Phillips told defendant, "I am going to start the search, okay on you. It is against the law to carry Percocets like that without a prescription bottle. Like I said right now, you're just being detained. You ain't under arrest." While searching defendant's pant leg, Phillips noticed that one of defendant's pant legs was slightly stuck in his boot. Phillips searched defendant's boot and sock area and found a bag of methamphetamine. Phillips then arrested defendant for possession

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3. When asked if he immediately pulled the pill bottle out of defendant's pocket after feeling it, Phillips testified, "Yes."

4. Although it is illegal to possess a controlled substance without a valid prescription, N.C.G.S. § 90-95(a)(3), no statutory provision exists in North Carolina that prohibits a person from possessing their prescription medicine outside of its original prescription container.

of methamphetamine.[5] Phillips issued defendant a citation for driving while license revoked ("DWLR").

Defendant was indicted for felony possession of methamphetamine and misdemeanor possession of a Schedule II controlled substance on 29 November 2021. Defendant moved to suppress the evidence obtained during the traffic stop on 20 May 2022, arguing that Phillips did not have probable cause to search him or the truck, nor did Phillips have any other basis to conduct the searches.

A suppression hearing was held before trial on 13 and 14 February 2023. Phillips was the sole witness called during the hearing. When asked on the first day of the hearing whether defendant would have been detained based on his revoked license status—even if no contraband had been found—the following exchange occurred between Phillips and the State:

Phillips: Yes, he can be arrested for that.

The State: So would he have been able to drive away from the scene had you found nothing on his person?

Phillips: No.

On the second day of hearing, the exchange with respect to Phillips's intentions continued:

The State: Yesterday you indicated that even if taking all, if nothing was found during your search of defendant or nothing was found in the vehicle, that the defendant would not have been allowed to leave the scene?

Phillips: Correct.

The State: What would you have done with defendant, assuming nothing else was found, what would you have done with him?

Phillips: Arrested him for driving while licensed revoked.

Phillips further testified that, after arresting someone for DWLR, he would search their person before placing them in his patrol car. On cross-examination of Phillips, defendant's questioning centered on

5. Phillips specifically told defendant he was "under arrest for possession of methamphetamine."

Phillips's interactions with defendant leading up to and during the protective frisk and the pocket search. Defendant presented no other evidence for the suppression motion. At the hearing's conclusion, the trial court denied defendant's motion and concluded that the search was lawful and that there was no constitutional violation of defendant's rights.

The possession of methamphetamine charge proceeded to jury trial, and defendant was found guilty of possession of methamphetamine. The trial court sentenced defendant to six to seventeen months' imprisonment, suspended for twenty-four months' supervised probation, on 14 February 2023. Defendant gave notice of appeal in open court. The misdemeanor possession charge was dismissed on 14 June 2023.

II. Discussion

Defendant raises numerous arguments on appeal. Defendant contends the seizure of the pill bottle exceeded the scope of a protective frisk and that because defendant was never arrested for DWLR, the search incident to arrest exception to the warrant requirement was inapplicable. Defendant also argues that defendant lacked probable cause to open the container. Lastly, in the alternative, defendant argues that the arrest for possession of the pills was not supported by probable cause. The State contends that the search and seizure were lawful, and, even if unlawful, the motion was still properly denied because the methamphetamine found in defendant's boot was admissible under the inevitable discovery doctrine.

A. Standard of Review

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether the trial court's findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146–47 (2003) (cleaned up). "The trial court's conclusions of law, however, are reviewed de novo." *State v. Duncan*, 272 N.C. App. 341, 345 (2020) (citing *State v. Fernandez*, 346 N.C. 1, 11 (1997)). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in light most favorable to the State." *Id.* (cleaned up).

B. The "Plain Feel" Doctrine and Probable Cause

[1] Evidence of contraband during a protective frisk may be admissible under the "plain feel" doctrine, provided that the officer "feels an object whose contour or mass" make its incriminating nature immediately apparent. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). In other words,

evidence of contraband—plainly felt during a frisk—may be admissible if "the officer had probable cause to believe that the item was in fact contraband." *State v. Shearin*, 170 N.C. App. 222, 226 (2005) (citing *Dickerson*, 508 U.S. at 375–77). In determining whether an object's incriminating nature was immediately apparent and whether probable cause existed to seize it, the totality of the circumstances is considered. *State v. Robinson*, 189 N.C. App. 454, 459 (2008) (citation omitted). When such "*facts and circumstances within the officer's knowledge* are sufficient to warrant a person of reasonable caution in the belief that the item may be contraband, probable cause exists." *State v. Briggs*, 140 N.C. App. 484, 493 (2000) (citing *Texas v. Brown*, 460 U.S. 730, 742 (1983)) (emphasis in original).

In *Robinson*, this Court held that there was probable cause to seize a film canister during a protective frisk because sufficient information existed to believe it contained contraband. 189 N.C. App. at 459–60. In concluding that probable cause existed, this Court considered that (1) the defendant was stopped in an area known for being a "drug location," (2) the officer had reports that the defendant sold drugs nearby; (3) the defendant "stopped talking, straightened up very abruptly, and looked surprise or frightened" when the officer made eye contact; (4) the officer thought defendant would flee and that the defendant then "started backing away, turned his right side away from the officer, and reached into his right pocket"; (5) the officer had "arrested at least three others who had exactly the same type of canister" with narcotics stored in them; and (6) the officer testified that it was immediately apparent that crack-cocaine was packaged in the film canister. *Id.* at 459 (cleaned up).

Here, the State, relying heavily on *Robinson*, contends that Phillips had probable cause to seize the pill bottle under the "plain feel" doctrine. We do not accept this contention because the facts and circumstances present at the time Phillips seized the pill bottle are substantially different from those in *Robinson*. Unlike *Robinson*, defendant was not in a "drug location," and there were no reports that defendant sold drugs in the area. Defendant also provided no reason for Phillips to believe that he was nervous during the stop and complied with Phillips's requests. Further, Phillips felt what he knew to be a pill bottle, which is distinct from a film canister in that people commonly carry such containers with their medication inside.[6]

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6. We do not imply that possessing a film canister alone constitutes probable cause either. *See State v. Sapatch*, 108 N.C. App. 321, 325 (1992) (holding that "[p]ossession of film canisters, without more, is insufficient to give rise to probable cause of a crime" even if the officer "had personal knowledge of their illegal use in other incidents."). However, carrying around a film canister in the digital age is less common than having a pill bottle with medication.

Thus, the State's application of the "plain feel" doctrine and reliance on *Robinson* is incorrect.[7]

We also reject the State's contention that the unlabeled pill bottle, for which defendant was unable to provide a prescription during the stop, gave Phillips probable cause that it contained contraband and to seize it. The State was unable to cite to a single case in North Carolina to support this contention, and many jurisdictions expressly reject the idea. *See People v. Alemayehu*, 494 P.3d 98, 108–09 (Colo. App. 2021) (citing several "authorities [that] reject the idea that an unlabeled pill pottle, in and of itself, constitutes probable cause" and concluding the same). However, even assuming *arguendo* that Phillips's search and seizure violated defendant's constitutional rights, the methamphetamine found in defendant's boot was still admissible because the contraband's discovery was shown to be inevitable.

C. Inevitable Discovery

[2] In response to the State's argument relating to the inevitable discovery doctrine, defendant contends that Phillip's discovery of the methamphetamine was not inevitable because defendant was not placed under arrest for DWLR and the trial court's finding was insufficient to support a conclusion that Phillips would have arrested defendant for driving while license revoked had the drugs not been located. Because that finding was inferred under our case law, we disagree.

Under the exclusionary rule, evidence obtained via unconstitutional search and seizure is generally inadmissible in a criminal case. *State v. Garner*, 331 N.C. 491, 505–06 (1992). However, under the inevitable discovery doctrine, "if the State can establish by a preponderance of the evidence that the contraband ultimately or inevitably would have been discovered by lawful, independent means, then it is admissible." *State v. Larkin*, 237 N.C. App. 335, 343 (2014) (cleaned up). This Court "use[s] a flexible case-by-case approach in determining inevitability." *Id.* (citing *Garner*, 331 N.C. at 503).

In the case *sub judice*, Phillips testified that—assuming no contraband had been discovered on defendant's person or in the truck—he would have arrested defendant for DWLR and subsequently searched defendant before transporting him in his patrol car. Upon review of the suppression hearing transcript, we agree with defendant that the trial court

7. This case is further distinct from *Robinson* in that Phillips never testified to previously arresting individuals for carrying controlled substances in the same type of pill bottle, nor did Phillips testify that it was immediately apparent to him that the pill bottle contained contraband.

made no express finding as to whether Phillips would have made such an arrest. However, our Supreme Court has held that "only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Bartlett*, 368 N.C. 309, 312 (2015) (citations omitted). "When there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *Id.* (citation omitted); *State v. Munsey*, 342 N.C. 882, 885 (1996) ("If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court."). Consequently, "our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing." *Bartlett*, 368 N.C. at 312.

Here, defendant presented no evidence that conflicted with Phillips's testimony that he would have arrested defendant for DWLR had no contraband been found. Instead, defendant's evidence—consisting only of a brief cross-examination of Phillips—focused on Phillips's interactions with defendant regarding the protective frisk and the pocket search. Because defendant's evidence failed to controvert Phillips's testimony, the finding that Phillips would have arrested defendant for DWLR is thus inferred under *Bartlett*. *See State v. Baker*, 208 N.C. App. 376, 384 (2010) ("[A] material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.").

Based on that inferred finding, the State provided sufficient evidence to support a finding that, had defendant not been arrested for possession of the seized substances, he would have been arrested for DWLR. In conjunction with such an arrest, the officer would have conducted a search incident to that arrest which would have led to the discovery of methamphetamine. Thus, the seizure was inevitable even if we reject the State's contentions regarding the initial pat down and search. Accordingly, the trial court did not err in denying the defendant's motion to suppress.

III. Conclusion

For the foregoing reasons, we find defendant had a fair trial free from prejudicial error.

NO ERROR.

Judge COLLINS concurs.

Judge STADING concurs in result only.

STATE OF NORTH CAROLINA
v.
AARON MICHAEL McLAWHON

No. COA23-814

Filed 19 March 2024

Constitutional Law—North Carolina—right to remain silent—evidence of pre-arrest silence—plain error analysis

In a prosecution for statutory sexual offense with a child by an adult and other related crimes, the trial court did not commit plain error in allowing the lead detective in the case to testify that she was unable to get defendant to come in for an interview during her investigation. Even if the court had violated defendant's right to remain silent under the North Carolina Constitution by admitting this evidence of his pre-arrest silence, defendant elicited substantially similar testimony from the detective on cross-examination and therefore could not show that the court's error had a probable impact on the jury's verdict.

Appeal by Defendant from judgment entered 28 September 2022 by Judge Josephine K. Davis in Pitt County Superior Court. Heard in the Court of Appeals 6 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State-Appellee.

Reid Cater for Defendant-Appellant.

COLLINS, Judge.

Defendant Aaron McLawhon appeals from judgment entered upon guilty verdicts of three counts of statutory sexual offense with a child by an adult, sexual act by a substitute parent or custodian, and indecent liberties with a child. Defendant argues that the trial court plainly erred by admitting a detective's testimony that she was unable to interview Defendant during her investigation. We find no plain error.

I. Background

Defendant and his wife were foster parents to J.P., born in 2012, and her younger sister, M.P., beginning in March 2018.[1] In August 2019, J.P.

1. We use initials to protect the identities of the minor children. *See* N.C. R. App. P. 42.

and M.P. moved in with their paternal grandmother ("Mimi"), who was in the process of adopting them. Mimi observed J.P. "laying on the loveseat and . . . fondling [herself]" in April 2020. Mimi took J.P. into the bedroom and asked whether anyone had ever touched her inappropriately; J.P. said that Defendant had touched her. Mimi reported the allegation to the Pitt County Department of Social Services ("DSS"); DSS reported the allegation to Detective Nikki Dolenti with the Pitt County Sheriff's Department on 17 April 2020.

A DSS social worker took J.P. in for a forensic evaluation on 6 May 2020 at the TEDI Bear Child Advocacy Center, which is "a place that helps the community to address issues of children . . . involved in allegations of maltreatment." During the forensic evaluation, J.P. "described in pretty good detail that [Defendant] put his hands in her private parts and that she was trying to stop it."

J.P. and M.P.'s maternal grandmother ("Mamu") came to visit in May 2020. Mamu is active "in an organization called . . . Bikers Against Child Abuse" and "happened to bring [her] uniform and on the back is a big black patch that says Bikers Against Child Abuse." J.P. asked Mamu about the organization; Mamu explained that child abuse "can be when a child gets hit or verbally or emotionally get[s] abused by words and things[,]" but she also explained that "there is another type of abuse which is called sexual abuse." Mamu explained that sexual abuse occurs "when somebody touches you wrong like in your privates and you really don't like it." J.P. responded, "like me?" J.P. "did not tell [Mamu] right then and there," but Mamu told J.P. to let her know if she ever wanted to talk about what happened to her.

J.P. asked to speak privately with Mimi and Mamu on 24 May 2020. J.P. told them that Defendant "touch[ed] her private area with his fingers." J.P. stated that she and Defendant "were sitting there watching movies and . . . were under blankets[,]" and he touched her vagina "under [her] panties." J.P. also told them that Defendant "would take a shower and he would ask her to come in and take a shower with her and she was scared because she was afraid that he was going to get mad at her[.]" Furthermore, J.P. stated that "when [Defendant] was touching her and everything[,] she did it also because she didn't want [M.P.] to be touched." Later that afternoon, J.P. asked to speak with Mimi and Mamu again because she "ha[d] more to tell [them]." J.P. told them that Defendant "touched her with his tongue and with his hand and that it hurt really bad."

Detective Dolenti interviewed J.P. on 27 May 2020, and J.P. told her that Defendant had "licked her private" and drew a picture to "show [her] how they were laying on the bed."

Defendant was indicted for three counts of statutory sexual offense with a child by an adult, sexual act by a substitute parent or custodian, and indecent liberties with a child. The matter came on for trial on 26 September 2022. J.P. testified that Defendant touched the inside of her vagina with his hand in the living room on multiple occasions; that Defendant touched her vagina with his mouth while she was in his bedroom; and that she would shower with Defendant when he asked because she "was scared he would do something to [her]." The jury returned guilty verdicts on all charges. The trial court consolidated Defendant's convictions and sentenced him to 300 to 420 months of imprisonment. Defendant appealed.

II. Discussion

Defendant argues that the trial court plainly erred by "allowing the State to present substantive evidence of defendant's pre-arrest silence." (capitalization altered). Specifically, Defendant argues that his "right to remain silent under the North Carolina Constitution was violated when Detective Dolenti testified that his refusal to speak with her prompted her to present the case to the District Attorney." Defendant failed to object to Dolenti's testimony at trial, and we thus review only for plain error. *See State v. Stroud*, 252 N.C. App. 200, 211, 797 S.E.2d 34, 43 (2017) ("[W]here an alleged constitutional error occurs during either instructions to the jury or on evidentiary issues, an appellate court must review for plain error if it is specifically and distinctly contended[.]").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (quotation marks, brackets, and citations omitted). A defendant cannot show prejudice "when cross-examination elicits testimony substantially similar to the evidence challenged." *State v. Barnett*, 223 N.C. App. 450, 457, 734 S.E.2d 130, 135 (2012) (citation omitted).

"Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 173-74 (2010) (quoting *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894 (2008)). "[A] defendant's

pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial." *Id.* at 395, 698 S.E.2d at 174 (citing *Boston*, 191 N.C. App. at 649 n.2, 663 S.E.2d at 894 n.2).

Here, when the State asked Dolenti on direct examination whether she did "anything else as far as [her] investigation after interviewing [J.P.] on May the 27th," Dolenti testified as follows:

> At that point I had already spoken with the attorney that was representing [Defendant] and was unable to get [Defendant] to come in for an interview. So my next step was to consult with the District Attorney's office in reference to the case.

Even assuming arguendo that the trial court erred by admitting this testimony, Defendant elicited substantially similar testimony on cross-examination. The following exchange took place between defense counsel and Dolenti:

> [DEFENSE COUNSEL:] And once you sat down with [J.P.] in that interview on the 27th you took out warrants the next day?
>
> [DOLENTI:] I believe that's the timeline.
>
> [DEFENSE COUNSEL:] So you were still making a decision about what was going to happen with the case until the allegation that he was performing oral sex on [J.P.]?
>
> [DOLENTI:] There was multiple things that kind of came to a head at that point. It was the end of my investigation. [Defendant] wouldn't come into interview and at that point I had no one else to talk to about the case.

By questioning Dolenti on the timeline of her investigation, defense counsel "elicit[ed] testimony substantially similar to the evidence challenged." *Barnett*, 223 N.C. App. at 457, 734 S.E.2d at 135. Defendant thus cannot establish that the admission of Dolenti's direct examination testimony "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citations omitted).

Accordingly, the trial court did not plainly err by admitting Dolenti's testimony that she "was unable to get [Defendant] to come in for an interview."

III. Conclusion

For the foregoing reasons, we find no plain error.

NO PLAIN ERROR.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
JACOB GREY SHELTON, DEFENDANT

No. COA23-729

Filed 19 March 2024

Sexual Offenses—sexual exploitation of a minor—nude photographs—depiction of sexual activity—circumstantial evidence

The trial court properly denied defendant's motion to dismiss a charge of sexual exploitation of a minor where the State presented sufficient evidence that defendant took nude photographs of a minor that depicted "sexual activity" as that term is defined by statute (N.C.G.S. § 14-190.16). Although defendant had deleted the photographs long before trial, a reasonable juror could still determine from the available circumstantial evidence that the photographs exhibited the minor in a lascivious way and that her pubic area was at least partially visible. Any contradictions in the witnesses' testimonies went to the weight and credibility of the evidence—an issue properly submitted to the jury.

Appeal by Defendant from judgment entered 10 January 2023 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 5 March 2024.

Attorney General Joshua H. Stein, by Deputy General Counsel Tiffany Lucas, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant.

GRIFFIN, Judge.

Defendant Jacob Grey Shelton appeals from the trial court's judgment entered after a jury found him guilty of first-degree sexual exploitation of a minor. Defendant contends the trial court erred by denying his motion to dismiss the charge because there was insufficient evidence to show he took photographs of a minor which depicted "sexual activity." We find no error.

I. Factual and Procedural Background

This case concerns an incident where Defendant took nude photographs of a minor female. The evidence tended to show as follows:

Late one night in Fall 2021, Defendant entered the bedroom of his girlfriend's daughter, Rachel,[1] and asked her to do "just this one thing for [him]." Rachel agreed because Defendant promised he would buy her whatever she wanted for Christmas in exchange. Defendant then forcibly and fully undressed Rachel, posed her on her bed, and took photographs of her with his cell phone. Defendant went to the bathroom for about fifteen minutes, and thereafter left Rachel alone for the remainder of the night. Rachel did not tell anyone what Defendant did that night. Rachel had witnessed Defendant be physically abusive to her mother before and feared he would hurt them if she told anyone.

Rachel eventually told a friend at school and the school guidance counselor what happened. The guidance counselor reported Rachel's statements to the Department of Social Services, who began investigating the next day and engaged the Sheriff's Office. Law enforcement interviewed Defendant twice regarding the incident. Detective Doiel of the Surry County Sheriff's Office first interviewed Defendant on 13 December 2021. Defendant denied taking any pictures of Rachel and said that, though he had gone into her room that night, it was to help her clean. Detective Doiel requested Defendant return the next day and Defendant agreed. Agent Stovall with the State Bureau of Investigation interviewed Defendant again the next day. Defendant once again denied taking any photos at first, but eventually admitted that he had taken two photographs of Rachel while she sat naked on her bed. Defendant said he realized his actions were wrong and deleted the pictures the next day. Detective Doiel then joined Agent Stovall in the room and Defendant repeated his confession, including confirmation that Rachel's legs were spread slightly apart when he took the photographs.

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1. We use a pseudonym to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b).

On 21 February 2022, a grand jury indicted Defendant on one charge of first-degree sexual exploitation of a minor. Defendant's case came on for jury trial on 24 October 2022 in Surry County Superior Court. During trial, the State presented the testimony of Rachel's guidance counselor, Detective Doiel, Agent Stovall, and Rachel. The State showed the jury a video recording of Defendant's confession to Detective Doiel and Agent Stovall. Defendant elected not to present any evidence. Defendant made a motion to dismiss the State's charge at the close of the State's evidence and again after stating his decision not to present any evidence. The trial court denied each motion.

The jury found Defendant guilty of first-degree sexual exploitation of a minor. On 10 January 2023, the trial court entered judgment on the jury's verdict and sentenced Defendant to a term of 73 to 148 months' imprisonment. Defendant entered oral notice of appeal in open court.

II. Analysis

Defendant contends the trial court erred by "denying [Defendant's] motion to dismiss where (1) the actual photos at issue were deleted long before trial, and (2) the other evidence failed to prove that those photos depicted 'sexual activity' as defined by statute." Essentially, Defendant asserts the State failed to present direct evidence that the photographs showed sexual activity, and the remaining circumstantial evidence was insufficient as well. We disagree.

" 'In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.' " *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed . . . even if the suspicion so aroused by the evidence is strong." *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (internal marks omitted) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). The evidence must be considered in the light most favorable to the State, and "[c]ontradictions and discrepancies in the evidence are strictly for the jury to decide." *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983) (citation omitted); *State v. Golder*, 374 N.C. 238, 249–50, 839 S.E.2d 782, 790 (2020) (citations omitted). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State*

v. Chekanow, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (internal marks and citation omitted).

"[S]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Campbell*, 373 N.C. at 221, 835 S.E.2d at 848 (citation omitted). Evidence may be direct or circumstantial:

> Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred. In other words, as has been said, circumstantial evidence is merely direct evidence *indirectly applied.*

State v. Wright, 275 N.C. 242, 249–50, 166 S.E.2d 681, 686 (1969) (citation omitted). " 'It is immaterial whether the substantial evidence is circumstantial or direct, or both.' " *State v. Ambriz*, 286 N.C. App. 273, 277, 880 S.E.2d 449, 457 (2023) (citation omitted). "Circumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence[.]" *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) (citations omitted). " 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury[.]' " *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citations omitted). Cases involving sexual exploitation are not exceptions to these principles. *See Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 570, 351 S.E.2d 305, 321 (1986) (confirming in sexual exploitation of minor case that "the jury *may* be convinced beyond a reasonable doubt by the State's presentation of circumstantial evidence").

Section 14-190.16 of the North Carolina General Statutes sets out the offense of first-degree sexual exploitation of a minor to be conduct which causes a minor to engage in sexual activity with the intent to make a visual representation of that activity:

> A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:
>
> (1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage

> in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity[.]

N.C. Gen. Stat. § 14-190.16 (2021). Defendant does not challenge whether the evidence showed that he knowingly made a visual representation—photographs—of Rachel while she was completely naked. Defendant challenges only the sufficiency of the State's evidence showing whether the photographs taken depicted "sexual activity."

"Sexual activity" is defined, among other things, to include "[t]he lascivious exhibition of the genitals or pubic area of any person." N.C. Gen. Stat. § 14-190.13(5)(g) (2021). "Our appellate courts have defined the term 'lascivious' as 'tending to arouse sexual desire.' " *State v. Corbett*, 264 N.C. App. 93, 100, 824 S.E.2d 875, 880 (2019) (citation omitted). "[T]he General Assembly intended that the relevant statutory language be construed broadly in order to provide minors with the maximum reasonably available protection from sexual exploitation." *State v. Fletcher*, 370 N.C. 313, 329, 807 S.E.2d 528, 540 (2017).

The parties each compare the present case to this Court's decisions in *State v. Ligon*, 206 N.C. App. 458, 697 S.E.2d 481 (2010), and *State v. Corbett*, 264 N.C. App. 93, 824 S.E.2d 875. In *State v. Ligon*, this Court was asked to determine whether photographs taken by the Defendant of a minor female met the statutory definition of "sexual activity." *Ligon*, 206 N.C. App. at 459, 697 S.E.2d at 483. The State presented photographs showing a minor female "sitting on a bench with her legs spread apart." *Id.* at 460, 697 S.E.2d at 483. Though some of the photographs showed either the defendant or the female pulling her shorts back and exposing her crotch, "[d]ue to the lighting in the photographs, it could not be determined whether the pictures showed [the female's] private parts or underpants." *Id.* The defendant claimed he took the photographs as evidence of marks left when his dog scratched the minor female, but also admitted to a detective that he intended to masturbate to the photographs when he returned home. *Id.* at 461, 697 S.E.2d at 484.

The State alleged the photographs showed "sexual activity" because they depicted the touching of the female's genitals as masturbation. *Id.* at 469, 697 S.E.2d at 489; *see* N.C. Gen. Stat. §§ 14-190.13(5)(a), (c). The Court noted that "the State failed to procure the testimony of the alleged victim" and "presented no evidence that [the defendant] had done anything to satisfy the statutory definition of prohibited sexual conduct." *Id.* It then held that "the pictures [did] not depict any sexual activity" because the statutory definition of masturbation was "not satisfied by a

photograph of [the female] merely having her hand in proximity to her crotch area" or a photograph of the defendant "touching [her] shorts, not her body." *Id.*

In *State v. Corbett*, this Court was again asked to "address the question of when charges of . . . sexual exploitation are properly submitted to a jury." *Corbett*, 264 N.C. App. at 94, 824 S.E.2d at 876. The State admitted into evidence a photograph "showing [his minor daughter] standing naked in [the defendant's] room[.]" *Id.* at 95, 824 S.E.2d at 877. The minor female was shown "fully nude except for her socks" and "[t]he focal point of the picture [was her] naked body." *Id.* at 100, 824 S.E.2d at 880. The defendant argued that the photograph did not show "sexual activity" because " '[w]hile [the female was] unclothed, her arms [were] crossed in front of her body and her hands block any view of her genital area.' " *Id.*

The Court disagreed with the defendant's argument, holding a reasonable juror could determine the photograph was "lascivious" because it was "clearly intended to elicit a sexual response based on the context in which it was taken[.]" *Id.* The facts that the photograph centered on the minor female's naked body and was taken in a bedroom supported the Court's holding. The Court further held that "reasonable jurors could have determined that the photograph at issue depicted [the minor female's] pubic area." *Id.* Though her "hands [were] positioned over her genitalia in the photograph, the fingers of her left hand [were] spread far enough apart that clearly visible gaps exist[ed] between them such that her pubic area [was] at least partially visible." *Id.* The partial visibility of the minor female's pubic area was enough to constitute "sexual activity" under sections 14-190.16 and 14-190.13(5)(g).

We hold the present case to be similar to *Corbett* and distinguishable from *Ligon*. The State presented the video recording of Defendant's confession to Detective Doiel and Agent Stovall into evidence, and played it for the jury to view. In the video, Defendant admitted that he went into Rachel's bedroom late at night and took photographs of Rachel while she sat on her bed fully nude, with her legs "slightly apart." Like the photographs in *Corbett*, the photographs here focused on Rachel's naked body while she sat on her bed, in her bedroom. Defendant prefaced the photographs by bargaining with Rachel for a favor, saying "I'll buy you anything for Christmas if you just do this one thing for me." After acquiring the photographs, Defendant left Rachel's room and went to the bathroom for ten to fifteen minutes. In context, a reasonable juror could have determined that the photographs exhibited Rachel in a lascivious way and that her pubic area was at least partially visible between her legs.

The present case differs from *Ligon* in two meaningful ways. First, the State claimed that the photographs showed Rachel's unclothed pubic area, not that they showed Rachel being touched or masturbating. The State had to present evidence only that the photographs depicted Rachel's unclothed pubic area, not that anyone was touching that area. Second, the State here procured the testimony of Rachel, the alleged victim. Rachel testified she was fully nude and "sitting up" on her bed when Defendant took the photographs. Rachel "heard the sound and the camera and the light flashed" twice on Defendant's phone. Rachel further explained that she was "looking directly at the phone," "[Defendant] was directly in front of [her]," and her hands were placed beside her on the bed. Rachel's testimony indicated that the photographs were taken in good lighting, directly in front of her, and her hands were not obstructing her pubic area from view. Even if her legs were only "slightly apart," a reasonable juror could have determined that the photographs depicted Rachel's pubic area.

Defendant contends this evidence did not prove the State's case because Detective Doiel's testimony contradicted Rachel's testimony. Detective Doiel testified that Rachel stated she never saw the photographs. On re-cross examination, Rachel testified Defendant showed her the photographs after taking them and she could at least see her breasts in them. Notably, though, there was no contradiction as to Rachel and Defendant's positioning when the photographs were taken. In total, Rachel's testimony still tended to show Defendant's guilt and contradictions in the evidence do not warrant dismissal; they instead present a question of weight and credibility for the jury to decide. *See Lowery*, 309 N.C. at 766, 309 S.E.2d at 236.

We recognize that the State's evidence in *Ligon* and *Corbett* included direct evidence that is not present in this case: the State submitted the photographs alleged to depict sexual activity into evidence and showed them to the jury. Though his arguments include assertions that the evidence was, at least in part, insufficient because the photographs were not present in this case, Defendant has failed to show precedent which states the photographs must be available at trial to prove the charge of sexual exploitation. The evidence needs only to show the defendant, *inter alia*, "induce[d], coerce[d], [or] encourage[d]" the minor to engage in "sexual activity" so the photographs could be taken. In the absence of direct evidence, the State satisfied its burden to prove these elements through sufficient circumstantial evidence. *See Cinema I Video*, 83 N.C. App. at 570, 351 S.E.2d at 321.

III. Conclusion

We hold that the State's case, including the testimony of the victim and Defendant's own admission, presented sufficient evidence of Defendant's guilt beyond mere conjecture or suspicion from which a reasonable jury could conclude that the photographs contained sexual activity beyond a reasonable doubt. The trial court did not err in denying Defendant's motion to dismiss the charge of first-degree sexual exploitation of a minor.

NO ERROR.

Judges HAMPSON and STADING concur.

STATE OF NORTH CAROLINA
v.
NATHAN JOSEPH TEMPLETON

No. COA23-443

Filed 19 March 2024

Motor Vehicles—fleeing to elude arrest—jury instructions—defense of necessity—reasonableness of belief

Defendant was not entitled to a jury instruction on the defense of necessity in his trial for felony fleeing to elude arrest with a motor vehicle and speeding in excess of eighty miles per hour, where defendant did not establish that his actions in driving his motorcycle at a high rate of speed while leading law enforcement vehicles on a thirty-minute chase were reasonable and that he had no other acceptable choices. Where one of the chasing vehicles was clearly marked "Sheriff" and had lights and sirens activated, a reasonable person would have had ample time and opportunity to realize that the pursuers were law enforcement and not members of a motorcycle gang who defendant claimed had threatened him earlier in the evening.

Appeal by Defendant from Judgment entered 15 September 2022 by Judge G. Frank Jones in Onslow County Superior Court. Heard in the Court of Appeals 7 February 2024.

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

Castle, Peterson & Naylor, P.C., by Paul Y.K. Castle, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Nathan Joseph Templeton (Defendant) appeals from a Judgment entered pursuant to jury verdicts finding him guilty of felony Fleeing to Elude Arrest with a Motor Vehicle and Speeding in Excess of Eighty Miles Per Hour. The Record before us, including evidence presented at trial, tends to show the following:

On 5 September 2021 at approximately 3:43 a.m., Sergeant Keith Whaley with the Onslow County Sheriff's Office saw a motorcycle travelling at a "high rate of speed" while parked in an unmarked patrol car off Highway 258. Using a radar, Sergeant Whaley clocked Defendant's speed at 114 miles per hour. Sergeant Whaley activated his blue lights and siren and began to pursue Defendant.

Defendant made several turns before making a U-turn in a yard and passing in front of Sergeant Whaley's car. Soon thereafter, Defendant nearly hit a marked patrol vehicle driven by Deputy Kyle O'Connor parked at the entrance to the subdivision Defendant was exiting. This marked patrol car had its lights and sirens activated. At trial, Defendant testified he immediately saw the "Sheriff" marking on the patrol vehicle. Defendant then led both Sergeant Whaley and Deputy O'Connor on a high-speed chase that lasted approximately thirty minutes. While attempting to make a turn, Defendant laid down his motorcycle, allowing Sergeant Whaley to catch him. Defendant continued his efforts to stand the motorcycle back up until he was finally held at gunpoint and forced to lay the bike back down. Defendant was subsequently arrested.

On 1 March 2022, Defendant was indicted for one count of felony Fleeing to Elude Arrest with a Motor Vehicle, one count of Speeding in Excess of Eighty Miles Per Hour, one count of Reckless Driving to Endanger, and one count of Carrying a Concealed Weapon Without a Valid Permit. The trial court determined it did not have jurisdiction with respect to the Concealed Weapon charge, and the charge was consequently dismissed.

Defendant's case came for trial on 13 September 2022. At the close of the State's evidence, Defendant moved to dismiss all charges for insufficient evidence. The trial court denied the motion.

Defendant then testified as to his account of the incident. Defendant claimed earlier in the evening on the night of the incident at issue, members of a motorcycle gang threatened Defendant while he was out riding. During the charge conference, Defendant requested the jury be instructed on the defense of necessity. The trial court stated, having viewed the evidence "[i]n the light most favorable to the defendant . . . in the exercise of discretion, the Court finds that the defendant failed . . . to demonstrate no other acceptable choices were available." Accordingly, the trial court declined to instruct the jury on the defense of necessity.

On 15 September 2022, the jury returned verdicts finding Defendant guilty of felony Fleeing to Elude Arrest with a Motor Vehicle and Speeding in Excess of Eighty Miles Per Hour, and found Defendant not guilty of Reckless Driving to Endanger. The trial court consolidated the charges and sentenced Defendant to four to fourteen months of imprisonment, then suspended execution of the sentence and placed Defendant on supervised probation for twelve months. Defendant timely filed Notice of Appeal on 23 September 2022.

Issue

The sole issue on appeal is whether the trial court erred by denying Defendant's request to instruct the jury on the defense of necessity.

Analysis

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted). We review challenges to the trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

The burden of "raising and proving affirmative defenses" is on the defendant in a criminal trial. *State v. Hageman*, 307 N.C. 1, 27, 296 S.E.2d 433, 448 (1982). Where there is insufficient evidence to support

each element of a defense, "the trial judge need not give a requested instruction on that point." *State v. Partin*, 48 N.C. App. 274, 285, 269 S.E.2d 250, 257 (1980).

To establish a defense of necessity, a defendant must prove: (1) defendant's action was reasonable; (2) defendant's action was taken to protect life, limb, or health of a person; and (3) no other acceptable choices were available to the defendant. *State v. Hudgins*, 167 N.C. App. 705, 710-11, 606 S.E.2d 443, 447 (2005). Defendant did not establish his actions were reasonable nor that there were no other acceptable choices available to him.

First, Defendant had ample time and opportunity to realize the vehicles pursuing him were law enforcement. The pursuit began only after Defendant-Appellant sped past Sergeant Whaley's parked patrol car at over 100 miles per hour, which then activated both lights and sirens. The chase took approximately thirty minutes. Although Defendant claimed at trial his fear stemmed from threats made to him by a motorcycle gang, a reasonable person would have realized he was being pursued by cars, not motorcycles.

Defendant analogizes this case to *State v. Whitmore*, an unpublished opinion of this Court. 264 N.C. App. 136, 823 S.E.2d 167 (2019). Although unpublished opinions are not controlling legal authority, N.C. R. App. P. Rule 30(e)(3) (2023), this case is instructive. In *Whitmore*, we held the trial court did not err by failing to instruct the jury on the defense of necessity because there was not substantial evidence of each element of the defense. *Id.* at *5. There, the defendant fled in a vehicle after being shot in an altercation at a barber shop, although no one was pursuing him. *Id.* at *1. One to two miles from the barber shop, the defendant ran two red lights while travelling at twice the speed limit and struck another vehicle, killing the driver. *Id.* This Court concluded the defense of necessity did not apply because the defendant had "ample opportunity to realize he was not being pursued in the one or two miles he traveled" before the collision, therefore there was not evidence presented there were no acceptable alternatives available to the defendant. *Id.* at *5.

Here, although Defendant was, in fact, being followed, he had ample opportunity to realize the vehicles pursuing him were law enforcement. Unlike the defendant in *Whitmore*, whose flight was at most two miles, Defendant's chase took thirty minutes—more than enough time for a reasonable person to realize the vehicles in pursuit were law enforcement. Moreover, the pursuit began only after Defendant sped past a

parked car which then activated lights and sirens. Additionally, while the defendant in *Whitmore* had been shot, Defendant in this case had at most received vague threats from a motorcycle gang, making his reasons for fleeing from patrol cars less compelling.

This case is also distinguishable from *State v. Miller*, in which this Court concluded the trial court erred by not instructing the jury on the defense of necessity. 258 N.C. App. 325, 344, 812 S.E.2d 692, 704-05 (2018). In *Miller*, the defendant was convicted of driving while impaired after fleeing from a bar where a patron threatened him and his wife with a gun, driving a golf cart on a highway. *Id.* at 326, 812 S.E.2d at 694. In *Miller*, witnesses testified specifically as to why alternative routes were not an option and the defense presented evidence that an alternative driver was likely also intoxicated at the time. *Id.* at 342-43, 812 S.E.2d at 703-04. The defendant also presented evidence that his actions were reasonable based on real, present threats made with a deadly weapon. *Id.* at 339-40, 812 S.E.2d at 702-03.

Here, Defendant has presented no such evidence on the lack of acceptable alternatives or the reasonableness of his actions. Again, Defendant passed a marked police car with lights and sirens activated during the chase, and the chase continued for a significant amount of time thereafter. Unlike the threat described in *Miller*, Defendant in this case did not present evidence to support the reasonableness of his belief he was being chased by a motorcycle gang. Defendant did not explain why he believed the patrol cars' lights and sirens belonged to motorcycles, nor why he failed to notice the pursuing vehicles had two headlights each rather than one, as is typical of motorcycles. Knowing the second car was a law enforcement vehicle marked "Sheriff," Defendant clearly had an alternative to fleeing. Thus, Defendant did not establish his actions were reasonable nor that he had no acceptable alternative available. Therefore, the defense of necessity did not apply. Consequently, the trial court did not err by not instructing the jury on the defense of necessity.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at Defendant's trial and affirm the Judgment.

NO ERROR.

Judges MURPHY and ARROWOOD concur.

LORI NICOLE STERNOLA, PLAINTIFF
v.
MARK DONOVAN ALJIAN, DEFENDANT

No. COA23-266

Filed 19 March 2024

Child Custody and Support—child support and arrears—imputation of father's income—improper judicial notice of job market—unsupported finding of bad faith suppression of income—delay in entering child support order

An order determining the permanent child support obligation and amount of arrears owed by a father, who had lost his job at a foreign bank, was reversed and remanded. Firstly, the court abused its discretion in taking judicial notice of the "substantial employment opportunities in banking and finance" in Charlotte, where the father lived, as this fact was not the sort of undisputed adjudicative fact contemplated under Evidence Rule 201(b). Secondly, the court erred by imputing income to the father where none of the evidence supported the court's finding that the father failed to seek new employment in good faith. Finally, by waiting twenty-one months after the child support hearing to enter the order—at which point the children had either reached or were close to reaching the age of majority—the judge failed to diligently discharge their administrative duties pursuant to Canon 3B(1) of the Code of Judicial Conduct and was instructed on remand to enter factual findings explaining the delay.

Appeal by defendant from judgment entered 4 August 2022 by Judge William F. Helms III in Union County District Court. Heard in the Court of Appeals 21 February 2024.

Emblem Legal, PLLC, by Stephen M. Corby, for the plaintiff-appellee.

Connell & Gelb PLLC, by Michelle D. Connell, and The Honnold Law Firm, P.A., by Bradley B. Honnold, for the defendant-appellant.

TYSON, Judge.

Mark Donovan Aljian ("Defendant") appeals from an order on permanent child support and adjudication of arrears. We reverse and remand.

I. Background

Defendant and Lori Nicole Sternola ("Plaintiff") met in Los Angeles in 1998, moved to London, England in 2001, and were married on 1 June 2002. They separated in February 2011 and later divorced. Plaintiff is a citizen of the United States. Defendant is a dual citizen of the United States by birth and a naturalized citizen of the United Kingdom.

Plaintiff and Defendant are parents of three children: KMA, born September 2001; M-MA, born March 2003; and, RTA, born May 2006. All three children were born while the parties resided in the United Kingdom and hold dual United States and United Kingdom citizenships.

Since separation in 2011, Plaintiff and Defendant have shared custody of their then minor children with Plaintiff having nine overnights and Defendant having five overnights every two weeks. The Central Family Court in London ("London Court") entered an order 13 December 2011 addressing property division, alimony, and child support.

The London Court entered an order allowing their teenager, KMA, to move with Plaintiff to the United States on 29 April 2015. Defendant retained custody of the other two children in London. Plaintiff and KMA moved to Waxhaw, in July 2015. Defendant, M-MA, and RTA remained in London.

The London Court entered an order addressing the cost apportionment of orthodontic treatment for the children and for reimbursement of air travel for the children. The London Court also entered an order on 9 August 2017 which allowed Defendant to move with M-MA and RTA to Los Angeles, California.

Plaintiff took custody of M-MA and RTA in August 2017 and kept them in Waxhaw in violation of the custody order. The London Court entered an order requiring her to return to the United Kingdom on 14 September 2017. Plaintiff appealed this order in the United Kingdom. Plaintiff also filed a complaint in Union County for temporary and permanent child custody and motions for emergency child custody, assumption of jurisdiction, and for attorneys' fees. Defendant filed a petition to register and enforce a foreign custody order on 4 October 2017. The district court entered a temporary child custody order on 14 November 2017, which ordered a status report of proceedings in the London Court.

The London Court entered an order on 22 December 2017 after both parties had moved to the United States. Plaintiff was living in North Carolina, and Defendant was living in California. The order also set out Plaintiff's and Defendant's visitation schedule with their children.

Mother amended her complaint adding claims for prospective and retroactive child support on 18 May 2018.

Defendant was involuntarily terminated from his employment with the Hong Kong and Shanghai Banking Corporation on 25 July 2019 due to his position being eliminated. Defendant received a one-year severance equal to his salary following termination. Defendant moved to Charlotte to be nearer to the children in October 2019.

The district court held a hearing on child support on 12 October 2020. The oldest child had reached eighteen years old at the time of the hearing, and the other children were seventeen and fourteen years old. Almost two years later, the district court entered an order on permanent child support and adjudication of arrears on 4 August 2022 finding, *inter alia*, Defendant's child support obligation was $2,000 per month, and he owed $32,296 in unpaid support arrears to Plaintiff. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

Defendant argues the district court erred by: (1) using speculative, unsubstantiated, and incompetent evidence to impute and determine his income; (2) imputing income in the absence of evidence of bad faith suppression of income to avoid paying child support; (3) ordering him to pay arrearage of $32,296; and, (4) denying his due process rights by delaying entry of the order for over 21 months after hearing.

IV. Findings of Fact

Defendant argues the district court erred by using speculative, unsubstantiated, and incompetent evidence to impute and determine his income.

A. Standard of Review

Generally, the trial court's decision regarding child support is:

> left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether [substantial] , , , evidence support[s] the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Williamson v. Williamson, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (citations and quotation marks omitted).

A trial court abuses its discretion when it renders a decision that is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted). We review conclusions of law *de novo*. *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013).

B. Analysis

Defendant challenges the following findings of fact:

> 17. Father has had a successful banking career and has attained a superior education, with an undergraduate and masters degrees (sic) from Ivy League schools;
>
> 18. Since 2011, Father has borrowed money from his mother for litigation expenses and living expenses. The terms of these loans were extremely favorable to Father. The Promissory Notes from 2011-2020 obligate Father to pay interest only, with interest rates from 1.51% to 2.5%. These interests (sic) rates were at all times below the Bank Prime lending rate, which ranged from 3.25% to 5.5% during this time period, per the Federal Reserve Bank and the Wall Street Journal.
>
> . . .
>
> 23. The Charlotte area is well-known as a banking center, and public data from the Bureau of Labor Statistics indicates substantial employment opportunities in banking and finance.

The record indicates Defendant received degrees from the University of California, Los Angeles ("UCLA"). At the time of the hearing and the time of this opinion, UCLA is a member of the Pac-12 Conference, and scheduled to join the Big Ten Conference on 2 August 2024. The Ivy League is a conference of eight schools located in the Northeastern United States. UCLA has been referred to as a "public ivy" by Richard Moll in *Public Ivies: A Guide to America's Best Public Undergraduate Colleges and Universities* and Howard and Matthew Greene in *The Public Ivies: America's Flagship Public Universities*. Although UCLA has been referred to by some as a "public ivy," it is not in the Ivy League conference.

Defendant testified the debt he incurred to his mother was spent on litigation expenses. ("It's entirely gone to litigation."). Unchallenged findings of fact show Defendant received a purchase money loan in the amount of $663,000.00 with an interest rate of 1.51%.

Defendant further argues the district court erred in taking purported judicial notice of "substantial opportunities in banking and finance" to exist after Defendant testified a bank in Charlotte was undergoing layoffs and restructuring. The evidence presented by Defendant was contradictory to the finding of which the district court had received no other evidence, but which determined by taking judicial notice.

North Carolina General Statutes allow courts to take judicial notice of adjudicative facts, which are "not subject to reasonable dispute in that [they] are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2023). The Official Commentary to N.C. Gen. Stat. § 8C-1, Rule 201(b) provides: "With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy." N.C. Gen. Stat. § 8C-1, Rule 201(b) N.C. Commentary (2023).

In *Thompson v. Shoemaker*, 7 N.C. App. 687, 690, 173 S.E.2d 627, 630 (1970), this Court denied a request to take judicial notice "of the scarcity of low income housing in the City of Charlotte[,]" because "the unavailability of low income housing in Charlotte is undoubtedly subject to debate and in our opinion it is not a factor that can be judicially noticed by this court." *Id.*

This Court in *Hinkle v. Hartsell*, 131 N.C. App. 833, 837, 509 S.E.2d 455, 458 (1998), applied the holding in *Thompson* in a custody case where the trial court took purported judicial notice that an area of Charlotte was a "high crime area." This Court held this finding was also error because "the prevalence of crime in and about the premises of the [Charlotte neighborhood], and how this crime affects the safety of its residents, is no doubt a matter of debate within the community." *Id.*

In the absence of substantial competent evidence, the trial court erred in finding by purportedly "judicially noticing" there were "substantial employment opportunities in banking and finance." Because the findings challenged by Defendant where the district court took judicial notice are crucial to the ultimate determination of the district court, the order of the district court is vacated. In light of our vacating the trial court's order, we need not address Defendant's remaining arguments,

other than the imputation of Defendant's capacity to earn income, which may recur on remand. We address this argument.

V. Imputing Income

Defendant argues the trial court erred in imputing income to him.

A. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). When this Court reviews for an abuse of discretion:

> the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

Spicer v. Spicer, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citations omitted).

B. Analysis

Defendant argues the district court erred by imputing income after finding his capacity or ability to earn "$20,000.00 per month or more and his failure to seek employment in good faith." Defendant argues no evidence exists of his bad faith suppression of income to avoid paying child support.

N.C. Gen. Stat. § 50-13.4(c) determines child support payments and provides:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, . . . and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2023).

Our Supreme Court has stated:

> In determining the amount of . . . child support to be awarded the trial judge must follow the requirements of applicable statutes. . . . Ordinarily the husband's ability to pay is determined by his income at the time the award is made if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. Capacity to earn, however, may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children.

Beall v. Beall, 290 N.C. 669, 673-74, 228 S.E.2d 407, 410 (1976) (internal quotations and citations omitted).

"Only when there are findings based on competent evidence to support a conclusion that the supporting spouse or parent is deliberately depressing his or her income or indulging in excessive spending to avoid family responsibilities, can a party's capacity to earn by considered." *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985) (citations omitted).

A trial court may only impute capacity to earn income to base an award of child support after the trial court has found the parent has disregarded his parental obligations by:

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) wilfully (sic) refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or[,] (8) intentionally leaving his employment to go into another business.

Wolf v. Wolf, 151 N.C. App. 523, 526-27, 566 S.E.2d 516, 518-19 (2002).

This Court has held "evidence of a voluntary reduction in income is insufficient, without more, to support a finding of deliberate income depression or bad faith." *Pataky v. Pataky*, 160 N.C. App. 289, 307, 585 S.E.2d 404, 416 (2003) (citations omitted).

Defendant's employment was involuntarily terminated in June 2019, as his position with the company was eliminated. Defendant was given

a severance package of one year's salary on 25 July 2019. Defendant presented evidence he had moved from Los Angeles to Charlotte to be closer to his children and to begin learning new skills to expand the potential pool of employers. The evidence presented to the trial court was Defendant had submitted many applications seeking employment in Charlotte and was not refuted. Defendant did not act in a willful disregard for his support obligations. *Id*. None of the other *Wolf* factors apply. *Wolf*, 151 N.C. App. at 526-27, 566 S.E.2d at 518-19. The district court erred in imputing capacity to earn income to Defendant.

VI. Conclusion

At least two of the parties' children have reached the age of majority and the other will reach the age of majority later this year. The district court abused its discretion in taking judicial notice of purported undisputed adjudicative facts pertaining to the job market in banking and finance in the Charlotte metropolitan area. The district court also erred in imputing capacity to earn income to Defendant by improperly finding without a basis that he had acted in bad faith to depress his income.

Canon 3B(1) of the North Carolina Code of Judicial Conduct requires a judge to "diligently discharge the judge's administrative responsibilities[.]" The prejudice to the parties by the delay in filing the order is obvious. Upon remand, the district court is to make findings of fact to explain the twenty-one month delay after hearing in the entry of the prior order.

The permanent order is vacated and remanded for further proceedings. *It is so ordered.*

VACATED AND REMANDED.

Judges MURPHY and WOOD concur.

THOMAS A. WARREN, Individually and as Personal Representative of the ESTATE OF THOMAS E. WARREN, JR., EVELYN WARREN, and ROSALIND REGINA PLATT, Plaintiffs

v.

SNOWSHOE LTC GROUP, LLC, MMDS OF NORTH CAROLINA, INC., DR. KARRAR HUSSAIN, M.D., EAGLE INTERNAL MEDICINE AT TANNENBAUM, and DR. RICHARD LYNCH, D.O., Defendants

No. COA22-595

Filed 19 March 2024

1. Appeal and Error—appellate rules violations—prior dismissal as sanctions—reconsideration on remand—Rule 2 invoked—petition for writ of certiorari addressed

On remand from the Supreme Court to determine whether sanctions other than dismissal were appropriate to address plaintiff's numerous appellate rules violations in a wrongful death case, the Court of Appeals remained convinced that dismissal was justified due to the scale and scope of the violations but, in the interest of finally resolving the drawn-out appeal, Rule 2 should be invoked by that court to suspend the appellate rules and consider plaintiff's petition for writ of certiorari.

2. Appeal and Error—petition for writ of certiorari denied—lack of merit on appeal—untimely complaint renewal—dismissal appropriate

After invoking Rule 2 to suspend multiple appellate rules violations in order to consider plaintiff's petition for writ of certiorari, the appellate court determined that, because plaintiff failed to show merit or that error probably occurred in the lower court, further review was not warranted and the appeal should be dismissed. The trial court did not err by dismissing with prejudice plaintiff's wrongful death lawsuit where the trial court properly denied plaintiff's belated motion for extension of time to re-file the lawsuit (more than a year after plaintiff took a voluntary dismissal) as not being allowed by Civil Procedure Rule 6(b), which does not permit a trial court to extend an expired statute of limitations.

On remand from the Supreme Court of North Carolina by Order dated 13 December 2023. Appeal by Plaintiffs from order entered 22 February 2022 by Judge John O. Craig, III, in Guilford County Superior Court. Originally heard in the Court of Appeals 11 January 2023 with order dismissing the appeal issued 11 January 2023.

Hatcher Legal, PLLC, by Nichole M. Hatcher, for Plaintiff-Appellants.

Bovis Kyle Burch & Medlin, by Brian H. Alligood, for Defendant-Appellee Snowshoe LTC Group, LLC.

Cranfill Sumner LLP, by Steven A. Bader and Samuel H. Poole, Jr., for Defendant-Appellee Lynch.

HAMPSON, Judge.

Factual and Procedural Background

Thomas A. Warren, individually and as personal representative of the Estate of Thomas E. Warren, Jr., Evelyn Warren, and Rosalind Regina Platt (Plaintiffs) appeal from an Order dismissing their Complaint against Snowshoe LTC Group, LLC (Snowshoe), MMDS of North Carolina, Inc., Dr. Karrar Hussain, M.D., Eagle Internal Medicine at Tannenbaum, and Dr. Richard Lynch, D.O. (Lynch) (collectively Defendants) under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim for which relief may be granted.

[1] As an initial matter, on 6 October 2022, Defendant Lynch filed a Motion to Dismiss Plaintiffs' Appeal citing numerous violations of the North Carolina Rules of Appellate Procedure contending the rules violations in totality constituted gross and substantial violations of the Rules of Appellate Procedure. We agreed with Plaintiffs' position and determined, consistent with *Dogwood Development and Management Company v. White Oak Transportation Company*, 362 N.C. 191, 200-01, 657 S.E.2d 361, 367 (2008), that dismissal was the appropriate sanction given the nature and number of the rules violations, the resulting frustration of adversarial process, and the impairment of our ability to substantively review this case. We allowed Defendant's Motion to Dismiss Plaintiff's Appeal by Order dated 11 January 2023.

Plaintiff sought *en banc* review by this Court of our Order dismissing the appeal. This Court—with no judges voting to allow—denied *en banc* review on 13 February 2023. Plaintiffs filed a Petition for Discretionary Review of our Order dismissing the appeal. On 13 December 2023, the Supreme Court issued an Order allowing discretionary review for the limited purpose of vacating our prior Order and remanding for consideration of whether another sanction other than dismissal is appropriate.

Plaintiffs' appellate rules violations in this case begin with the failure to properly designate the Order being appealed in their notice of

appeal compounded by their failure to include a statement of grounds for appellate review in their brief. The adversarial process and our appellate review are further hampered by, among other things: Plaintiffs' substantial failure to include record citations in briefing; failure to include a non-argumentative statement of facts; and various failings in properly compiling or timely settling the Record on Appeal. Indeed, it is not even clear Plaintiffs' notice of appeal of the Order that Plaintiffs actually seek to challenge was ever timely or timely prosecuted. We remain convinced the scale and scope of the violations of our Appellate Rules more than justify dismissal of the appeal. Considering the circumstances of this case, no other sanction is warranted or appropriate.

However, given the length of time this case has now been pending in our appellate courts and in the interest of finally resolving this appeal for the benefit of all parties involved, in the exercise of our discretion we invoke Rule 2 of the Appellate Rules to suspend operation of our rules and treat Plaintiffs' appeal as a Petition for Writ of Certiorari. It is fundamental that "a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Cryan v. Nat'l Council of Young Men's Christian Associations of United States*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021)). We, therefore, examine the dispositive issue argued by Plaintiffs on appeal to determine whether review by *certiorari* is merited. The Record before us tends to reflect the following:

On 21 October 2020, Plaintiffs filed a Complaint against Defendants alleging the wrongful death of their decedent on 18 November 2015—and ancillary claims—arising from Defendants' alleged medical malpractice. The same day, Plaintiffs filed a Motion for Extension of Time Under N.C. Gen. Stat. § 1A-1, Rule 6(b) alleging the Complaint in this case constituted a re-filing of a previously filed suit which had been voluntarily dismissed without prejudice on 16 September 2019. The Motion for Extension requested the one-year time period to re-file the previous suit under Rule 41(a)(1) be retroactively extended to permit the filing of the Complaint in this case. The Motion for Extension alleged Plaintiffs' delayed filing of the Complaint was the result of excusable neglect. Defendants Snowshoe and Lynch filed Motions to Dismiss Plaintiff's Complaint.[1]

1. It appears the remaining Defendants did not appear in this action because they were never served with the Summons and Complaint.

On 10 March 2021, the trial court entered an Order which included the following unchallenged Findings of Fact:

> 1. The instant action is a renewal of a lawsuit previously filed by the same Plaintiffs on November 21, 2017 . . . . Plaintiffs filed a voluntary dismissal of that lawsuit, without prejudice, on September 16, 2019.
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> 2. Plaintiffs' decedent . . . whose death is the subject of Plaintiffs' initial and current wrongful death actions, died on November 18, 2015.
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> 3. The instant lawsuit was commenced by Plaintiffs' filing of their complaint on October 21, 2020.

Based on these Findings of Fact, the trial court concluded:

> 1. Rule 41(a)(1) of the North Carolina Rules of Civil Procedure allows a Plaintiff to dismiss an action without prejudice. Provided the initial action was timely filed, the same Rule permits a Plaintiff to file a new action based on the same claims within one year after the dismissal.
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> 2. Plaintiffs' complaint in this action was filed outside of the one year renewal period, as was Plaintiffs' motion for extension of time to refile complaint.
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> 3. Because the complaint was untimely filed, Plaintiffs' wrongful death action is barred by the applicable two-year statute of limitations.
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> 4. Where, as here, a complaint shows on its face that it is barred by the statute of limitations, dismissal under Rule 12(b)(6) is appropriate.
>
> 5. Because the complaint was untimely refiled, it must be dismissed as a matter of law.

As a result of its Findings of Fact and Conclusions of Law, the trial court denied Plaintiffs' motion to extend the time to file its complaint, allowed Defendants' Motion to Dismiss, and dismissed the action with prejudice. On 22 February 2022, the trial court entered an order amending clerical errors in its 10 March 2021 Order dismissing Plaintiffs' Complaint with prejudice. On 2 March 2022, Plaintiffs filed Notice of Appeal, which designated only the order entered 22 February 2022 amending the 10 March 2021 Order.

Issue

[2] The dispositive issue on appeal is whether the trial court erred in denying Plaintiffs' Motion for Extension of Time to file the Complaint under Rule 6(b) and dismissing the Complaint where the Complaint was filed after the expiration of the one-year re-filing period provided by Rule 41(a)(1) of the North Carolina Rules of Civil Procedure and after the expiration of the statute of limitations.

Analysis

Plaintiffs argue the trial court abused its discretion in denying their Motion for Extension of Time under Rule 6(b) of the North Carolina Rules of Civil Procedure to file their Complaint after the expiration of the one-year period provided by Rule 41(a)(1) for re-filing of a lawsuit voluntarily dismissed without prejudice. Plaintiffs contend the trial court should have allowed the motion for extension of time upon a showing of excusable neglect and deemed their belated Complaint timely filed.

Rule 6(b) provides in relevant part:

> (b) Enlargement.--When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. *Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect.*

N.C. Gen. Stat. § 1A-1, Rule 6(b) (2023) (emphasis added).

"Rule 6(b) grants our trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of 'excusable neglect.' " *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). "As an initial matter, the only time periods that may be extended based upon the authority available pursuant to N.C. Gen. Stat. § 1A–1, Rule 6(b), are those established by the North Carolina Rules of Civil Procedure." *Glynne v. Wilson Med. Ctr.*, 236 N.C. App. 42, 52, 762 S.E.2d 645, 651-52 (2014) (citing *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 108, 493 S.E.2d 797, 801 (1997)).

However, our Courts recognize Rule 6(b) does not permit a trial court to extend a statute of limitations. *See id.* This is so, at least in part, because " 'the statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense', and '[i]t is clear that a judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned.' " *Osborne v. Walton*, 110 N.C. App. 850, 854–55, 431 S.E.2d 496, 499 (1993) (quoting *Congleton v. City of Asheboro*, 8 N.C. App. 571, 573, 174 S.E.2d 870, 872 (1970)). "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all." *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957) (superseded by statute, N.C. Gen. Stat. § 1-15(b) (1971), on other grounds as recognized in *Black v. Littlejohn*, 312 N.C. 626, 630-31, 325 S.E.2d 469, 473 (1985)).

For example, in *Glynne*, we observed a trial court had no authority to extend the time for filing a state court complaint under Rule 6(b) after the tolling provisions of a federal statute expired and the statute of limitations had run. *Glynne*, 236 N.C. App. at 52, 762 S.E.2d at 651. Similarly, in *Osborne*, this Court concluded Rule 6(b) could not be applied to extend a statute of limitations where an action abated following the expiration of time to file a complaint after issuance of a summons under N.C. R. Civ. P. 3(a)(1)-(2). *Osborne*, 110 N.C. App. at 855, 431 S.E.2d at 499.

We have also held "that trial courts do not have discretion pursuant to Rule 6(b) to prevent a discontinuance of an action under Rule 4(e) when there is neither endorsement of the original summons nor issuance of alias or pluries summons within ninety days after issuance of the last preceding summons." *Locklear v. Scotland Mem'l Hosp., Inc.*, 119 N.C. App. 245, 247–48, 457 S.E.2d 764, 766 (1995) (citing *Dozier v. Crandall*, 105 N.C. App. 74, 78, 411 S.E.2d 635, 638 (1992)). In *Locklear*, this Court recognized, following discontinuance of the action: "Any subsequent issuance of a summons in the case would have resulted in the commencement of an entirely new action from the date the summons was issued, more than one year after the date on which plaintiffs took a voluntary dismissal and otherwise outside of the statutory limitations period." *Id.* at 248, 457 S.E.2d at 766.

In this case, like our Court in *Osborne*, even if we construed Rule 6(b) as providing authority to extend the one-year savings provision provided by N.C. R. Civ. P. 41(a), Rule 6(b) cannot apply to extend an otherwise expired statute of limitations. *See Osborne*, 110 N.C. App. at

855, 431 S.E.2d at 499. Here, Plaintiffs make no argument that—absent the savings provision of Rule 41(a)—the statute of limitations on their claims arising from Plaintiffs' decedent's 2015 death had not expired by the time they filed their 2020 Complaint. As in *Locklear*: "Any subsequent issuance of a summons in the case would have resulted in the commencement of an entirely new action from the date the summons was issued, more than one year after the date on which plaintiffs took a voluntary dismissal and otherwise outside of the statutory limitations period." 119 N.C. App at 248, 457 S.E.2d at 766. Upon expiration of the one-year savings provision, Defendants' right to rely on the statute of limitations defense vested. *See Osborne* 110 N.C. App. at 854–55, 431 S.E.2d at 499.

Plaintiff's Complaint was filed more than one year after the date on which Plaintiffs took a voluntary dismissal and after the expiration of the applicable statute of limitations. Plaintiff's action is barred by the statute of limitations. *Id.* Therefore, even if the trial court had authority under Rule 6(b) to extend the one-year timeframe for re-filing a complaint following a voluntary dismissal, any extension would have been futile following expiration of the statute of limitations. *Id.* Consequently, Plaintiffs have failed to show any merit in their appeal of the trial court's dismissal of this action pursuant to Rule 12(b)(6).

Conclusion

Accordingly, for the foregoing reasons, we conclude Plaintiffs arguments on appeal are without sufficient merit to justify further review by *certiorari* and dismiss the appeal.

APPEAL DISMISSED.

Chief Judge DILLON and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MARCH 2024)

BURLESON v. BURLESON No. 23-187	Wake (19CVS16342)	Affirmed
EST. OF BARRY v. BLUE No. 23-599	Cumberland (20CVS733)	Affirmed
IN RE A.G.C. No. 23-355	Rutherford (21JT123) (21JT124) (21JT125)	Affirmed
IN RE A.Z.M.M. No. 23-539	Cabarrus (21JT189)	Affirmed
IN RE C.W.M. No. 23-702	Buncombe (20JT16)	Affirmed
IN RE D.G.E. No. 23-622	Yancey (20JT10) (20JT11) (20JT12)	Affirmed
IN RE E.D-A. No. 22-1002	Durham (17JT104)	Affirmed
IN RE E.G.C. No. 23-683	Franklin (20JT55) (20JT56)	Affirmed
IN RE K.M.S. No. 23-787	Forsyth (21JT89)	Affirmed
IN RE L.L. No. 23-273	Wake (21JA34)	Affirmed
IN RE M.G.W. No. 23-271	Wayne (21JB13)	Vacated and Remanded
IN RE S.C. No. 23-615	Wake (22JB550)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
IN RE S.D.Z. No. 23-828	Rowan (23JT3)	Affirmed.

IN RE S.M.B. No. 23-862	Rowan (22JA209) (22JA210)	Affirmed
IN RE Z.C. No. 23-835	Robeson (20JT111)	Affirmed
KEAN v. KEAN No. 23-46	Iredell (18CVD2233)	Affirmed
STATE v. ALLISON No. 23-635	Burke (20CRS52824)	No Error
STATE v. BENNETT No. 23-461	Avery (21CRS244) (21CRS50281) (21CRS50283)	No Error.
STATE v. BOYCE No. 23-779	Iredell (21CRS51625-26)	No Error
STATE v. BURNETTE No. 23-162	Stokes (20CRS50720)	No Error in Part; Remanded for Resentencing
STATE v. CALDERON No. 23-400	Harnett (15CRS52730-32)	No Error
STATE v. CONNER No. 23-470	Columbus (16CRS1248-49)	Affirmed
STATE v. COVINGTON No. 23-480	Mecklenburg (03CRS241344) (03CRS241674-75) (03CRS241680)	Affirmed
STATE v. CRUMP No. 23-53	Union (21CRS52096)	Affirmed
STATE v. HANCOCK No. 23-758	Union (21CRS50781) (22CRS789)	No Error
STATE v. JONES No. 23-687	Union (18CRS50322)	AFFIRMED AS MODIFIED
STATE v. LEGGETTE No. 23-849	Forsyth (18CRS60008)	Vacated and Remanded.

STATE v. LEWIS No. 23-644	Granville (19CRS51061)	No Error; Remanded For Correction of Clerical Errors.
STATE v. MELVIN No. 22-859	New Hanover (21CRS50140)	No Error
STATE v. PATE No. 23-738	Scotland (21CRS50001-02)	NO ERROR IN PART; REMAND IN PART
STATE v. PRICE No. 23-367	Mecklenburg (20CRS221045) (20CRS221048) (20CRS221052-56)	NO ERROR AT TRIAL, RESTITUTION JUDGMENT VACATED AND REMANDED.
STATE v. RICK No. 23-10	Gaston (19CRS55442)	No Error
STATE v. SWAIN No. 23-807	Bertie (18CRS50604) (18CRS50612)	Dismissed
STATE v. WALKER No. 23-681	Anson (21CRS50581-82)	No Error.
STROUPE v. WOOD No. 23-127	Rowan (21CVS180)	Affirmed
VENTERS v. LANIER No. 23-870	Wake (21CVS1307)	Dismissed